Legal Guide for Foreign Investors in Brazil

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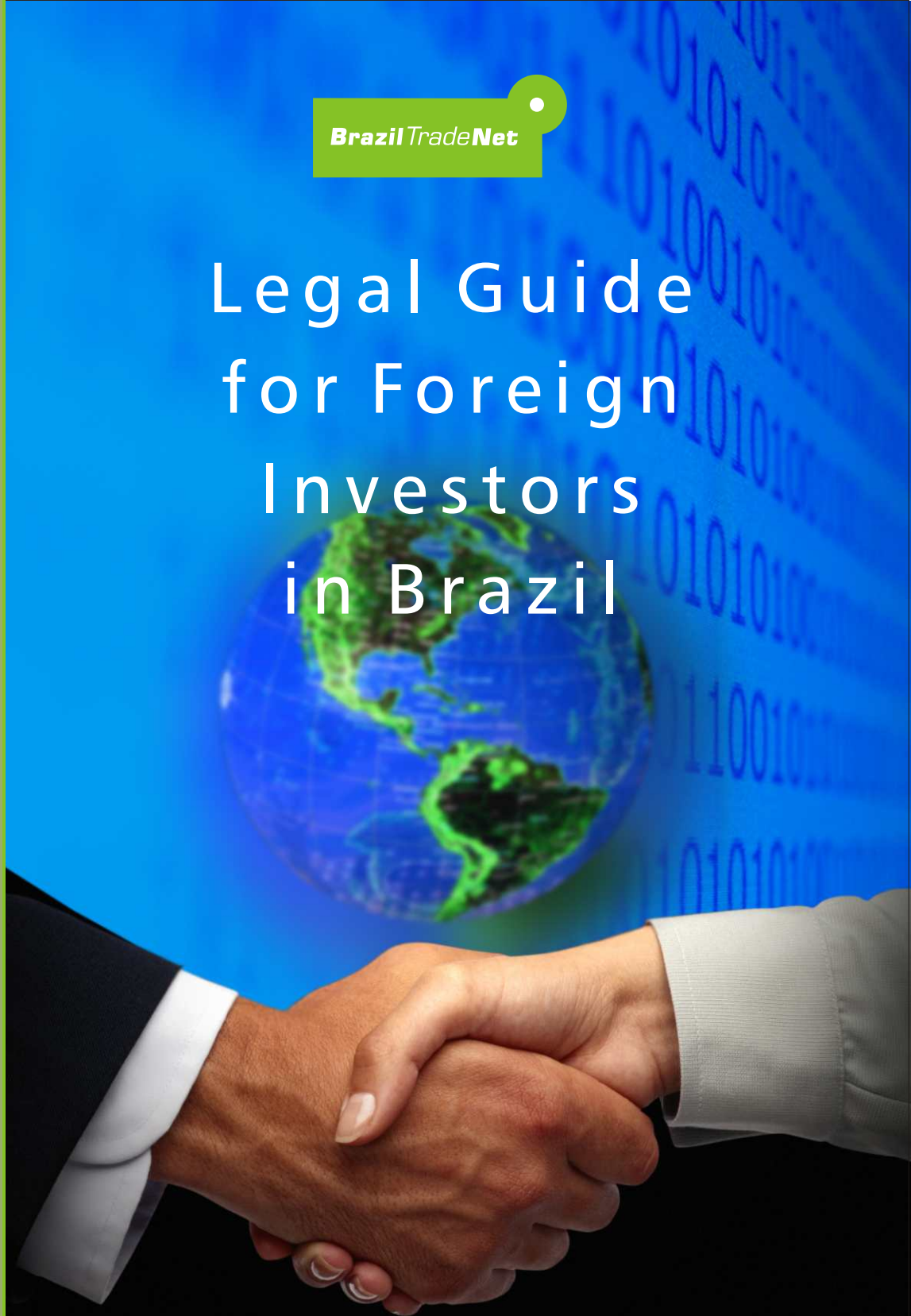

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Legal Guide
for Foreign Investors
in Brazil

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1. The Brazilian Legal System

Brazil is a federative republic, constituting an indissoluble union of States, Municipalities, and the Federal District.

Brazil's legal system is codified, and laws are issued by the Federal Government, States, and Municipalities, each within its own sphere of authority. Court decisions entail correct application of current Brazilian laws. When no specific legal provision exists, courts decide based upon analogy, custom, and general legal principles. Legal precedents do not bear the force of law in Brazil, though they may play a significant supporting role in specific court decisions.

The Federal Constitution provides for the legislative authority of the Federal Government, States and Municipalities, thus avoiding redundancy or overlapping of jurisdictional spheres. In consonance with principles laid down in the Federal Constitution the legislative authority of the Federal Government supercedes that of States and Municipalities.

The Federal Government is thus vested with exclusive authority to legislate on civil, commercial, criminal, procedural, electoral, agrarian, maritime, aeronautical, space, and labor law; expropriation, water, power, informatics, telecommunications, radio broadcasting, monetary system, foreign exchange, credit policy, insurance, foreign trade, mineral deposits, nationality, citizenship, and other matters.

The Federal Constitution authorizes the Federal Government, States and the Federal District to legislate concurrently regarding such matters as: taxation, financial, economic, and prison law; production and consumption; environmental liability and consumer rights; education and teaching; social security, social protection, and health. On such issues, the authority of the Federal Government is limited to setting general guidelines, whereas that of the States and the Federal District is circumscribed by enabling legislation, observing general guidelines of federal legislation.

The Federal Constitution is the keystone of the Brazilian legislative system. It ensures the citizen fundamental rights and guarantees, and determines the political and administrative structure of the Federative Republic of Brazil. It defines the respective spheres of authority of the Executive, Legislative and Judicial Branches; orients the tax system; and provides for economic and financial policy, and the social order. Organization and government of the States is provided for in their own constitutions and laws, observing principles laid down in the Federal Constitution.

Brazil's main legal texts are Codes, compiling basic legislation. The most prominent of these are: the Civil Code, the National Tax Code, the Penal Code, the Consolidated Labor Laws, the Code of Civil Procedure, and the Code of Penal Procedure. None of these codes takes precedence over the Federal Constitution, which is the supreme law of Brazil.

2. Institutions for Economic Development

Decree-Law 200/67, and its subsequent alterations, classifies the Federal Administration into two categories: the Direct and Indirect Administration. The Direct Administration applies to the administrative structure of the Presidency of the Republic and Federal Ministries; whereas the Indirect Administration encompasses a variety of entities or Authorities, under Federal participation or ownership (Joint Capital Corporations, State Owned Companies, and Foundations), linked to a ministry.

The President of the Republic heads the Federal Public Administration, assisted by Ministers of State.

The Presidency of the Republic comprises: the Presidential Staff (*Casa Civil*), the General Secretariat, the Secretariat for Institutional Relations, the Personal Staff Office, the Institutional Security Office, and the Strategic Affairs Center.

Ministries are independent bodies that preside the Federal Administration, subordinated only to the Presidency, and their functions are defined under the Administrative Reform of 1967 and its subsequent alterations.

Authorities (*Autarquias*), including Regulatory Agencies, are public legal entities established by law, with political, financial, normative, and administrative autonomy. The purpose of Regulatory Agencies (ANP, ANEEL, ANATEL, and others) is to control and supervise activities carried out, in the public domain, by private companies.

2.1. Ministries

Ministry of Justice

Responsible for upholding the legal system: political rights, and constitutional guarantees; judicial policy; nationality; immigration and foreigners; narcotics; public security; the Federal Police, the Federal Highway and Railroad Police, and the Police of the Federal District; planning, coordination and management of National prison policy; oversight of the economic order; ombudsmen for Indians, and consumer rights; legal aid for the poor; defense of property in general, of Federal property, and that of entities pertaining to the Federal Public Indirect Administration; and Governmental actions aiming at suppression of the use, illegal trafficking, and unauthorized production of narcotics or addictive drugs.

Ministry of External Relations

Responsible for the fields of international politics, diplomatic relations, and consular services; international cooperation programs, and Brazilian participation in commercial, economic, technical, and cultural negotiations with foreign governments and entities; providing assistance to delegations, committees, and Brazilian representatives at international and multilateral agencies.

Ministry of Transportation

Responsible for matters relating to: rail, road, and water transport; the merchant navy, ports, and shipping routes, and air transportation. Among the bodies linked to this Ministry are:

- the National Transport Infrastructure Department (DNIT);

- the National Land Transport Agency (ANTT).

Ministry of Agriculture, Livestock, and Food Supply

Responsible for agricultural policy, encompassing: production, marketing, supply, and storage; minimum price guarantees; promotion of farming and livestock production; agricultural information systems; animal and plant health; supervision of agricultural inputs; classification and inspection of plant and animal products; soil protection, conservation, and management; agricultural technological research; meteorology and climatology; rural development; rural cooperatives and associations, agro-energy, technical assistance, and rural extension; policies for coffee, sugar, and alcohol, including planning and execution of governmental action for manufacture of sugar and alcohol. Among the entities linked to this Ministry are:

- The Brazilian Agricultural Research Corporation (EMPRAPA) – that provides feasible solutions for sustainable development in rural areas and agribusiness;

- The São Paulo General Storage Corporation (CEAGESP) – a major network of supply stations and warehouses ensuring supply in the State of São Paulo.

Ministry of Education

Responsible for national education policy: early-childhood education; general schooling, encompassing primary, secondary, and higher education; special education and distance learning, excepting military education; youth and adult education; vocational training; evaluation, educational information, and research; university research and extension; teacher training and financial assistance to poor families to keep children in schools.

Ministry of Culture

Responsible for cultural policy; protection of Brazil's cultural and historic heritage; identification and demarcation of the lands pertaining to descendents of former-slave *(Quilombo)* communities.

Ministry of Labor and Employment

Responsible for policies and guidelines for generation of jobs and income; support for workers; modernization of labor relations; workplace inspections including docks, and application of penalties foreseen in law or labor regulations; wage policies, immigration policy; professional training and development; workplace safety and health; urban cooperatives and associations.

Ministry of Social Security

Responsible for matters relating to social security and supplementary pensions; provision of benefits in the event of incapacity, old age, involuntary unemployment, lack of family support, or imprisonment; and survivor benefits to dependents.

Ministry of Health

Responsible for national health policies: coordination and supervision of the Unified Health System (SUS); environmental health and measures for the promotion, protection and recuperation of individual and collective health, including that of workers and of Indians; health information; critical inputs for health; preventive measures in general, health surveillance, including control of borders, sea and river ports and airports; and especially surveillance relating to drugs, food, and medicines; health-related technological and scientific research.

Among the entities linked to this Ministry are:

- the Health Surveillance Agency (ANVISA);

- the National Complementary Health Agency (ANS).

Ministry of Development, Industry and Foreign Trade

Responsible for development of industry, trade, and services; industrial property, and technology transfers; metrology, standardization, and industrial quality; foreign trade policies, including participation in international negotiations; protecting trade; support for micro and small companies and handcrafts; and for business registration activities. Among the entities linked to this Ministry are:

- the National Metrology Institute (INMETRO);

- the National Industrial Property Institute (INPI).

- the National Bank for Economic and Social Development (BNDES) is a public corporation, owned by the Federal Government, with a private legal corporate identity and its own funding, the mission of which is to support companies and foster economic development. BNDES has two wholly-owned subsidiaries: the Special Industrial Finance Agency (FINAME) that offers loans for the purchase of capital equipment; and *BNDES Participações* (BNDESPAR) that provides support for the placement of securities on the Brazilian capital market. The three companies together comprise the BNDES System.

Ministry of Mines and Energy

Responsible for matters relating to geology, minerals, and energy; hydroelectric resources; mining and steelworks; oil, fuels, and electricity, including nuclear power. Among the entities linked to this Ministry are:

- the National Electric Power Agency (ANEEL) – in charge of regulating and inspecting production, transmission, distribution, and sales of electric power;

- the National Petroleum Agency (ANP) - in charge of regulating, contracting, and inspecting economic activities of the oil industry.

Associated Companies:

- the Brazilian State Oil Company - *Petróleo Brasileiro S.A.* (PETROBRAS);

- the Brazilian Electric Power Company - *Centrais Elétricas Brasileiras S.A.* (ELETROBRAS).

Ministry of Communications

Responsible for national telecommunications and radio-broadcasting policies; telecommunications, radio broadcasting, and postal services. Among the entities linked to this Ministry is:

- the National Telecommunications Agency (ANATEL) – responsible for fostering development of telecommunications in Brazil, by ensuring a modern and efficient telecommunications infrastructure, to provide users throughout the Nation with adequate and diversified services at fair prices.

Ministry of Science and Technology

Responsible for preparing and implementing national science and technology research policy; planning, coordination, supervision and control of all scientific and technological activities; preparation of informatics and automation development policies; national bio-security policy; space and nuclear policy; and control of the export of sensitive assets and services.

Ministry of Environment

Responsible for environmental and water resources policies; preservation, conservation and sustainable use of ecosystems, biodiversity and forests; enhancement of environmental quality and rational use of natural resources; implementation of policies for guiding the interface between the environment and productive processes; policies and environmental planning for the Amazon Region and ecological-economic zoning. Among the entities linked to this Ministry are:

- the National Water Agency (ANA);

- the Brazilian Institute for Environment and Renewable Natural Resources (IBAMA).

Ministry of Defense

Responsible for national defense policy; military policy and strategy; national naval and aeronautical policies; management and coordination of the Brazilian Armed Forces.

Ministry of Finance

Responsible for defining and executing economic policy; matters pertaining to currency, credit, financial institutions, capitalization, popular savings, private insurance, and open private retirement policies; tax and customs policy, including administration, inspection and collection; public financial administration and accounting; management of public domestic and foreign debt; economic and financial negotiations with governments, multilateral and governmental agencies; general public prices and administrative tariffs; supervision and control of international trade; studies and research for monitoring economic scenarios; and authorizations (excepting when precluded by the National Monetary Council) relating to distribution of prizes by lot for publicity purposes, consortium purchase operations, and retail sales of publicly offered goods, etc. Among the entities linked to this Ministry are:

- the National Monetary Council (CMN). Responsible for formulation of currency and credit policies to promote economic and social development. The CMN has authority to: establish general guidelines for monetary, exchange, and credit policies; regulate the establishment and functioning of financial institutions, and inspect and discipline the application of monetary and exchange policy instruments.

- the Central Bank (BACEN). Responsible for ensuring compliance with CMN rules governing the Brazilian Financial System; guaranteeing the integrity of the currency; serving as the depository for national gold and foreign currency reserves; control of all forms of credit; control of foreign capital in compliance with the law; regulating clearance of checks and other papers; representing the Brazilian Government before international and foreign financial institutions; effecting inspections and granting authorizations to financial institutions; effecting purchases and sales of federal public securities in pursuit of monetary policy, etc.

Ministry of Planning, Budget and Management

Responsible for national strategic planning: evaluation and assessment of the social and economic impacts of Federal Government policies and programs; elaboration of special studies for reformulation of policies, etc. Among the entities linked to this Ministry is:

- the Brazilian Institute of Geography and Statistics (IBGE).

Ministry of Agrarian Development

Responsible for land tenure reform: promotion of sustainable development in rural areas, and family agriculture. Among the entities linked to this Ministry is:

- the Brazilian Institute for Settlement and Land Reform (INCRA).

Ministry of National Integration

Responsible for formulation and implementation of national development policy: planning and implementation of regional development programs; strategies for regional economic integration, etc.

Ministry of Sport

Responsible for national sports policy and social inclusion by means of sport.

Ministry of Tourism

Responsible for national tourism development policies.

Ministry of Cities

Responsible for urban development policy: the housing sector, basic and environmental sanitation, urban transport and traffic management, and urban water supply.

Ministry of Social Development and Combating Hunger

Responsible for coordination of national social development policies: food and nutritional security; social welfare; distribution of income transfers, etc.

2.2. Chambers of Commerce

Various Chambers of Commerce actively promote trade and economic ties between Brazil and other countries, among them: the American Chamber of Commerce; the Japanese Chamber of Commerce and Industry and the Italian-Brazilian Chamber of Commerce and Industry.

3. Foreign Capital

3.1. General Features

Foreign capital in Brazil is governed by Law 4.131 (the Foreign Capital Law) of 3 September, 1962, and Law 4.390 of 29 August, 1964. Both these laws were put into effect by Decree 55.762 of 17 February, 1965 and subsequent amendments.

According to the Foreign Capital Law, "foreign capital is considered to be any goods, machinery or equipment that enters Brazil with no initial foreign exchange disbursement, intended for production of goods and services, and any funds brought into the country for use in economic activities, provided that they belong to individuals or corporate entities domiciled or incorporated abroad".

The two official exchange markets in Brazil, both of which are subject to Central Bank regulations, are: the "commercial/financial" exchange market, essentially reserved for trade-related transactions and foreign currency investments in Brazil; and the "tourism" exchange market, used for such other transactions as unilateral funding transfers.

Under Central Bank Resolution 3.265, of 8 March, 2005, free and floating exchange regulations were unified for financial institutions.

Exchange operations entail exchange contracts for the inflow or outflow of foreign currency.

3.2. Registration of Foreign Capital

Foreign capital must be registered by means of an Electronic Statement of Registration – Foreign Direct Investment Module (RDE-IED), on the Central Bank Information System (SISBACEN).

For the purposes of the Electronic Statement of Registration, foreign direct investment is defined as permanent holdings in Brazilian companies or, in accordance with common market practices, long-term ownership by non-resident investors; individuals or corporate entities residing, domiciled or incorporated abroad, through ownership of shares or stock in Brazilian companies, or investments in foreign companies authorized to operate in Brazil.

According to rules currently in effect, the party responsible for the foreign direct investment must register with SISBACEN, prior to registering on the RDE-IED

Module. He is then issued a permanent number, and all subsequent changes and additions must be recorded under this same registration.

According to provisions of Circular 2.997/00, foreign investments to be effected and registered are not subject to preliminary review or verification by the Central Bank. The declaratory nature of the statement implies that the Brazilian company receiving the investment, and/or the representative of the foreign investor, are responsible for effecting registration.

All foreign investment must be registered with the Central Bank. Such registration is required for remittances abroad, repatriation of capital, and for registration of reinvestment of profit.

3.3. Currency Investments

No preliminary official authorization is required for investment in currency. To subscribe capital or purchase stock in an existing Brazilian company, the investor need only transfer the funds by means of a banking institution authorized to operate with foreign exchange. However, authorization of the exchange contract is conditional upon presentation of a RDE-IED registration number for the foreign investor and for the Brazilian company receiving the investment.

Registration of the investment must be effected through the RDE-IED System by the Brazilian company receiving the investment and/or the representative of the foreign investor, within 30 days of closing the exchange contract.

In the event that the registration of the foreign investment is to be paid from a non-resident account in Brazil, it may be effected in Brazilian currency. All transactions relating to such investments must be effected through the non-resident account, with updating of the corresponding investment registration by means of the RDE-IED Module.

3.4. Investment via Conversion of Foreign Credits

Investments related to foreign resources not registered with the RDE-IED System are subject to prior authorization from the Central Bank's Department for Combating Financial Crimes and Supervision of Exchange and International Capital (DECIC).

Conversion into investment of foreign credits duly registered on the RDE-IED Module does not require prior authorization from the Central Bank.

With regard to operations that require registration on the RDE-IED Module, article 8 of the Annex to Circular 2.997/00 regards as conversion into foreign direct investment all "transactions whereby credits eligible for transfer abroad, under current rules, are used by non-resident creditors to purchase or pay up holdings in a Brazilian company"

In order to effect registration, however, the investor and company in which the investment is to be made must provide: (i) a statement from the creditor and committed investor, defining precisely the due dates of installments, the respective sums to be converted and, with respect to interest and other charges, the period to which they refer, and the respective rates and calculations; and (ii) a binding statement from the creditor, agreeing to the conversion.

3.5. Investment via Import of Goods without Exchange Cover

Investment in the form of importation of goods without exchange cover (applicable only to tangible goods), effected as a means of acquiring paid-up stock, do not require prior approval from the Central Bank.

For the purposes of registration on the RDE-IED Module, both tangible and intangible assets must be targeted exclusively at paying-up of capital.

Registration of foreign direct investments, resulting from the import of intangible assets without coverage of an exchange contract, requires prior approval from DECIC. For tangible assets, the value recorded on the Register of Financial Transactions (ROF) Module of the RDE System, linked to the Import Declaration (DI); and the currency stated on the corresponding ROF may be used.

Registration of foreign capital that enters Brazil in the form of assets must be made in the currency of the investor's country or, at the express request of the investor, in another currency, maintaining the exchange parity.

Foreign capital is considered to be any goods, machinery or equipment that enter Brazil with no initial disbursement of foreign currency, intended for production or marketing of goods or provision of services. The import of used goods is conditional upon the absence of similar goods in Brazil. Used goods must be used in projects that foster the country's economic development.

Once the tangible goods have been cleared by customs, the Brazilian company has 90 days to register the investment with the Central Bank.

3.6. Capital Market Investments

On 26 January, 2000, the Brazilian Monetary Council approved Resolution 2.689, whereby any non-resident investors, whether and individual or corporate entities, individually or collectively, may invest in the Brazilian financial and capital markets.

Investment Companies – Foreign Capital, Investment Funds – Foreign Capital, Annex IV Portfolios (mechanisms created by Annexes I, II and IV) and Fixed-income Funds – Foreign Capital, were replaced by a unified investment "portal", through which foreign funds entering Brazil on behalf of non-resident investors may be invested in fixed- or variable-income instruments and investments, offered on the financial and capital markets, just as they are to resident investors.

Non-resident investors will now use the same registration to invest in the fixed- and variable-income markets, and may migrate freely from one type of investment to another. To access these markets, the foreign investor must appoint a representative in Brazil, responsible for registering the transactions, filling out the form attached to Resolution 2689/00, and registration with the Brazilian Securities Commission (CVM).

Pursuant to Article 6, insets I and II of Resolution 2.689/00, bonds and securities belonging to foreign investors must be kept in custody by entities authorized by CVM or by the Central Bank, or (if applicable) registered with the Special Settlement and Custody System (SELIC) or with the registration and financial settlement system supervised by the Center for Custody and Financial Settlement of Securities (CETIP).

In all transactions carried out on behalf of a non-resident investor, the exchange contract must state the RDE registration number in the appropriate field.

3.7. Remittance of Profits

Generally speaking, there are no restrictions on the distribution of profits and their remittance abroad. Since January, 1996, Profits have been exempt from withheld income tax.

Profit remittances must be registered as such through the RDE-IED Module, considering the stake held by the investor in the total shares or stock as a proportion of paid-up corporate capital in the company.

Brazil has signed double-taxation treaties with the following countries: Sweden,

Japan, Norway, Portugal, Belgium, Denmark, Spain, Austria, Luxembourg, Italy, Argentina, Canada, Ecuador, the Netherlands, the Philippines, France, Korea, the Czech Republic and Slovakia, Finland, Hungary, India, China, Chile and Israel.

3.8. Reinvestment of Profits

According to the Foreign Capital Law, reinvestment comprises "profits of companies established in Brazil and paid to persons or companies resident or domiciled abroad, which are reinvested in the company that produced them or in another sector of the domestic economy".

Reinvested earnings are registered in the currency of the country to which such earnings are to be remitted, whereas those reinvestment of investments in Brazilian currency are registered in Brazilian currency (Article 20 of Circular 2.997).

Foreign investor profits to be reinvested in Brazilian companies (even if said companies are other than those in which the earnings were obtained) for purposes of paying up or purchasing shares and/or stock, must be registered as Investment in the RDE-IED System. Such reinvestments must be registered as foreign capital (in the same manner as the original investment) and thereby increase bases for tax assessment on any future repatriation of capital.

In the cases of reinvestment of profits, interest on net equity and profit reserves, the stake of the foreign investor vis-à-vis the total number of paid-up capital stock in the company in which the earnings were generated must be observed.

3.9. Repatriation

Repatriation of foreign capital registered with the Central Bank of Brazil to its country of origin requires no prior authorization.

Article 690, inset II of the 1999 Income Tax Regulations, states that foreign currency registered with the Central Bank of Brazil as non-resident investments may be repatriated and is not subject to income tax withheld at source. However, sums in foreign currency, which proportionally exceed the original investment (capital gains), are subject to withholding of income tax at the rate of 15%.

In the specific case of repatriation of capital, it should be noted that the Central Bank of Brazil generally examines the net worth of the company involved, as shown on its balance sheet. If the net worth is negative, the Central Bank of

Brazil may deem that a dilution of the investment has occurred, and may thus deny authorization for repatriation of part of the investment in proportion to said negative result.

3.10. Transfer of Foreign Investments

Law 10.833, of 29 December, 2003 establishes that, as from 1 February, 2004, "any acquirer, whether an individual or corporate entity resident or domiciled in Brazil, or said acquirer's attorney-in-fact, when such acquirer is resident or domiciled abroad, shall be responsible for the withholding and payment of the income tax applicable to capital gains under article 18 of Law 9.249 of 26 December, 1995, earned by said individual or corporate entity resident or domiciled abroad, who transfers property located in Brazil." Prior to the entering into force of the aforementioned law, Brazilian Income Tax did not apply to transactions entailing the transfer or of assets or rights located in Brazil, between individuals or corporate entities incorporated abroad. However, such taxation applies only income of the seller of assets or rights in Brazil, not to that of the acquirer.

The foreign purchaser is entitled to register capital in the same amount as the registration previously held by the selling company, regardless of the price paid for the investment abroad. Nonetheless, the registration number on the RDE-IED Module of the Central Bank of Brazil should be changed to reflect the name of the new foreign investor, essential to allow the new investor to remit/reinvest profits and to repatriate capital.

3.11. Restrictions on Remittances Abroad

Remittance of funds abroad is restricted when such funds are not registered on the RDE-IED System, since remittance of profits, repatriation of capital, and registration of reinvestment are all based on registered foreign investment.

3.12. Restrictions on Foreign Investment

The following prohibitions and limitations apply to foreign capital in the Brazilian economy.

(A) Prohibitions:

Foreign capital investment is prohibited in the following activities:

- activities involving nuclear energy;
- health services;
- post office and telegraph services; and
- the aerospace industry.[1]

(B) Limitations

- Following the 1995 constitutional reform, Brazilian companies (even if foreign owned) may now acquire, operate and lease rural lands. However, acquisition of rural lands by foreigners residing in Brazil or by foreign-based corporate entities authorized to operate in Brazil is subject to certain conditions prescribed by law, and to congressional authorization.

- Furthermore, for reasons of national security, certain limitations apply to the acquisition of properties by foreigners in border areas. Purchase of such lands is requires authorization from the General Secretariat of the National Security Council.

- There are also some restrictions on the participation of foreign capital in financial institutions; however, these restrictions may be waived in the national interest. This matter is to be the subject of an enabling law Supplementary legislation that is likely to apply to insurance companies.

- To operate public air transport services a concession is required. By law, such concession, are granted only to Brazilian corporate entities (meaning those incorporated and managed in Brazil), in which at least 80% of the voting capital is owned by Brazilians (this limitation which also applies in increases capital stock). Moreover, such companies must be under the management of Brazilians. Finally, foreign capital participation may not exceed the authorized limit of 20% of voting capital, and requires approval from the aeronautical authorities.

- Some restrictions apply to foreign ownership and management of newspapers, magazines and other periodicals, and of radio and television networks.[2]

- Brazilian companies, even if under foreign control, may request and obtain

[1] Launching and orbital positioning of satellites, spacecraft, aircraft and related activities, not including manufacture or marketing of said items or accessories.

[2] Constitutional Amendment 36/02 of 28 May, 2002, changed provisions of article 222 of the Federal Constitution. Under the new wording, no less than 70% of total and voting capital of newspaper and radio broadcasting companies must belong, directly or indirectly, to native born Brazilians or those naturalized for over 10 years. Foreigners may hold no more than 30% of total and voting capital of such companies. Managerial and programming decisions must in the hands of native born Brazilians or those naturalized for over 10 years.

permission to operate in the mining sector.

- Law 9.074/95 states that the Concession Law (Law 8.987/95) applies to participation of private companies in the generation and transmission of electric power, and to the operation of customs posts and terminals, highways, and dams. There are no restrictions on foreign capital investments in such companies.

4. Brazilian Foreign Exchange Regulations

Although the Brazilian Foreign Exchange Market is exactly a free market, in view of the centralized control maintained by the Central Bank (BACEN). Nonetheless, in recent years it has undergone deregulation, and currently almost any type of transfer from or to Brazil can be accomplished.

CMN Resolution 3.265, of 4 March, 2005, recently unified the free rate and floating rate markets, thereby allowing international transfers in *reais* (TIR) by means of a single market encompassing currency exchange operations, TIR and exchange gold-instrument markets.

All currency exchange operations necessary for foreign trade (import and export) can be effected by means of this new unified exchange market, and all inflow and outflow transfers of financial resources requiring registration with BACEN can be performed. This system, instituted in the 1960s, enables non-Brazilian residents to register their investments in Brazil and provides supporting documentation for future remittances resulting from investments (i.e., remittances of profits, dividends and repatriation of principal invested). Foreign loans, direct investment in companies in Brazil, and capital market investments are among the financial resources that can require registration with BACEN.

Regarding transfers to and from Brazil and foreign currency purchases, limits on foreign currency purchases, and the requirement that such transactions comply with BACEN's pre-established models have been abolished under the new regulations. Currently, all that is required is that the transaction be legal, economically sound, and that the correct supporting documentation be provided.

Moreover, since 1996, an electronic system for registration of exchange transactions, foreign investments, and loan transactions performed in the former Free Rate Currency Exchange Market has been gradually introduced. This implies that registration is based upon investor's statements filed on the electronic system that can be accessed by Internet, thus dispensing with BACEN's requirement of prior authorization for certain transactions.

Lastly, international transactions in *reais* (TIRs) are now subject to the same criteria, provisions and requirements that apply to general currency exchange operations. On the other hand, under the new regulations, it is no longer acceptable to credit values in *reais* in bank accounts held by third parties (financial institutions abroad) for subsequent remittance abroad.

5. Forms of Association

5.1. General Aspects

The Brazilian legal structure provides for forms of association whereby parties may form corporate entities and other forms of incorporation do not imply corporate structure. The latter group includes consortia and other forms of legal businesses whereby parties do not relinquish their status as individuals. Incorporation of a company, on the other hand, entails a written agreement, either private or public, in which the contracting parties express their aims either individually or as a partnership (*sociedades personificadas or não personificadas*). The latter include *sociedades em comum* and *sociedades em conta de participação*.

Brazilian legislation provides for the following types of companies, *sociedade simples* General Partnership *sociedade em nome coletivo, sociedade em comandita simples*, Partnership by Shares *sociedade limitada*, Corporation *sociedade anônima* and Private Limited Liability Company *sociedade em comandita por ações*.

The law attributes corporate status to such companies upon registration with the competent pubic registry office, which thus become legal entities, with distinct liability to that of their partners.

Brazilian law also provides for associations, foundations and co-operatives. Such forms of association are not-for-profit, either due to their charitable nature or in the light of their particular characteristics and aims, and are thus different from commercial organizations, regardless of whether the generate revenues.

It should be stressed that all the types of company foreseen under Brazilian legislation, apart from joint stock companies (*sociedades anônimas*), may function either as 'simple' companies (*sociedades simples*) or business corporations (*sociedades empresariais*) however, this should be expressed in their articles of incorporation at the time of their founding. Companies (*Sociedades simples* must be registered the Civil Registry of Corporate Entities, whereas business corporations (*sociedades empresariais*) must register with the board of trade.

5.1.1. *Sociedade Anônima* (S/A)

A joint stock company (*Sociedade Anônima or Companhia*), as described in article 1.088 of Brazilian Civil Code and Law 6,404 of 15 December, 1976, partially amended by Law 9.457 of 5 June, 1997, and by Law 10.303, of 31 October, 2001, is fundamentally a legally constituted business corporation, with capital stock

represented shares. The principal purpose of companies it to generate profits for distribution among the shareholders.

A *Sociedade Anônima* is identified by a name, followed by the words *Sociedade Anônima,* in full or abridged to S/A; or preceded by the word *Companhia*, or abridged to *Cia*. The corporate name may consist of a name (*e.g.* of the founder or a distinguished forbearer. The corporate name may describe corporate aims or activity out, however, such a description is not mandatory.

There are two kinds of S/As: publicly traded companies which obtain funds through public offerings and subscriptions and are supervised by the Brazilian Securities Commission (CVM); and a closed capital companies which obtain the shareholders own capital or that of subscribers, in which case the accounting and administration is simpler.

Capital stock is represented by securities known as shares. Depending on the nature of the rights or advantages that these conferred upon their holders, shares may be common, preferred or fruition shares.

Aside from essential rights, common shares confer upon their bearers voting rights; whereas preferential shares, though they entitle their bearer to special rights, may grant or suppress voting rights. Fruition shares confer the bearer the right to continue participating in the corporate profits of ordinary or preferential shares, even upon their amortization, without reduction in capital.

By means of a Shareholder's Agreement, the shareholders may decide issues relating to purchase and sale of their shares, establish preferential acquisition rights, or exercise voting rights. All obligations set forth in Shareholders Agreement are binding, and must be respected by the Company.

A S/A may be managed by its Board of Directors and Administrative Council, or exclusively by a Board of Directors, as determined in Law or in its Bylaws.

An Administrative Council is a collegiate decision-making body. Such councils are optional for closed-capital corporations, and mandatory open-capital or authorized-capital corporations. The Administrative Council must be comprised of at least three members, who must be individual shareholders, resident or non-resident in Brazil.

The Board of Directors is the executive body of a S/A. It is responsible for representing the company and ensuring its regular operation. The Board is composed of no less than two directors, that may or may not be shareholders, who must be individuals residing in the Brazil, elected for a maximum term of three years.

The shareholders may supervise corporate management by means of the Fiscal Council. The principal purpose of the Fiscal Council is to oversee company's accounts and management. Such supervision may be permanent or periodic. Installation of a Fiscal Council reflects the desire of the shareholders to ensure more stringent control over corporate management. It should comprise no less than three and no more than five members, each with a substitute, who may or not be shareholders, elected by the General Meeting. In certain cases, members of a Fiscal Council represent specific categories of shareholders.

5.1.2. *Sociedade Limitada (LTDA.)*

Articles 1.052 to 1.087 of the Civil Code provide for Limited Liability Companies (*Sociedade Limitada*). These may take the form of a simple company (*sociedade simples*) or a business corporation (*sociedade empresária*), depending upon their corporate aims, and type of business.

A LTDA. is organized through the Articles of Association and has limited liability partners. Since every partner has its responsibility limited to the value of their shares, all of them are jointly liable for the payment of the capital stock.

Under the New Civil Code, the structure of companies must include the Meeting of Shareholders, the Management, and an Audit Committee as established by the partners in the articles of association. The meeting of shareholders is the main decision-making body of a corporate organization, which meets whenever the law or the articles so require. The management is carried out by one or more individuals, who may or not be shareholders, nominated in the articles of association which also specifies their terms of office.

The capital stock is divided into shares. Each share represents an amount in money, credits, rights or assets which a shareholder contributes toward the formation of the company's capital. Shares must be registered and are not represented by securities. As the ownership and the number of shares are written in the Articles of Association, any transfer of such shares requires an amendment. At the meetings of shareholders, changes resulting in modification to the articles of association or reorganization company's Bylaws require favorable votes representing at least three-fourths 3/4, of the capital stock.

Rules Common to Both S/As and LTDAs.

Corporate operations involving transformation, mergers, consolidation or split up may be formalized either by S/As or by LTDAs., under the terms of Articles

1.113 to 1.122 of Law 10.406, of 10 January, 2002 (Civil Code), and articles 220 to 234 of Special Law 6.404, of 15 December, 1976 (the S/A Law).

Transformation is an operation whereby a given company, without dissolving, changes its corporate classification. In this process, the company must observe a form corresponding to the new classification.

Acquisition (*incorporação*) is an operation whereby one or more companies are absorbed by another, which then assumes all in all their assets and liabilities.

Merger (*fusão*) is an operation whereby two or more companies amalgamate, with the aim of forming a new company which then assumes all in all their assets and liabilities of the now extinct former companies.

A split up (*cisão*) is an operation whereby a company transfers parts all its net equity to one or more existing or specially formed companies, resulting in the extinction of the parent company in the event that it has transferred all its net equity, or reducing of its capital, if it transferred on only part of its net equity.

5.1.3. Other Types of Companies and Forms of Association

Owing to partial or unlimited liability, the other types of company are uncommon, but may become attractive under certain business circumstances. There follow brief outlines of some of these types of companies.

5.1.3.1. *Sociedade em Comandita Simples* or *Sociedade em Comandita por Ações*

A Limited Co-partnership (*Sociedade em Comandita Simples*) or a limited partnership by shares (*Sociedade em Comandita por Ações*) may have two classes of partners: those with unlimited liability, who are responsible for the corporate management and representation, known as full partners (*comanditados*); and those whose responsibility is limited to the value of their shares, known as silent partners (*comanditários*).

In *sociedades em comandita simples*, the participation of *comanditados* partners represented by corporate shares, however liability is governed by the rules of *sociedade em nome coletivo* (See the next item). Thus the liability of partners is unlimited and shared.

Sociedade em comandita por ações is governed by articles 1.090/1.092 of Brazilian

Civil Code and by a special chapter of the Law of Companies by shares and has, for both types of partners, its corresponding interests represented by shares.

5.1.3.2. *Sociedade em Nome Coletivo* (General Partnership)

The relevant corporate feature of the General Partnership is the partners' unlimited liability vis-à-vis the company's debts. Thus, all partners are jointly liable with the company for its liabilities before third parties. However, the partners' assets cannot be executed until all the company's assets have been exhausted.

Responsibility for the management of the company falls on all of the partners, as long as the Articles of Association does not specifically determine which partner will have this responsibility.

The company's name may be the full name of one or more partners, adding the expression "& Cia." if other partners' names should be omitted.

5.1.3.3. *Sociedade em Conta de Participação* - SCP

A *Sociedade em Conta de Participação* (SCP) is a joint venture agreement entailing a partnership with one ostensible and one unidentified partner. Such partnerships are unincorporated, i.e., they have no corporate status even if registered. Since such joint ventures are formed exclusively for the purpose of a specific undertaking, they exist for a determined period of time, specifically for execution of predetermined transactions.

Aside from the ostensible partner, there may be 'hidden' partners, which contribute capital or other inputs toward the undertaking. Their liability is exclusively toward the ostensible partner, pursuant to the corresponding articles of association, which also records their status as creditors. In the event of bankruptcy of the ostensible partner, the hidden partners have no priority or preference rights.

Establishment of an SCP is not subject to formalities other than registration of its articles of association, and is acceptable under Brazilian legislation. It thus constitutes a partnership existing among the parties, with no relation to third parties. Third parties deal exclusively with the ostensible partner, who bears full responsibility for all such dealings.

Management of an SPC is the exclusive responsibility of the ostensible partner, who assumes liability for the company's business and must, upon conclusion of

the undertaking, present accounts to the other partners.

5.1.4. *Consórcio*

Strictly speaking, the word *consórcio* means union, combination, association or consortium. In the context of Brazilian corporate legislation, however, a *consórcio* is an association among two or more companies for the purpose of pursuing a specific project. The parties thus preserve their corporate identity, while pooling their efforts to achieve specific objectives.

Although based upon a contract, the resulting consortium does not have corporate standing, since the parties only bind themselves under the terms of the consortium agreement. Each party is liable for its specific obligations as established therein, without presumption of joint liability before third parties, except in regard to labor relations.

If the parties to the consortium are S/As, the consortium agreement must be approved by their general meeting. If they are not S/As, the consortium agreement must be registered before the competent authorities.

The consortium agreement must contain the following items:

- name of the consortium, if any;
- objectives of the consortium;
- duration, address, and legal venue of the agreement;
- determination of the participating companies' obligations and commitments;
- rules for receipt and distribution of profits;
- management and accounting policies, shares of each of the participating companies, and administrative charges, if applicable;
- rules for deliberation, and voting rights of each participant; and
- dues of each participant towards expenses of the project, if applicable.

The consortium agreement and any subsequent amendments must be filed before the Board of Trade in whose jurisdiction the head office is located. Upon filing of the consortium at the Board of Trade, a certificate must be published in the State or Federal Official Gazette (DOU), and in a newspaper with large circulation.

5.2. Registration Process

In Brazil there are two types of public registry for companies: (i) Commercial

Registry, intended for the filing of activities of business companies (including registration of individual companies and the of subordinates of the individual partner and other agents), effected at the State Board of Trade; and (ii) Civil Registry, intended for the registration of the acts 'simple' companies (*sociedades simples*), effected at Civil Registry of Corporate Entities, which have jurisdiction within specific court districts.

5.2.1. Registration of Companies

Commercial Registry is effected by the Boards of Trade in each state, and is compulsory for self-the employed and for business corporations engaged in business activities that entail production or circulation of goods and services

The law defines all S/As as business companies. Aside from these, any general partnership (*Sociedade em nome coletivo*), limited co-partnership (*Sociedade em Comandita Simples*), or LTDA (*Sociedade Limitada*), provided that its purpose is the pursuit of economic activities through production or circulation of goods or services, performed by means of a corporate structure, must register with the Board of Trade in the state where it operates or where it may open branches.

The form chosen, along with a characterization of corporate aims must be clearly and accurately enunciated in the registration of the company with the Board of Trade or Civil Registry of Corporate Entities.

The filing of the Articles of Association of a S/A must be accompanied by the following documents:

- Articles of Incorporation or Minutes of the General Incorporation Meeting, listing the particulars of the subscribers and proof of payment of the entire capital stock;
- Bank deposit slip (from *Banco do Brasil S.A.*) attesting to deposit in cash of the equivalent to no less than ten percent (10%) of the paid up capital subscribed;
- Bylaws signed by all subscribers;
- Report on the subscribed capital, signed by the founders or by the Secretariat of the General Meeting, containing full name, nationality, marital status, profession, residence and domicile of subscribers, in addition to the number of subscribed shares and the amount paid;
- Power-of-attorney of any foreign resident shareholder, signed before a Public Notary in the country of origin, stamped by the Brazilian Consulate, translated by a public sworn translator in Brazil and registered at the Public Notary Office.

- Documentary proof of partners resident abroad;
- Photocopies of Identity cards of elected directors and board members;
- Forms duly filled out with data on the company and its shareholders, accompanied by proof of payment of all charges due for filing.

For all business companies, the filing of incorporation documents and any subsequent amendments must be effected at the Board of Trade in the jurisdiction of the company's head office, accompanied by a petition signed and dated by a partner, attorney, or other duly authorized person.

A request to file articles of incorporation of a business company with the Board of Trade must be accompanied by the following documents:

- Three original copies of the Articles of Association signed by all the partners and two witnesses;
- Tenor or certificate, when the articles of association has been entered into by a public deed;
- Certified photocopy of each partner's identity card;
- Power-of-attorney from partners resident or incorporated abroad, signed before a public notary in the country of origin, stamped at the Brazilian Consulate, translated by a public sworn translator in Brazil and registered at a Brazilian Deeds and Documents Registry Office;
- Documentary proof of existence of any foreign partner resident abroad;
- Personal declaration signed by each partner or manager of the society that he is not prevented from engaging in commercial activities, which may be made in the articles of association themselves or in a separate document;
- forms with data on the company and its partners, duly filled out, accompanied by proof of payment of filing fees.

5.2.2. The Civil Registry of Legal Entities

A 'simple' company (*sociedade simples*) i.e., one that has not adopted the structure of a S/A or other types that do does not engage in commercial activities, must register at the Civil Registry of Corporate Entities.

To register a 'simple' company a petition must be addressed to the Civil Registry, accompanied by the following documents:

- articles of incorporation or corresponding amendments thereto, duly signed by its partners;
- certified photocopies of the identity documents of the partners;
- a proxy granted by foreign resident partners, signed before the Public Notary

of his country of origin, stamped at the Brazilian Consulate, translated by a public translator in Brazil and registered at the Public Notary's Office in Brazil.

The Articles of Association of a 'simple' company (*sociedade simples*) may only be filed at the Civil Registry of Corporate Entities after having been duly certified by a lawyer.

6. Public Companies

6.1. General

Law 6.404/76 (the Brazilian Corporations Law) makes a distinction between private (closed stock) companies and public (open stock) companies. Public companies must necessarily take the form of a corporation and their securities are admitted for trading on the securities market.

Because public companies are permitted to raise funds from the market through public offerings of their securities, they are subject to a series of specific obligations imposed by law and by regulations issued principally by the Brazilian Securities and Exchange Commission, aimed at protecting the investor. The Brazilian Securities and Exchange Commission (*Commissão de Valores Mobiliários* - CVM"), created by Law nº. 6.385/86, is a federal agency linked to the Ministry of Finance, whose purpose is to regulate, develop, control and supervise securities markets in Brazil.

Law 10.303/01 expanded the scope of the CVM's activities to encompass Commodities and Futures Markets, organized over-the-counter markets, and the clearing and settlement of security transactions. The CVM is an independent agency that operates under a special regime. Though linked to the Ministry of Finance, the has independent administrative authority, its own financial resources and budget. CVM commissioners have a fixed terms of office and security of tenure.

Among the attributions of the CVM's purposes is protection of investors, and such protection is effected by means of a variety of control and supervisory mechanisms. Ultimately, its aim is to stimulate investment and savings in stocks and the financial markets.

Thus, while in closed stock companies there is great freedom to establish rules for the operation of the company that will best serve the shareholders' interests, public companies are subject to a number of restrictions that reduce the shareholders' flexibility in establishing the rules that will govern the company.

In addition to complying with the provisions of the Brazilian Corporations Law, publicly-held companies must also fulfill various registration requirements in order to have their securities admitted for trading on the stock exchange or on the over-the-counter market.

The CVM may classify public companies in various categories, according to the

types and classes of securities issued by the company and admitted for trading in the market. Furthermore, it is the CMV's prerogative to specify rules that apply to each category, though to date it has not done so.

Only public companies may issue depositary receipts (DRs), which are certificates representing shares in the company. DRs are traded on foreign markets, enabling the company to raise funds outside Brazil.

6.2. Securities Market

The sector of the Brazilian financial system referred to as the 'Securities Market' includes a variety of transactions involving securities issued by publicly-traded companies, such as shares, debentures, subscription bonuses and promissory notes for public distribution. Aside from such securities, Law 6.385/76 lists all the types of securities that may be traded on the Securities Market and that are subject to the CVM's supervision.

Securities issued by publicly-traded companies may be traded on the stock exchanges or in the over-the-counter markets (organized or not), over which CVM maintains regulatory supervision.

Stock exchanges, according to National Monetary Council Resolution 2.690/00, may be formed as associations or corporations. Their obligations include the establishment of a venue or system appropriate for buying and selling bonds and/or securities in a free and open market, organized and supervised by the stock exchange, its members and the regulatory authorities.

The organized over-the-counter market comprises a securities trading system, where securities issued by public companies not registered on the stock exchanges can be traded. The trading system is maintained by a self-regulatory entity responsible for supervising and inspecting participants and trading on the market. Registration of assets for trading on the organized over-the-counter market is simpler than for trading on the stock exchanges and, in practice, stocks traded on the organized over-the-counter market have less liquidity than those traded on the stock exchanges.

When public companies are not registered either with a stock exchange or an organized over-the-counter market, their securities may be traded on the non-organized over-the-counter market, where trades are made directly between securities brokers, without supervision of a self-regulatory entity.

6.3. Management

Public stock companies are required to have a two-tiered management structure, composed of a Board of Officers and a Board of Directors. In closed companies, the latter body is optional.

The Board of Directors is a deliberative body, with powers to supervise the company's business and to establish its internal structure. The Board must have at least three directors, all elected at the general annual meeting of the shareholders of the company. Directors may be non-residents, but must be shareholders of the company. Under Brazilian corporate legislation, non-resident directors must appoint a representative who is resident in Brazil, to receive service of process in legal proceedings.

Brazilian Corporations Law entitles holders of no less than 15% of the voting shares in a public stock company to elect and/or remove one member (and his substitute) of the Board of Directors, by separate vote at the annual general meeting of shareholders.

Likewise, holders of preferred shares without voting rights or with restricted voting rights in a public stock company that represent no less than 10% of the company's capital have the right to elect and/or remove one member (and his substitute) of the Board of Directors, in a separate vote at the general meeting of shareholders, provided they have not exercised any right to elect a member of the Board of Directors provided for under the company's bylaws. In both cases, shareholders must demonstrate that they have held the 15% of the voting capital of the company, or the 10% of the total company capital, uninterruptedly, for no less than three months prior to the general meeting for election of directors.

Furthermore, if the holders of voting shares, and holders of preferred shares without voting rights or with restricted voting rights, are unable to attain the percentages required for a separate vote to elect one member (and his substitute) to the Board of Directors, the two groups may join to elect a single Board member (and his substitute), provided that their aggregate shareholdings represent at least 10% of the capital of the company.

The Board of Officers is an executive body. With powers to conduct the company's day-to-day business, the Board of Officers has exclusive authority to represent the company before third parties. The Board of Officers is composed of at least two members, elected by the Board of Directors, if the Company has one, or by the general meeting of shareholders. All Officers must be resident in Brazil, though they need not be shareholders. They may comprise up to one-third of the Board of Directors.

In order to have their securities traded in stock exchanges or over-the-counter markets, public companies must have, in addition to a Board of Directors, an investor relations officer, responsible for providing information to members of the public who have invested in the company, to the CVM and, if the company is registered with stock exchanges or organized over-the-counter markets, to those entities, in addition to ensuring that the company's registration is up to date, in accordance with CVM Instruction 202/93.

Finally, public companies must create a Fiscal Council, to advise on matters related to governance of the company. The Fiscal Council is the means whereby shareholders can supervise management of the company, and it may function permanently or when requested by the shareholders.

6.4. Periodic Filing Requirements and Other Information

Public stock companies are required to disclose and/or communicate various types of information related to their business.

In addition to publication requirements established in the Brazilian Corporations Law and applicable to all companies, once a public stock company's securities have been registered with the CVM, it must provide information on a periodic basis to the CVM, to the stock exchange on which its securities were first admitted for trading, to the stock exchange on which its securities were most traded in the last fiscal year, and to any other stock exchange that requests such information (CVM Instruction 202/93).

Information that must be submitted on a regular basis, at the times and in the form established by regulation, consists of:

- financial statements and, if applicable, consolidated financial statements, drawn up in accordance with Brazilian Corporations Law and CVM regulations, accompanied by a report from the management of the company and opinion of an independent auditor;
- Standardized Financial Statements (*Demonstrações Financeiras Padronizadas* – DFP) form;
- notice of the call to the annual general shareholders' meeting;
- Annual Information (*Informações Anuais* – IAN) form;
- summary of decisions taken at the annual general shareholders' meeting;
- minutes of the annual general shareholders' meeting;
- facsimile of the securities certificates issued by the company, whenever a change is effected; and
- Quarterly Information (*Informações Trimestrais* – ITR) form, accompanied by

a Special Review Report by an independent auditor.

In addition to the information listed above, certain events or facts can trigger a requirement to submit information, again at the times and in the form established by regulation, such as:

- notice of the call to an extraordinary general shareholders' meeting;
- summary of decisions taken at the extraordinary general shareholders' meeting;
- minutes of the extraordinary general shareholders' meeting;
- shareholders' agreement;
- Corporate Group convention (agreement to form a Corporate Group);
- statement of a material fact or act;
- information regarding any petition for protection from creditors, including grounds for the petition, financial statements drawn up especially for the purpose of obtaining protection from creditors and, if applicable, the prospects of debenture holders recovering their investment;
- judgment granting protection from creditors;
- information on any petition or confession of bankruptcy;
- judgment declaring bankruptcy; and
- any other information that may be requested by CVM.

With respect to statement of material fact or act, CVM Instruction 358/02 defines as material any or fact related to the business of a company (including any decision by the controlling shareholder and any resolution adopted by the shareholders in general meeting or by any of the management bodies of the company) that could influence (a) the quoted price of securities issued by the company; (b) the decision by investors to trade in the company's securities or to continue holding them; or (c) the decision by investors to exercise any of the rights pertaining to ownership of the company's securities.

CVM Instruction 358/02 provides examples of events that may constitute a material fact:

- signature of agreements for transfer of control of the company, even if subject to conditions;
- changes in control of the company, including changes in control resulting from the signing, amendment, or termination of shareholders' agreements;
- signing, amendment or termination of shareholders' agreements to which the company is party or which have been entered in the company's books;
- entry or exit of a shareholder that has an operational, financial, technological or management agreement or arrangement with the company;
- authorization for trading securities issued by the company in any domestic

or foreign market;
- decision to apply for cancellation of the company's registration as a public stock company;
- merger, consolidation or spin-off, involving the company itself or related companies;
- transformation or dissolution of the company;
- changes in the company's assets;
- changes in accounting criteria;
- renegotiations of debt;
- approval of stock option plans;
- changes in the rights and privileges attached to securities issued by the company;
- share splits and reverse splits and the issue of share dividends;
- acquisition of shares to be held in treasury or for cancellation, and the sale of shares so acquired;
- declaration of the profit or loss and the distribution of dividends;
- signing or termination of agreements, or failure to close a deal, when the expectation of closing the deal is public knowledge;
- approval, modification or abandonment of a project, and any delay in its implementation;
- commencement, recommencement or suspension of the manufacture or sale of products or services;
- discovery, change or development in connection with the company's technology or resources;
- any change in the projections disclosed by the company;
- filing for judicial arrangement with creditors, petition or confession of bankruptcy, or the bringing of any lawsuit that may affect the financial situation of the company.

At its discretion, the CVM may require a public stock company to disclose, correct, amend or republish information related to a material.

Likewise, the CVM, the stock exchange, or over-the-counter market on which the company's securities are traded may require the company's investor relations officer to provide further information to clarify communications and/or disclosures made in connection with a material fact.

Exceptionally, a public stock company may choose to withhold information under periodic filing and other requirements, including material fact disclosure requirements, if the controlling shareholders or management deem that such disclosure could jeopardize legitimate interest of the company, provided that said information is not leaked and so long as there is no unusual variation in quoted price or trading volume of the securities issued. In such cases, the CVM requires

that the company submit a statement of the reasons that led it to believe that disclosure would put its legitimate interests at risk.

Basic information contained in the company's registration must be kept up-to-date and the CVM must be informed of any changes.

Such information submitted to the CVM must also be available to securities holders through the company's investor relations department. The CVM will disclose said information to the public, excepting information classified as confidential.

Reporting requirements of public companies are also regulated. Information must be published in a widely-circulated newspaper in the city where the stock market on which the company's securities have been most traded in the past two fiscal years, or in the city where the company's head offices are located. The company must use the same newspaper for all publications.

6.5. Public Offers for the Buyback of Shares (POBS)

Under Brazilian Corporations Law and CVM regulations, public companies are required to make a Public Offer for Buyback of Shares (POBS) (*Oferta Pública para Acquisição de Ações* – OPA), in the following situations:

- POBS for cancellation of registration of a public stock company, by the controlling shareholder or by the company itself, with the aim of acquiring all the shares issued by the company (art. 4 § 4 of the Brazilian Corporations Law and CVM Instruction 361/02);
- POBS to increase holdings when, under CVM regulations, the controlling shareholder's interest reaches a percentage that undermines the trading value of the remaining shares. The offer must be for all the shares of the affected class or type. (Art. 4 § 6 of Brazilian Corporations Law and CVM Instruction 361/02);
- POBS to transfer of control, as a condition for validating any direct or indirect legal transfer of control of a public stock company. This offer by the shareholder who has acquired control aims to cover all shares that have full and permanent voting rights in the company (art. 254-A of Brazilian Corporations Law and CVM Instruction 361/02).

Generally speaking, the Public Offer for the Acquisition of Shares is addressed to all holders of a single type and class of shares covered by the offer, and must be published at least once in the widely-circulated newspaper normally used by the company to publish notices, in accordance with CVM regulations.

If, at the end of the Public Offer for the Acquisition of Shares, less than 5% of all shares issued by the company remain in the market, the general meeting of shareholders may authorize redemption of the shares for the price established in the Public Offer for the Acquisition of Shares, thereby withdrawing them from circulation.

The Public Offer for the Acquisition of Shares must be effected by auction on the stock exchange or organized over-the-counter market on which the shares covered by the offer are traded; otherwise, the offer may be effected on the stock exchange or organized over-the-counter market at the discretion of the proponent.

6.6. Primary and Secondary Public Offerings

Public stock companies may make public offerings for distribution of securities in the primary and secondary markets, subject to requirements established under applicable legislation, particularly CVM Instruction 400/03.

An offering is said to be primary when the issuing company offers securities for distribution to the public in order to raise funds. A secondary offering is when one or more of the issuer's shareholders offers to transfer all or part of their holdings or securities to the public. Primary and secondary offerings often occur simultaneously.

Any public offering of securities in Brazil must be submitted for prior registration with the CVM. Among the most pertinent registration requirements established by CVM Instruction 400/03 are those relating to the prospectus, which must contain information on the offer, the securities offered, the issuing company, and its financial status. The prospectus must be written in readily accessible language and the information it contains must be complete, precise, accurate, current, clear, and objective, so to enable investors to make an informed decision regarding the investment.

Any use of advertising materials in connection with the offer requires prior approval by the CVM. Under no circumstances may information that differs or is inconsistent with the prospectus be presented to potential investors.

The CVM may, depending upon the specific characteristics of the offer, waive certain registration requirements, including publication, deadlines, and other procedures foreseen in the regulations.

Public stock companies that have already effected public offerings may file

Securities Distribution Programs with the CVM, to facilitate the examination and registration for future offerings. When the company wishes to make a new offering, it must submit to the CVM a supplement to the prospectus, and definitive versions of the draft documents filed under the Securities Distribution Program.

To effect a public offering, the proponent must engage an underwriter to place the securities with the public. The proponent may authorize the underwriter to distribute a supplementary lot of securities, in the event that demand is greater than expected, at the same price as the initial lot of securities. The prospectus must specify limits for the supplementary lot, which can not exceed 15% of the securities initially offered.

Furthermore, at his own discretion, the proponent may increase the offering by up to 20%, without making a new application or modifying the terms of the original registration.

The CVM has the power, at any time, to suspend (for up to 30 days) or to cancel any offering that is contrary to current legislation, or that is noncompliant with its terms of registration. Even after registration has been issued, it may cancel any offering that is deemed illegal, contrary to CVM regulations, or fraudulent.

6.7. Differentiated Listing on the São Paulo Stock Exchange (BOVESPA)

BOVESPA's Differentiated Levels of Corporate Governance are a set of rules of conduct for companies, their management, and their controlling shareholders that BOVESPA deems important for enhancing the value of shares and other assets issued by companies.

Corporate governance consists of a set of principles and practices that seek to minimize potential conflicts of interest among a company's shareholders and the officers responsible for its management. The efficiency of a corporate governance system is upheld by three pillars: (a) corporate rules of conduct, which may be set by law or by contract (corporate governance in the strict sense); (b) transparency of information disclosed; and (c) means employed to ensure that such rules are effectively enforced.

There are currently four BOVESPA special listing segments for securities issued by public companies. The rating depends on the issuing company's compliance with BOVESPA's Differentiated Levels of Corporate Governance: (a) Level 1 of Corporate Governance (Level 1); (b) Level 2 of Corporate Governance (Level 2);

(c) BOVESPA's New Market (New Market); and (d) The Market of Shares of S/As (BOVESPA MAIS).

Voluntary compliance by a company to these rules, and the consequent adoption of corporate governance practices in addition to those applicable to all companies by law, enables a company to be listed on Level 1, Level 2, or the New Market, depending on the degree of commitment to BOVESPA, or BOVESPA MAIS, where the company is listed on the organized over-the-counter market administered by BOVESPA.

Compliance with BOVESPA's Differentiated Levels of Corporate Governance brings various benefits to all parties. For investors, it allows (a) more accurate pricing of shares; (b) improvement in the process of monitoring and inspecting the company's business; (c) greater security as to their corporate rights; and (d) reduced risks associated with investment. For companies, it allows: (a) improved institutional image; (b) increased demand for their shares; (c) increased value of their shares; and (d) lower cost of capital.

A public stock company may seek compliance with any of the BOVESPA listing levels by signing a binding contract to abide by the set of corporate governance rules for the respective level. These rules are set by BOVESPA regulations (the Differentiated Levels of Corporate Governance Regulations, in the case of Levels 1 and 2; the New Market Listing Regulations, in the case of the New Market; and the BOVESPA MAIS Listing Regulations, in the case of BOVESPA MAIS).

To attain a listing under Level 1, companies must undertake to comply with a set of rules aimed at improving the information disclosed to the public and dispersion of shares. The main Level 1 practices aim:

- to maintain a minimum number of shares in circulation, representing at least 25% of the company's capital;
- to adopt mechanisms that foster dispersion of the company's capital through public offerings;
- to meet additional requirements when preparing prospectuses for public offering of securities;
- not to issue founder's shares;
- to improve the company's financial statements, annual and quarterly information filings, by consolidating financial statements, indicating cash flows and ensuring that quarterly information filings are reviewed by independent auditors;
- to hold an annual public meeting with analysts and other interested parties, to disclose information on the company's financial status, its projects and prospects;

- to comply with disclosure rules in transactions involving securities issued by the company and held by the controlling shareholders;
- to disclose the terms of contracts between the company and related parties; and
- to make available an annual calendar of corporate events.

To obtain a Level 2 classification, in addition to adopting the Level 1 practices, the company must comply with a more comprehensive set of corporate governance rules, including additional rights for minority shareholders. Level 2 practices aim:

- to set a unified term of no more than two years for the entire Board of Directors, which must be composed no less than five members, of whom 20% must be independent directors;
- to disclose financial statements in accordance with the international US/GAAP or IFRS standards;
- to extend to all common shareholders the same price conditions granted to controlling shareholders when negotiating control of the company and no less than 80% of that price to preferred shareholders;
- to extend voting rights to preferred shareholders on some matters, such as transformation, merger, consolidation, or split-up of the company and approval of contracts between the company and other firms in same group;
- to make a Public Offer for the Acquisition of Shares for all shares in circulation, for no less than their economic value, in the event that the company goes private or cancels its registration for trading at Level 2; and
- to submit corporate disputes to the Arbitration Chamber for resolution.

A company's securities may be listed on the New Market provided the company abides by rules for Levels 1 and 2 and, moreover, undertakes to ensure that its capital stock is composed exclusively of common shares.

BOVESPA MAIS, anew segment of the organized over-the-counter market, was created to expand opportunities for trading on BOVESPA to new public companies. To this end, the company must comply with advanced corporate governance practices, similar to rules applicable to the New Market for ensuring greater transparency and respect for shareholder rights. BOVESPA MAIS aims to assist new entrants by enabling gradual access to capital markets, building up their standing in the market, enhancing transparency, their shareholder base and liquidity.

7. Regulatory Framework of Local Capital Markets

7.1. Relevant Laws Affecting Local Capital Markets

Law 6.385/76 (the Securities Law) is the main law governing securities markets in Brazil, though, Law 6.404/76, and the amendments introduced by Law 10.303/01 (the Corporations Law), also contains relevant provisions for the regulation of the capital markets.

The Securities Law created the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários* – CVM) and regulates overall operation of capital markets, public distribution of securities, listing of securities on exchanges, disclosure requirements, activities of brokers and intermediaries, types of securities negotiated, and the types of companies which may be traded on the capital markets. The Securities Law also invests the CVM with regulatory and enforcement powers.

Implementation of the Securities Law is effected by means of resolutions, circulars, instructions, opinions, deliberations and other administrative mechanisms, issued periodically by the National Monetary Council (CMN), the Central Bank (BACEN), the CVM, the stock exchanges and the organized over-the-counter markets (Organized OTCMs).

7.2. Local Regulatory and Supervisory Authorities

7.2.1. The National Monetary Council

With respect to securities markets, the Securities Law invests the CMN with the following powers: (i) to define general policies relating to the organization and operation of capital markets, (ii) to regulate the granting of credit in the market, and (iii) to establish general rules to be followed by CVM in the performance of its functions; and (iv) to determine which CVM activities must be performed in cooperation with the Central Bank.

7.2.2. The Securities and Exchange Commission (CVM)

The CVM is a governmental agency responsible for regulating and supervising

compliance with the Securities Law and all issues relating to local capital markets.

The CVM is governed by a president and four board members, appointed for five-year terms by the President of Brazil, and confirmed by the Senate, each of whom must have renowned expertise in securities markets.

CVM also has authority to regulate the activities of brokers, dealers, financial institutions, stock exchanges, Organized OTCMs, publicly companies, investment funds and firms, investment portfolios and custodians, independent auditors, consultants and market analysts.

The CVM may take action and impose administrative sanctions on any persons and entities that fail to comply with the Securities Law, the Corporations Law, or any other regulations within the CVM's jurisdiction. The CVM's primary sanctions may include: (i) warnings; (ii) fines; (iii) suspension or revocation of registration or authorization to participate in the securities market; (iv) temporary suspension, for up to 20 years, from participation in certain activities relating to the securities market; and (v) suspension or removal of directors, officers, and fiscal counsels of public companies, or of companies that participate in the securities distribution system.

Sanctions imposed by the CVM in no way affect any civil or criminal liability of parties found to have breached securities regulations.

The CVM represents Brazil's securities markets at the Council of Security Regulators of the Americas (COSRA), the International Organization of Securities Commissioners (IOSCO), and at MERCOSUR.

CVM has signed memorandums of understanding for the sharing of information and legal assistance with the securities regulators in the following countries: United States (the Security and Exchange Commission and the Commodities Futures Trading Commission), South Africa, Germany, Argentina, Australia, Bolivia, Canada/Quebec, Chile, China, Equator, Spain, France, Greece, Hong Kong, Italy, Luxembourg, Malaysia, Mexico, Paraguay, Peru, Portugal, Romania, Singapore, Thailand and Taiwan.

7.2.3. The Central Bank

Under the terms of Law 4.595/64, the Central Bank is responsible for implementing CMN policies relating to monetary policy, exchange controls, regulation of financial institutions (including brokers and dealers), control of

foreign investment (including investment in the securities markets) and such other matters relating to securities markets deemed by the CMN to fall under the Central Bank's regulatory responsibilities.

The Central Bank is governed by a nine-member Board, headed by a Governor, appointed by the President of Brazil for an unlimited term, and subject to confirmation by the Senate.

7.2.4. Self-Regulation

Self-regulatory organizations in the Brazilian securities markets, such as stock exchanges and the Organized OTCMs, act as ancillary institutions to the CVM, and are subject to its supervision. It is incumbent on such entities to inspect their members and to ensure compliance with current rules and regulations. Organizations such as the Brazilian Association of Investment Banks (ANBID) are fully self-regulating, and not subject to CVM supervision.

7.2.4.1. Stock Exchanges

The São Paulo Stock Exchange (BOVESPA) is Brazil's foremost stock exchange.

Shares, commercial papers, debentures, investment fund *quotas* and derivatives, are regularly traded on BOVESPA.

Stock exchanges are responsible for organizing, maintaining, registering and supervising the securities trading and, to this end, they are authorized to issue regulations to complement those emanating from the CVM.

The negotiable instruments that may be traded on Brazilian stock exchanges are: (i) securities duly registered with CVM, (ii) rights arising therefrom, (iii) stock indexes, (iv) derivatives, and (v) government bonds, and other negotiable instruments issued by private entities, when authorized by the Central Bank and the CVM.

Recently, BOVESPA implemented the "home-broker" system, whereby investors can deliver orders to their brokers via the internet which, in turn, has links to BOVESPA's electronic data systems.

On December 11, 2000, BOVESPA launched a new trading market (known as the New Market) designed exclusively for the listing and trading of shares of companies that submit to stricter corporate governance and disclosure standards

than those required by Brazilian law.

In order to be traded on the New Market, the company must (i) issue common shares only; (ii) maintain a free float of at least 25% of its outstanding shares; (iii) extend to all shareholders the same terms and conditions enjoyed by controlling shareholders in the event of sale of control (tag along rights); (iv) disclose annual balance sheets in accordance with US/GAAP or IAS/GAAP standards, and (v) disclose any related party transactions.

Settlement and custody of securities transacted are effected by a clearing house controlled by the stock exchanges, generally on the 2nd and on the 3rd business days subsequent to the relevant closing date (financial and physical settlement, respectively).

The Brazilian Custody and Settlement Company (CBLC), a private company based in São Paulo, provides custody and settlement services to BOVESPA and SOMA (*Sociedade Operadora do Mercado de Ativos*) an Organized OTCM body.

7.2.4.2. Organized Over the Counter Markets (OTCMs)[3]

Organized OTCMs comprises partnerships or commercial companies specifically incorporated with the purpose of trading securities, in accordance with CVM rules and subject to CVM's prior approval.

The following securities may be traded on the Organized OTCMs: (i) securities registered with CVM for trading on Organized OTCMs; (ii) certificates of investments in audiovisual production; (iii) *quotas* of closed-end investment funds, subject to a public distribution, *e.g.*, stock mutual funds, real-estate mutual funds, and others); and (iv) other securities expressly authorized by the CVM.

Currently, SOMA and the Custody and Settlement Chamber (CETIP) are the only Organized OTCMs in Brazil.

For a specific security to be admitted for trading on SOMA, a specialized market maker must be appointed.

[3] Non-organized OTCMs, as defined by Article 3 of CVM Instruction 202, comprise all trades conducted outside stock exchanges through intermediation of members of the securities market. Shares traded on a stock exchange cannot be traded over-the-counter, except in case of a public distribution. OTCM transactions are usually executed by telephone by broker/dealers from their offices, and are not coordinated by CVM, though they are subject to its supervision. The price and volume of OTCMs transactions are not regularly published.

7.2.4.3. National Association of Investment Banks (ANBID)

The ANBID Code, approved on September 22, 2005 by the National Association of Investment Banks (ANBID), established self-regulation and set disclosure standards to be followed by ANDIB member institutions when coordinating public offerings of securities on the Brazilian market. The ANBID Code sets operating standards similar to those in effect in countries with highly organized capital markets.

The ANBID Code establishes full disclosure parameters to be observed by Brazilian capital markets. It demands self-regulation and creates uniform rules and standards that are far stricter than the minimum requirements set by law with regard to public distribution of both debt and equity securities in the primary and the secondary markets in Brazil. Under its provisions, financial institutions acting as coordinators of underwriting syndicates (underwriters) are responsible for preparation of prospectuses. They are also required to conduct independent due diligence to verify all material information concerning the issuer's business, properties and financial status, relevant securities and other material facts which may have a bearing on an investor's decision with regard to the offered or requested investment funding.

The ANBID Code also establishes comprehensive minimum content rules for prospectuses, which must contain: (i) information regarding risk factors, (ii) description of the issuer's main sector-related aspects; (iii) description of the issuer's business and his corporate governance, environmental protection, and social responsibility policies, (iv) management discussion and analysis (MD&A) of issuer's financial status and results of operations, based on the three preceding fiscal years, (v) information about the issuer's current outstanding securities, (vi) relevant litigation affecting the issuer, and (vii) operations with related parties and underwriters for issuance of securities.

7.3. Definition of Securities

In Brazil, the concept of securities is formal and defined by law. According to the Securities Law and regulations thereof issued from time to time, the following are deemed as securities: (i) shares, debentures, warrants and coupons of the aforesaid securities; (ii) stock indexes; (iii) commercial papers; (iv) subscription rights; (v) subscription receipts; (vi) options; (vii) share deposit certificates; (viii) certificates of investments in film production; (ix) certificates representing mercantile contracts for deferred purchase of energy; (x) collective investment contracts; (xi) real estate receivable certificates; (xii) future contracts, options and other derivatives, which underlying assets are securities; and (xiii) any

negotiable instruments or collective investment contracts, when publicly offered, which grant participation, partnership or remuneration rights, including those resulting from the provision of services, which income arises from the work of the entrepreneur or third parties.

The Securities Law expressly excludes federal, state and municipal public debt certificates and all negotiable exchange certificates issued by financial institutions excepting debentures, from its definition of securities. Such negotiable instruments are thus subject to control and monitoring of the Central Bank.

7.4. Offer and Distribution of Securities in Brazil

7.4.1. The Concept of Public and Private Offers for Distribution of Securities

Public offering of securities in Brazil are subject to restrictions imposed by the Securities Law require prior registration with CVM.

The Securities Law defines a public offering as one conducted by means of (i) the use of lists or bulletins of sales or subscription, offering circulars, prospectuses or or any form of advertisement to the public; (ii) the full or part-time search for subscribers or buyers for the securities, by means of employees, representatives, agents, or any person, regardless of whether they are part of the securities distribution system; (iii) negotiation in stores, offices, or any other premises; and (iv) use of marketing, by word or in writing, by letter, announcements, notices, through mass media or via electronic communication.

Registration is intended to provide adequate and accurate disclosure of facts concerning the issuer and the securities he proposes to sell. It does not, however, make judgment of the risk inherent to investing in the securities, nor does it does not preclude sales of securities in poorly managed or unprofitable companies.

CVM Instruction 400/03, which sets forth the new regulations for public offerings of securities, allows public companies which have already made public offers to file with the CVM's program for distribution of securities, in order to facilitate future offerings. The distribution program has a maximum term of two years. Offers made under registered programs entail a simplified registration procedure.

A further innovation introduced this regulation is exemption of registration and of certain requirements (including publication, deadlines and procedures). When

granting such exemptions, the CVM takes into consideration: (i) the type of public company; (ii) the unit value of its securities or the value of the offer; (iii) the distribution plan; (iv) rules in force in other jurisdictions where which the offer is to be made; (v) characteristics of the exchange offer; and (vi) the target public.

The issue and distribution of debt securities outside Brazil by Brazilian companies are not subject to registration with CVM.

7.4.2. Registration Process

Public distribution of securities in Brazil may only be effected by companies registered with the CVM as publicly companies. Aside from registration with the CVM prior to distribution to the public, the company's securities must also be accepted for trading on the stock exchange or on an organized or non-organized OTCMs.

7.4.3. Registration of the Issuer as a Public Company

The documents and information required for the registration with the CVM include: bylaws, minutes of the meeting appointing an investor relations officer, and audited financial statements for the three preceding fiscal years. Registration of a company with the CVM usually takes between 30 to 120 days. Prior to approving the trading of securities on stock exchanges and Organized OTCMs the same documentation submitted to the CVM must be filed.

7.4.4. Requirements for a Public Distribution of Securities

Public offers of securities, either on the primary or on the secondary market, require prior authorization from the CVM. For such purposes, the coordinator of the transaction must file with the CVM the required documentation, which includes: (i) minutes of the meeting of shareholders or board meeting, approving the issuance of the securities; (ii) a copy of the agreement for the distribution and/or underwriting of the securities; (iii) a draft of the agreement between the members of the syndicate for the distribution of the securities; (iv) a copy of the stabilization contract, if any (stabilization is not permitted without such contract); (v) copies of the prospectus; (vi) announcements of commencement and termination of distribution; and (vii) statement of the issuer and the coordinator attesting the correctness of the information contained in the prospectus.

Registration for public distribution is obtained in 20 business days and may be interrupted once in the event that the CVM requires additional information regarding the registration request. The deadline for fulfilling such requirements is 40 business days, and may be extended for an additional 20 days at the request of the parties involved. One all requirements have been fulfilled, the CVM will process the request for registration within 10 days.

7.4.5. Issue of Depositary Receipts: Access to the Foreign Capital Markets

Brazilian companies wishing to access foreign capital markets to raise funds by issuing equity securities must establish a depositary receipts program.

Depositary Receipts (DRs) are certificates evidencing shares or other stock-related securities issued by a Brazilian public company.

The implementation of such a program requires the appointment of a non-Brazilian depositary, to issue the depositary receipts abroad based on shares custodied in its name in Brazil, in another Brazilian custodian designated by the depositary to hold the shares underlying the DRs.

The DR program may or may not be sponsored by the Brazilian issuer of underlying securities. Establishment and operation of a DR program requires prior approval of CVM and the Central Bank. Registration with CVM is required to ensure the same disclosure requirements for all holders of both DRs and underlying securities. Registration with the Central Bank is required for the transfer of funds from and to Brazil.

After the registration of the program with the CVM and the Central Bank, shares held by Brazilians or foreigners may, at any time, be deposited with the custodian for issuance of the corresponding DRs abroad. Foreign investors may sell the DRs abroad, or request cancellation of the DR and sell the underlying shares in Brazil.

7.4.6. Access to the Brazilian Market by Foreign Companies Through Security Depositary Certificate (BDR) Programs

Foreign corporations may trade their securities on Brazilian stock markets by means of security depositary certificates (BDRs) representing securities issued by public companies incorporated abroad and issued by a depositary institution

in Brazil. Establishment of BDR Programs requires prior approval from the CVM and the Central Bank.

BDRs may be issued either under a three-tiered sponsored program, or under a non-sponsored program. In either case, the issuer of the underlying securities is subject to supervision of a securities and exchange commission in its country of origin, that has signed a cooperation agreement with CVM.

7.5. Tender Offers for Acquisition of Shares of Brazilian Companies

7.5.1. Takeovers by Tender Offer

According to the Corporations Law, acquisition of control of a Brazilian public company by means of a tender offer may be made effected through purchase for cash or through an exchange of shares.

The offer must be attract a sufficient number of voting shares to ensure control of the company, and must effected and guaranteed by a financial institution.

The tender notice must disclose the terms and conditions of the tender offer, including the identity of the purchaser, the number of shares it proposes to acquire, the price and conditions of payment, and the procedure for tendering the shares.

The fact that up to 2/3 of shares in a company may be non-voting works in favor of controllers with over 50% of the voting stock by making takeovers through tender offers less feasible. Thus almost all takeovers are effected through private transactions.

7.5.2. Going Private - Delisting Tender Offer

The controlling shareholder or a public company may, at any time, make a tender offer for acquisition of all voting and non-voting shares held by other shareholders, with the aim of delisting the corporation.

Under a delisting tender offer, shareholders are invited either to sell their shares to the controlling shareholder or the company; or to express their opinion in favor of or against the delisting.

Delisting requires acceptance of the offer or agreement and cancellation of the company's registration by shareholders representing more than 2/3 of the free floating shares which, for this purpose, are considered the shares which those that have expressly agreed to the cancellation of the company's public registration, or have qualified to participate in the bidding.

If such delisting requirements are not met, the controlling shareholder may acquire no more than 1/3 of the free floating shares, and may not launch a new tender offer for one year subsequent to settlement of the first offer.

7.5.3. Voluntary Tender Offer

The acquisition of shares by a controlling shareholder of a Brazilian public company without making a tender offer, is limited to 10% of each class or type of shares.

Such a tender offer requires prior CVM approval and may be conditioned to the acceptance of a maximum or minimum number of shares. The tender notice must specify (i) the terms and conditions of the offer, (ii) conditionalities relating to the transfer of control, if that be the case, (iii) justification and goals of the offer and (v) the controlling shareholder's intention to delist the company.

Furthermore, in the event that the controlling shareholder makes a new purchase offer within two years, at a price higher than paid to those who accepted the initial offer, these earlier sellers must be reimbursed the balance of the two prices.

Lastly, in the event that within one year of the offer an event occurs that leads to exercise of withdrawal rights, shareholders who sold their shares in the tender offer, but would have the right to withdrawal had they not sold their shares, are entitled to any positive difference between the withdrawal price and the price paid at the time of acceptance of the offer.

In the event the offer aims to acquire over 1/3 of the free float or results in acquisition of more than 1/3 of the free float, established rules for delisting tender offers must be followed.

7.6. Investor Protection Rules

7.6.1. Disclosure by Public Companies

Public companies must publish quarterly financial statements (*Informações Trimestrais* – ITRs), standardized annual reports (*Demonstrações Financeiras Padronizadas* – DFP), and Annual Information (*Informações Anuais* – IAN, equivalent to an SEC F-20 form). They must also publish notices of events that may materially affect trading of their securities.

7.6.2. Disclosure by Shareholders of Public Companies

Controlling shareholders, officers, and managers of a publicly-traded company must notify the CVM and the stock exchange or organized OTCMs where their securities are traded whenever there is a 5% increase in their holdings of any class or type of shares in the company. The information to be furnished includes the number of shares purchased, the price paid for them, the reasons and the objectives related to the acquisition, and a statement by the purchaser as to any agreement relating to the exercise of voting right or the transfer of securities issued by the company.

Non-controlling shareholders are required to inform the CVM and notify the market whenever their direct or indirect participation in the voting capital of public companies increases by 10%. Such information must include the identity of the acquirer, the purpose of the acquisition(s), the number of shares acquired, the total holdings in the voting capital of the company, information on any debentures convertible into voting shares that the shareholder may possess, and any agreement related to the exercise of voting rights or to the transfer of securities issued by the company. Thereafter, any 5% increase in his voting capital must likewise be informed and disclosed.

7.6.3. Market Manipulation and Other Fraudulent Practices in the Securities Market

CVM rules also encompass (i) market manipulation, (ii) creation of artificial demand, supply or price conditions, (iii) adoption of unfair practices and (iv) fraudulent transactions.

Price manipulation in the securities market implies use of any process or means with the aim of directly or indirectly, increasing, maintaining or lowering the prices of securities, so as to induce third parties to buy or sell such securities.

Artificial demand, supply, or price conditions in the securities market implies those created by transactions whose participants or brokers, by willful misconduct or omission, directly or indirectly alter the flow of purchase and sales orders. Fraudulent transactions in the securities market are those which use mechanism or devices intended to mislead third parties, with the aim of obtaining illicit economic advantages for the parties involved in the transaction, for intermediaries, or for any other party.

Unfair practices in the securities market are those which result in one party obtaining an unfair dominant position vis-à-vis other market participants in the trading with securities.

Breach of such rules is deemed a serious offense under CVM regulations, and may result in administrative sanctions. Furthermore, an investor damaged by such unlawful conduct may claim compensation for losses and damages suffered.

Since few such cases have been brought before the courts it is not possible to observe a definite trend with regard to judicial interpretation in relation to market manipulation.

7.6.4. Insider Trading

Insiders are defined as controlling shareholders and managers (directors and officers) of a company. CVM rules forbid insiders to use information, relating to material facts to which they have privileged access due to their position, to obtain for themselves or other persons any advantage through trading of securities.

Although not defined as insiders, the following persons are likewise subject to restrictions: brokers, dealers, and other members of the distribution system, and anyone who, in view of a position or function or for any other reason, has material knowledge or information prior to its disclosure to the market. Family relationships are also taken into account in determining insider status.

Insider trading is regarded as a serious offense under CVM regulations, and perpetrators are subject to severe penalties. Furthermore, an investor damaged by insider trading in the purchase or sale of securities may claim compensation.

7.7. The Money Laundering Law

Law 9.613/98 (the Money Laundering Law) makes money laundering or concealment of assets, rights and valuables criminal offenses.

The Money Laundering Law places a series of obligations upon Corporate Entities in the securities industry, including stock and commodities exchanges, organized OTCMs, banks, brokers, dealers, asset management companies, and the branches and representatives of foreign financial institutions.

Such obligations include: (i) identification and maintenance of records on all clients; (ii) keeping on file, for a 5-year period, all transactions performed for such clients which exceed certain established limits; (iii) compliance with all requests from the Council for Financial Activities Control (COAF), as determined by the courts; and (iv) development and implementation of internal control systems to monitor and detect transactions that may constitute money laundering, such as business involving sums not consistent with the financial status of the parties, trades which repeatedly cause losses or profits to one of the parties, and business involving substantially higher sums than are normal in market transactions.

7.8. Civil Remedies

7.8.1. Securities Sold in Violation of Registration and/or Prospectus Requirements

Where an investor has purchased a security sold in violation of registration and/or prospectus requirements under the Securities Law, the following remedies are available: (i) action for the recovery of damages based on Law 7.193/89 which may be brought *ex officio* by the Office of the Public Prosecutor (*Ministério Público*) or by request of the CVM; and (ii) action for recovery of damages based on Article 186 of the Brazilian Civil Code, which may be brought by a party injured by any action or omission on the part of an individual or corporate entity.

Investors may also claim damages against anyone engaged in fraudulent transactions or those involving artificial conditions of demand, price manipulation, or other unfair practices.

Derivative action for misleading information or omissions may be brought against the managers (directors and officers) of the issuer, based on Articles 155 and 157 of the Corporations Law. Any shareholder may initiate a derivative action if the board remains inactive for more than three months after a decision taken by the meeting of shareholders. Shareholders representing 5% or more of the company's capital may initiate a derivative action, regardless of any contrary decision on the part of the meeting of shareholders.

Moreover, any investor may sue issuers, underwriters, and intermediaries,

provided that their collusion in the act which caused damage can be proven.

7.8.2. Insider Trading

Where an investor has been injured by insider trading in the purchase or sale of securities, remedy is available through action based on CVM Instruction 8, and Articles 147, 182 and 186 of the Civil Code.

7.8.3. Fraudulent Brokerage Activities and Handling of Brokerage Accounts

7.8.3.1. Excessive or Unfair Profits or Commissions

Where an investor has been injured by fraudulent brokerage practices in the purchase or sale of securities, by excessive or unfair profits or commissions, the remedies available include action for injuries based on Article 186 of the Civil Code, or Articles 18 *et. seq*. of the Brazilian Consumer Protection Code.

7.8.3.2. Operating while Insolvent or Financially Unsound and Other Losses Caused by Intermediaries

In the event that an investor is injured by a broker operating while insolvent or otherwise financially unsound, remedies available include ordinary action under Article 186 of the Civil Code.

7.8.4. Class Actions

Class actions in Brazil are restricted to environmental and certain other specific issues, and do not extend to issues relating to securities. However, the Office of the Public Prosecutor (*Ministério Público*) may bring action on behalf of investors under Law 7.913/89.

7.8.5. Waiver of Rights

Investors acquiring a security may, in principle, waive their rights under the Securities Laws, rules, and regulations. However, such waivers may be disregarded by a judge if not duly communicated to investors or if deemed to be in breach of

fundamental investor protection principles. Consumer protection provisions are considered a matter of public order and, accordingly, may not be waived. For the same reasons, private agreements do not preclude action brought by the CVM or by any stock exchange.

7.8.6. Procedural Requirements

7.8.6.1. Jurisdiction

State courts generally have jurisdiction over civil suits and thus over remedy for securities violations. The statutory basis for such jurisdiction resides in the Brazilian Code of Civil Procedure.

7.8.6.2. Venue

Except when otherwise acknowledged by the parties, according to the Securities Law, courts with jurisdiction in the domicile of the defendant are competent to hear any case.

7.8.6.3. Statute of Limitations

Under Article 205 of the Brazilian Civil Code, action is subject to a 10 year statute of limitations. There are, however, exceptions to the above rules.

8. Tax System

8.1. General Features

The Brazilian Federal Constitution, promulgated on October 5, 1988, confers upon the Federal Union, the States, and the Municipalities power to levy taxation.

In Brazil taxation may take the form of taxes, fees, betterment fees, other contributions, and compulsory loans.

Taxation may be instituted by any of the three levels of government, in accordance with specific powers conferred under the Constitution.

Fees collected at the three levels, are used to fund services such as law enforcement, and other collective public services delivered or provided to the taxpayer.

Betterment fees (though as yet not commonly levied) may be collected from the property owners that benefit from execution of public works.

Contributions can only be levied by the Federal Government. There are (a) social contributions (payroll charges); (b) contributions to intervene in the economic domain, (c) contributions in the interest of professional or economic categories, and (d) contributions to finance social security.

Compulsory loans can be instituted only by the Federal Government, to defray urgent public investment of relevant national interest, or extraordinary expenses resulting from public calamity or foreign wars.

Unless otherwise expressly stated in the Constitution, the imposition and collection of taxation must comply with certain fundamental constitutional rules, including:

- the principle of legality (whereby taxation may only be levied or increased by enacted law);
- the rule of equality (whereby taxpayers in equivalent situations must receive identical tax treatment);
- the principle of non-retroactivity (whereby taxation cannot be levied on events that occurred prior to entering into force of the law that created a new tax or which increased rates or the base of computation of existing ones);
- the principle of precedence (whereby taxes cannot be collected in the same fiscal year in which the law that created them or increased their rates was

published, nor prior to ninety days of said publication. Contributions, on the other hand, can be collected in the same fiscal year, but must respect the ninety-day deadline);
- the principle of non-confiscation (whereby taxation cannot be confiscatory).

8.2. Federal Taxes

Only the Federal Government may levy the following taxes: Import Duties (II); Export Duties (EI); Income and Capital Gains Tax (IR); Tax on Industrialized Goods (IPI); Tax on Credit, Exchange and Insurance, or on Securities Transactions (IOF); Tax on Rural Land (ITR), and Tax on Large Fortunes (IGR).

8.2.1. Income Tax

Income tax (*Imposto de Renda* – IR) is assessed on income and wealth increases of resident individuals from domestic or foreign sources at rates of 15% and 27.5% (depending on the income bracket), and on capital gains of corporate entities at the rate of 15%;

Corporate income tax is assessed on profits and capital gains generated by operations in Brazil or abroad. It is normally assessed on net profits of the company (other applicable basis are assumed profit and arbitrated profit). Taxable income is equal to net profits (ascertained in quarterly or annual balance sheets) adjusted for additions and deductions set forth in income tax legislation.

Corporations taxed on the basis of net profit may choose to pay tax in monthly installments, on the basis of estimates, provided they observe certain conditions established in income tax legislation.

The current corporate income tax rate is 15%, whether calculated on net profit, assumed profit, or arbitrated profit, whatever the company's business. A 10% supplementary tax is applicable to the portion of net profits which exceeds R$ 20,000 per month.

Profits or dividends assessed as of January 1, 1996, paid out or credited to individuals or corporations domiciled in Brazil or abroad, are no longer subject to income tax (either withheld at source or due on taxpayer's return) regardless of whether assessed on the basis of net profit, assumed profit, or arbitrated profit.

Withheld income tax (*Imposto de Renda* na Fonte – IRF) is due on income paid,

credited, remitted, or delivered to non-residents, at the rate of 15% or 25% depending upon the beneficiary's country of residence and the nature of the income. As of January 1, 2001, a 'Contribution of Intervention in the Economic Domain' is due, at the rate of 10%, upon remittances of royalties or compensation deriving from technology transfers, in cases where the withheld income tax rate is 15%. This does not apply to profits and dividends, which are exempt from withheld income tax.

As of January 1, 1997 new rules were introduced in income tax law to regulate transfer pricing in business transacted by resident individuals or corporations with non-resident parties for import and export, and interest payments abroad. These rules apply in the following situations: (i) when a corporation domiciled in Brazil conducts business with non-domiciled related parties; (ii) when a domiciled individual or corporation carries out business with a related or unrelated party domiciled in a country where income tax is not charged or is assessed at a rate lower than 20%, or where the domestic legislation maintains secrecy with regard to equity participation or corporate ownership.

8.2.2. Tax on Industrialized Goods

The tax on industrialized goods (*Imposto sobre Produtos Industrializados* – IPI) is levied on output and on the importation of industrialized goods. IPI is non-cumulative; and thus tax due may be offset by credits arising from the purchase of raw materials, intermediary products, and packaging materials. However, no credits are granted for goods that become fixed assets. The rates at which IPI is charged on the value of industrialized goods, as they are imported or dispatched from domestic plants, varies in accordance with the nature of the goods. The average rate is 10%. Export goods are exempted from IPI.

8.2.3. Tax on Credit and Exchange Transactions

The tax on credit and exchange transactions, insurance and securities (*Imposto sobre Operações Financeiras* – IOF) is due on bank loans and similar transactions, on foreign currency transactions, on insurance premiums, and on securities traded. The rate varies depending on the type of operation.

8.2.4. Tax on Large Fortunes

The tax on large fortunes (*Imposto sobre Grandes Fortunas* – IGF) has not yet been instituted.

8.3. State (and Federal District) Taxes

The States and the Federal District are empowered to levy the following taxes:

- inheritance and gift tax (ITD);
- tax on circulation of goods, interstate and inter-municipal transport, and communications (ICMS);
- tax on ownership of motor vehicles (IPVA).

The Tax on Circulation of Goods and Services (ICMS) is the main State tax, and is due on operations involving circulation of goods (including manufacturing, marketing, and imports) and on interstate and inter-municipal transport and communications services. ICMS is non-cumulative, and thus tax due may be offset by credits arising from the purchase of raw materials, intermediary products, and packaging materials. which allows the taxpayer to record input tax credits from the ICMS paid on the purchase of raw materials, intermediary products, packaging materials. Tax credits for goods destined to become fixed assets may be accepted, subject to certain restrictions. Intrastate rates normally vary from 7% to 25% (the average rate in the states of RJ, SP, MG and RS is 18%, whereas for other states and the DF it is 17%). Rates applied to interstate commerce are 7% or 12%, depending on the destination. Export goods are exempted from ICMS.

8.4. Municipal Taxes

Municipalities and the Federal District are empowered to levy the following taxes:

- urban property tax (IPTU);
- tax on real estate transfers (ITBI);
- services tax (ISS).

Services tax (*Imposto sobre Serviços* - ISS) is levied on certain services listed in federal law, and the average rate is 5%.

8.5. Social Charges

The Federal Government may levy the following charges (or social contributions) to fund social programs:

- Social contribution on corporate profits (CSL): levied on pre-tax profits, assessed

in accordance with commercial law, with adjustments and exceptions set forth in law. The current rate is 9%;

- Social contribution for funding Social Security (COFINS): levied monthly on the gross income. Current rates are 3% and 7.6%, the former being cumulative and the latter non-cumulative, in accordance with criteria set forth in law. Export goods are exempted from COFINS.

- Contribution toward the Social Integration Program (PIS): levied monthly on the gross income of corporate entities. Current rates are 0.65% and 1.65%, the former being cumulative and the latter non-cumulative, in accordance with criteria set forth in law; Export goods are exempted from PIS.

- Contribution toward the Social Integration Program (PIS) and Social contribution for funding Social Security (COFINS), levied on imports, assessed on the customs value of goods or the price paid for services, including applicable taxes. The general rates are 1.65% for PIS/PASEP, and 7.6% for COFINS, aside from other specific rates;

- Payroll charges for Social security contributions (CINSS): employers must withhold this charge on behalf of their employees, at the rate of 11%, whereas self-employed workers pay 20%. In both cases, the basis for calculation of this charge is limited to R$ 2.400,00 (adjusted monthly as of January 2004). Corporations pay CINSS at the rate of 20% on payments to individuals for services performed, with no ceiling;

- Provisional Contribution on Financial Operations (CPMF): established by Constitutional Amendment 3/93, this charge, instituted in January 1997, was extended to December 2007 by Constitutional Amendment 42/03. The rate is 0.38%;

- Contribution to intervene in the economic domain (CIDE): (i) CIDE/Fuel is due at specific rates on import and trade in the domestic fuel market; and (ii) CIDE/Remittances is due on remittances to foreign individuals for royalties or technology transfers. The rate is 10%.

9. Anti-Trust Legislation

Law 4.137, of September 10, 1962, introduced antitrust legislation based upon the U.S. regulatory model. However, owing to lack of interest on the part of the Government and of the authorities responsible for instituting and enforcing the law, for almost 30 years Brazil's antitrust system was virtually inoperative.

In the early 1990s, with the passage of Law 8.002 and Law 8.158, new impetus was given to combating crimes against the economic order, the protection of free competition, and defense of consumers' rights. This renewed interest in ensuring fair market conditions culminated in the enactment of Law 8.884, of June 11, 1994, which effectively brought Brazil's antitrust legislation into force.

Brazil's antitrust authority, the Administrative Council for Economic Defense (CADE), established in 1962, operates as an independent agency linked to the Ministry of Justice, and has broad enforcement powers to protect the public and the constitutional order. CADE retains title to juridical goods under its protection, exercised on behalf of the community, and in this it is assisted by the Secretariat for Economic Law (SDE) and the Secretariat for Economic Monitoring (SEAE). Its jurisdiction may extend to acts performed abroad which may have consequences in Brazil. The law regards as a domestic company, any foreign corporation which has a subsidiary, branch, agency, office, representative or the like in Brazil (article 2, § 1st, modified by Law 10.149, of December 21, 2000). Moreover, under § 2nd of the same article, the foreign company shall receive notification and summonses pertaining to all procedural acts, regardless of any power of attorney, contractual or statutory provisions, in the name of the person responsible for its branch, agency, subsidiary, or other establishment in Brazil.

Prior to stipulating offenses against the current economic order, Law 8.884/94 clearly states the authorities' jurisdiction over any and all individuals and corporate entities, public or private companies, organizations and joint ventures, including those of a temporary nature, or without legal personality. The antitrust law also specifies the individual liability of corporate officers and managers, severally or jointly with the company itself. Moreover, Section 18 specifies, under limited circumstances, conditions in which stockholders can be held personally responsible for corporate liabilities.

Among the acts considered breaches of the economic order prohibited by antitrust law are efforts: to limit or impair free competition; to control any relevant market for goods and services; to increase profits arbitrarily; or abusive exercise of economic power. Furthermore, also forbidden under the rules currently in force

are: any price fixing agreements among competitors; market sharing covenants; imposition of obstacles to market entry; dumping; withholding of goods with a view to forcing up prices; and fixing of excessive prices.

The law lists no less than twenty-four different infractions to be carefully considered. Penalties can be severe, depending upon the gravity of the offence, the number of times it has occurred, and the economic status of perpetrator. Penalties may be of the order of 30% of the company's total gross sales in the preceding fiscal year, and may also entail a fine to be paid by the manager as an individual, ranging from 10% to 50% of that sum which, in the event of recurrence, may be doubled. Furthermore, there are other penalties foreseen, such as prohibition on conducting business, contracting, or obtaining benefits from government bodies.

Unjustified failure of a defendant or third party to comply with a summons to provide oral testimony, in the course of preliminary investigations or administrative proceedings, may result in a fine ranging from R$ 500,00 (five hundred reais) to R$ 10.700,00, (ten thousand, seven hundred reais), taking into consideration his financial status (article 26, § 5, of Law 10.149/2000). Moreover, the defendant may be subject to a penalty ranging from R$ 21.200,00 (twenty-one thousand, two hundred reais) to R$ 425.700,00 (four hundred and twenty five thousand, seven hundred reais), taking into consideration his financial status, in the event that he impedes, obstructs, or in any other way hampers any investigation, be it under administrative proceedings or the preliminary phase thereof (article 26-A, Law 10.149/2000).

Under an innovation introduced by Law 10.149/2000 (article 35-B) relating to the abovementioned penalties, there is a possibility of plea bargain with the authorities, in the event that individuals or corporations involved in violations against the economic order resolve to collaborate with investigators in the administrative proceedings, in which case they may be spared punitive action by the public authorities, or obtain a lesser penalty, ranging from one to two-thirds of the applicable fine.

CADE, SDE and SEAE proceedings may be opened based on third-party claims. There is no appeal against CADE rulings in the administrative sphere, and any party that feels aggrieved can only seek redress in the courts.

Under Law 8.884/94 parties are obliged to seek prior CADE approval for agreements that may hinder free competition or result in market dominance. In such cases (in accordance with article 54) requests must be submitted prior to completion of the transaction, or within 15 business days thereof. As of January 1, 2001, the fee for filing such requests is R$ 45.000,00 (forty-five thousand reais).

Prior approval from CADE is usually preferable, given that the complexities and untoward consequences of an unfavorable *a posteriori* ruling may even invalidate the agreement or actions already implemented thereunder.

According to article 54, acts that may damage free competition or result in market dominance, and thus require CADE approval include: mergers of companies or groups of companies, resulting in a market share of over twenty percent, or in which any of the participants has reported annual gross billings of R$ 400.000.000,00 (four hundred million reais). However, CADE Digest 1, published in the Official Gazette (DOU) on October 18, 2005, finds that the criteria established in the aforementioned article 54 apply only to annual gross billings in Brazil, of the parties involved in the operation submitted for approval. This finding is important, in that it has significantly reduced the number of submissions to CADE relating to companies whose foreign annual gross billings amount to more than R$ 400.000.000,00 (four hundred million reais).

Article 54 clearly states that mergers may be approved, provided they meet certain objective and legal criteria (productivity, quality, and technology gains, no direct damage to current competition and, above all, clear benefits for consumers resulting from lower prices). In certain cases, CADE may condition its approval of a merger to the signing of a "performance commitment" by the parties for the fulfillment of certain goals, on pain of penalties for non-compliance.

CADE Resolution 15, of August 19, 1998, provides a list of the information and documents that must be attached to applications submitted under the terms of article 54. The list is extensive and may include documentation from abroad, that some parties have difficulty in obtaining levels.

Lastly, the final section of Law 8.884/94 foresees circumstances in which state intervention may be imposed, under a court appointed interventor.

10. Brazilian Labor Law

Labor Law in Brazil was strongly influenced by developments and trends in Europe, the efforts of various countries to codify laws for the protection of workers and, particularly, by Brazil's commitments to the International Labour Organization. These influences, alongside significant domestic factors, including burgeoning industrialization and the labor policies of the Brazilian Government, were instrumental in the formulation of a body of national labor laws.

The Consolidated Brazilian Labor Laws (*Consolidação das Leis do Trabalho* – CLT) came into effect in 1943, as a consequence of efforts by legal scholars to harmonize existing laws and develop an institutional framework.

Thus the CLT, which contains over 900 articles, provides legal standards governing labor relations in Brazil.

Chapters of the CLT encompass:

- Safety in the workplace;
- Working hours, the minimum wage, and vacations;
- Workers health;
- Labor tutelage;
- Nationalization of labor;
- Protection for women and child workers;
- Individual employment contracts;
- Trades union organizations;
- Union fees.

The CLT also provides the framework for the Brazilian labor courts system and related agencies, and establishes rules for labor proceedings.

Since 1943, the Brazilian legal system has undergone further developments, and various laws relating to important issues such as the right to strike have been approved, and new wording has been introduced into certain articles of the CLT.

The promulgation of the Federal Constitution of 1988 introduced new labor rights and enhancements to the standards provided in the CLT.

The basic labor rights provided for in the Federal Constitution, the CLT, and specific labor laws are as follows:

- minimum wage;
- 44-hour work week;
- irreducibility of wages;
- unemployment insurance;
- 13th salary (Christmas bonus);
- profit sharing;
- overtime pay;
- annual vacations;
- maternity leave;
- paternity leave;
- prior notice of dismissal;
- retirement benefits;
- approval of collective standards;
- industrial accident insurance;
- Time of Service Guarantee Fund (FGTS);
- right to strike;
- provisional job security for members of Accident Prevention Committees, employees that are pregnant or suffering from work-related injuries;
- tips;
- commissions;
- family allowances;
- education allowances;
- transport passes;
- food vouchers;
- daycare benefits;
- unhealthy working-conditions premium;
- risk premium;
- night-shift premium;
- transfer premium;
- funeral assistance;
- paid weekly rest;
- unemployment insurance;
- signed Work Document (CTPS).

Other sources of law observed by the Brazilian Labor Courts include:

- Collective Bargaining and Labor Agreements;
- High Labor Court (TST) Jurisprudence Statements;
- Standards issued by the Ministry of Labor;
- Certain Conventions of the International Labour Organization.

Labor rights may entail heavy costs for companies and, consequently, many have adopted outsourcing or sought more flexible labor arrangements (often referred

to as flexibilization) through Collective Bargaining or Labor Agreements.

Recent decisions of the High Labor Court (TST) have tended to accept flexibilization as a necessary development in labor relations.

Brazil is undergoing significant and historic changes in the field of labor relations. One such change was Constitutional Amendment 45, approved in 2004, which expanded the competence of the Brazilian Labor Courts. Prior to this amendment, the court's powers were limited to conflicts between employers and employees. Now, the Labor Courts have jurisdiction over a broader range of disputes, including disputes stemming from services provided by self-employed workers.

11. Foreign Workers in Brazil

According to Law 6.815 of August 19, 1980, authority to grant work permits to foreign nationals in Brazil is the exclusive competence of the Ministry of Labor's Immigration Coordination Unit (CGIg).

The authorities have a considerable degree of discretionary power when dealing with issues relating to immigration, which are regarded as maters of national sovereignty, and are often a reflection of national foreign policies and reciprocity of treatment.

Visa applications do not necessarily imply that a visa will be granted and, in themselves, do not signify that any right has been acknowledged.

There are various types of visa defined by the Brazilian law, and eligibility depends essentially on the specific purpose of travel to Brazil. Not all visas allow foreigners to work in Brazil. Generally, criteria for obtaining a visa are not influenced by the nationality of the applicant or whether he/she has a spouse or children under 18 years of age.

The law establishes seven categories of visa:

- Transit
- Tourist
- Temporary
- Permanent
- Courtesy
- Official
- Diplomatic

The most common categories of visa sought by those wishing to immigrate to Brazil are Tourist, Temporary and Permanent visas.

11.1. Short-term Business and Tourist Visas

Visas are required for nationals of certain countries traveling to Brazil on short-term business or as tourists. Holders of such visas may not work, perform technical assistance services, nor receive payment for services from any source in Brazil.

A Business visa may be obtained at the Brazilian Consulate in the jurisdiction of

residence of the applicant. Generally, an application for a Business visa should be supported by a letter from either a foreign or Brazilian company requesting the business trip, stating the following:

- the purpose of the trip and the activities the foreigner will perform while in Brazil;
- names, addresses, and telephone numbers of business contacts in Brazil;
- arrival and proposed departure dates;
- guarantee of financial and moral responsibility for the applicant for the duration of the visit.

A Business visa allows the foreigner to participate in meetings, conferences, fairs, and seminars, to visit potential clients, to conduct market research, and perform similar activities. A foreigner holding a Business visa may not work in Brazil, and any company employing such a foreigner is subject to a fine, and the foreigner to deportation.

A Tourist visa can usually be obtained by shoring a round-trip airline ticket and proof of financial support capacity during the visit in Brazil. A Tourist visa is valid only for tourism purposes, and any company that employs foreigners hold such a visa is subject to penalties stipulated in the previous paragraph.

If the applicant for a Tourist visa requires a visa to enter a country he/she proposes to visit upon leaving Brazil, that visa should be stamped on the passport, prior to requesting the Brazilian visa.

It generally takes only 24 hours to obtain a Tourist visa. Such visas are generally valid for a period 90 days, counting as of the first arrival in Brazil, and allow multiple entries during that period. An extension for a further period up to 90 days may be obtained from immigration authorities in Brazil, prior expiration of the visa. A foreigner on a Tourist visa may remain in Brazil for no longer than 180 days within a given 365-day period.

11.2. Temporary Work Visas

For individuals coming to Brazil on a temporary basis for work purposes, several types of visas may be applicable depending upon the specific situation or circumstance. There follows a list of categories of workers eligible for Temporary Work Visas:

Professionals employed by brazilian companies

Individuals with specialized skills or knowledge (unavailable in Brazil) coming to Brazil to work for a short period as employees of a Brazilian company are eligible for this type of visa. Such visas may initially be issued for a period of up to two years, and may be renewed for an additional two-year period. Proof is required of at least one year of experience in the activity the candidate is to perform in Brazil in the case of a university graduate, or two-year experience in the case of a non-graduate. The foreign national is expected to provide proof of specialized knowledge or skills, professional experience, or management skills that are not readily available on the Brazilian domestic labor market. The Brazilian company is required to meet the "2/3 rule", whereby 2/3 of its employees and of those on its payroll should be Brazilian citizens. The company must also provide information regarding its corporate wage structure, and on wages to be paid to the candidate both in Brazil and abroad. The portion paid in Brazil must be approximately 25% higher than the portion paid abroad.

Technical personnel with no employment contract

Foreign individuals coming to Brazil to provide technical services or technology transfers, under a Technical Assistance or Technology Transfer Agreement singed by a Brazilian and a foreign company. Such visas are not appropriate for foreign nationals coming to the country to perform managing, administrative, or financial activities. Except when the companies belong to the same group, such Agreements must be registered with Brazilian Patent and Trademark Office (INPI) prior to the visa application. In the latter case, the technician is not an employee of the Brazilian company and any remuneration should be paid exclusively from a source abroad. The sponsoring company is responsible for the candidate's medical expenses and for those of his/her dependants while the candidate is working in Brazil. This type of visa may be granted for one year, with the possibility of an extension for an additional year, provided all requirements are met. In cases of emergency, such a visa may be issued by the Brazilian Consulate in the jurisdiction of the applicants residence, for a non-extendable period of 30 days. An emergency is defined as an unforeseen situation that places in jeopardy life, the environment, or the assets and capacity of operation of a Brazilian company.

Artist and athletes

Applications for this category of visa in should be submitted to the Brazilian Labor Ministry by the Brazilian organization sponsoring the event for which the individual's services are required. Information about the event and respective

contract must be submitted along with the application.

Foreign journalists

A foreign journalist working on a temporary basis in Brazil as correspondent of a foreign media company should apply for this type of visa with the sponsorship of the company. The wages of such journalists may not be paid in Brazil. The visa application should be requested directly at the Brazilian Consulate abroad with jurisdiction over the individual's place of residence.

Crew of chartered vessels under contract or lease agreements

Such visa applications must be accompanied by authorization for the vessel to operate in Brazilian waters, a report from the Navy, and a copy of the respective contract. Part of the crew must be comprised of Brazilian nationals.

Research scientists

Such visas are designed for foreign professors, technicians, scientists, and researchers propose to work in Brazilian public or private schools or universities or research institutions. A letter and employment contract from the institution sponsoring the visa application.

Social welfare

A temporary visa may be granted up to two years for a foreign volunteer wishing to perform religious or social welfare services in a Brazilian institution. Such foreigners may not receive remuneration for temporary volunteer work performed in Brazil.

With the exception of foreign journalists and Social welfare workers, all applicants for these types of visa must first obtain a Work Permit from the Brazilian authorities. Such Permits are issued by the Ministry of Labor and, prior to granting a permanent or temporary visa to any person wishing to work in Brazil, Brazilian Consular Authorities are required by Brazilian law demand that applicants obtain a work permits. When the permit is issued, a notice is published in the Federal Official Gazette (DOU) and the Consulate is notified, and the foreign national may be granted the visa.

11.3. Other Temporary Visas

Other types of visas may be issued to foreigners coming to Brazil for purposes other than work. It should be observed that the visas listed below do not entitle the bearer to work in Brazil or receive any remuneration from a Brazilian source. Visas in this category are listed below:

Religious missions and studies

Such a visa may be granted to clergy on specific missions in Brazil, for up to one year.

Student visas

Student visas may obtained the Brazilian Consulate with jurisdiction over the applicant's place of residence. Foreign students in exchange programs are required to furnish documents from the school and exchange program.

Trainees

Such a visa is required of foreign graduates wishing to attend a trainee program in Brazil for a 12 month period, with no employment relationship to a Brazilian entity. The visa application requires proof of graduation within the previous 12 months, and a declaration that any remuneration shall be paid exclusively from abroad. Such a visa is valid for no more than one year.

Internships

Such a visa is required of foreign individuals attending internship programs in Brazil, including employees of foreign companies with a Brazilian subsidiary, that have no employment links to any Brazilian entity. Such a visa application requires Commitment Term between the intern, the Brazilian institution and internship program coordinators. Such a visa is valid for no more than one year.

Health treatment

Such a visa is required of foreign individuals intend who come to Brazil for health treatment. The visa application should be accompanied by a doctor's

recommendation and proof of capacity to pay for health treatment.

11.4. Permanent Employment Visa

A Permanent visa may be issued under four circumstances:

Family ties

If the applicant is married to a Brazilian citizen or has a Brazilian child he/she shall be eligible for a permanent visa, than can be issued by a Brazilian Consulate abroad, prior to arrival in Brazil, or by the Ministry of Justice if the candidate is already in Brazil. In this case, the applicant is allowed to work in Brazil.

Retirement

If the applicant is retired in his/her home country of origin and intends to transfer permanent residence to Brazil. The individual must provide proof that he/she can transfer no less than USD 2.000,00 (two thousand US dollars) to Brazil on a monthly basis.

Foreign corporate officers

An officer of a foreign company that has a branch or subsidiary in Brazil that wishes to transfer residence to Brazil is eligible for this category of visa. Individuals who are to be permanently transferred to Brazil to work for a subsidiary or branch of a foreign-owned company in the capacity of officer may also apply for a permanent visa with the right to work. To be eligible to apply for a permanent visa for one of its officers, the foreign company must have invested no less than US$ 200,000 in Brazil, for each foreign officer, and such investment must be registered with the Central Bank; or at least US$ 50,000.00 (fifty thousand American dollars) and the commitment to hire, within the two following years, at least 10 new Brazilian employees for the Brazilian company. Moreover, the name of the officer must figure in the Brazilian Company's by laws, conditioned to approval of the visa, and confirmed in the position once he/she is granted the visa. If this foreigner is appointed an officer in more than one company of the same group or conglomerate, the Ministry of Labor must issue prior authorization.

Individual foreign investor

A permanent visa may be granted to an individual who invests no less than US$ 50,000.00 (fifty thousand US dollars) in a new or existing Brazilian company. Exceptionally, the Ministry of Labor may grant a permanent visa to an individual who invests less than US$ 50,000.00 (fifty thousand US dollars) provided that he/she presents a business plan committing the Brazilian company to create no less than ten new jobs for Brazilian nationals in the following five years,.

Furthermore persons who have been employed in Brazil in a temporary capacity (regardless of whether the company is Brazilian or foreign owned) for a period of four years may apply for permanent resident status. To obtain a permanent work permit an individual who has worked in Brazil on a temporary basis for four years, must submit an application to the Ministry of Justice no less than 30 days prior to expiry of the four-year deadline.

11.5. Registration Upon Entry Into Brazil

Foreigners, upon entering Brazil with a Temporary Work Visa or a Permanent Visa must register with the Federal Police (Ministry of Justice) and obtain the foreigners ID card within 30 days of arrival. This rule applies only to alien residents in Brazil, immigrants, and temporary residents with the right to work. Artists, athletes, tourists, and businesspersons on short visits are not required to register.

Holders of Temporary work visa and Permanent visas must also register with the Federal Revenue Service (SRF/MF), and their earnings are subject to taxation under Brazilian tax law.

Employees of Brazilian companies must obtain a Work Document (CTPS), in compliance with Brazilian labor legislation. For its part, the Brazilian company must sign the work document and notify the Ministry of Labor, within 90 days of the foreigner's arrival in Brazil.

Foreign holding a Permanent or Temporary work visa and employed by a Brazilian organization are subject to Brazilian taxation as of the date of entry into Brazil. Holders of all other types of Temporary visas are considered residents for tax purposes as of their 183rd day in Brazil.

Work visas entail an employment link with the sponsor organization. Any change of employer is subject to prior approval by the Ministry of Justice and the Ministry of Labor.

Upon finally leaving Brazil, the foreigner must submit a "Declaration of Final Departure" to the Federal Revenue Service (SRF/MF) and request cancellation of his/her taxpayer registration and tax liability. The sponsoring company must inform the Ministry of Labor when the foreigner's employment contract is terminated, so that the visa and registration may be canceled.

11.6. Travel in Advance of Permanent or Temporary Employment

Individuals traveling to Brazil on business, prior to obtaining a work permit and appropriate visa, may obtain a short-term business visa. Such a visa does not entitle them to work in Brazil or to receive payment from local sources, until the work permit and visa have been issued. Such individuals should obtain a Permanent or Temporary visas at the Brazilian Consulate with jurisdiction over the individual's residence.

11.7. Employment of Spouses/Offspring

Accompanying spouses and offspring may remain in Brazil as dependents of the visa holder for as long as the visa is valid. However, such dependants are not permitted to engage in employment or any paid activity while residing temporarily in Brazil, without first converting their visa to resident status.

12. Acquisition of Real Estate in Brazil

12.1. Introduction

Under Brazilian law, issues relating to property are subject to the law of the country where such property is located (*lex rei sitae*). Essentially, issues relating to real estate property in Brazil are governed by the Brazilian Civil Code (CCB).

The Brazilian Civil Code classifies assets by physical criteria, whereby they can be divided into two broad categories: movable assets and immovable assets. Movable assets are those that can be removed by external forces or by themselves, without causing their own destruction or devaluation.

Immovable assets (land and buildings) are, by nature, immobile or fixed to the soil, and cannot be partially or totally removed without causing their own destruction or devaluation, i.e., without substantially altering or destroying them. Immovable property encompasses land, and anything that has been naturally or artificially incorporated thereto.

Brazilian law further confers certain rights with the status of immovable assets for legal purposes. This is the case with deeds to immovable property, government stock incorporating an inalienability clause, and inheritance right to property though succession, even when inheritance is comprised only of movable assets.

As a general rule, the owner of land also owns the subsoil. Therefore, a landowner may excavate to a reasonable depth for construction of basements or subterranean garages. The landowner cannot, however, prevent third parties from engaging in activities at depths that do not put his property at risk, provided that such activities are carried out in the public interest (*e.g.*, excavation of subway lines, passages for conduits, etc.)

Land ownership rights, according to the Brazilian Civil Code do not encompass mineral deposits, mines and mineral resources, potential hydroelectric power sources, archeological sites, or other assets referred to in specific legislation. It thus makes a clear distinction between land ownership and rights to such elements of the subsoil as mineral and hydroelectric resources, which are considered Federal Government property. Thus, federal authorization or a license is required for exploitation of mineral and hydroelectric resources.

Air space is subject to similar rules. A landowner may build vertically on his land, provided he observes limitations foreseen in law (*e.g.*, zoning rules). He may refuse construction by third parties on his land, or block the building of

structures that may place him in jeopardy. He may not, however, interfere with activities taking place above a certain height, and that pose no risk (aircraft routes, installation of power lines at a safe height, etc.).

Foreign individuals or foreign-owned companies may acquire real estate in Brazil under the same conditions as Brazilian individuals or companies. However, according to Internal Revenue Service Order (IN) 200, non-resident individuals or organizations must be registered with the General Register of Corporate or Individual Taxpayers (CNPJ or CPF) prior to purchasing any real estate in Brazil. Furthermore, special conditions apply to ownership by foreign individuals or companies of property located in coastal or frontier zones, and in certain specifically designated national security areas.

Conditions relating to the purchase of rural land by foreign individuals or foreign-owned companies are discussed in greater detail in item 12.3.3. Moreover, foreign individuals or foreign-owned companies may acquire rights *in rem* relating to immovable property.

12.2. Possession and Ownership

The two most significant concepts relating to real estate are the right of possession and the right of ownership:

Right of Possession

The right of possession stems from use of the land by an agent as if he were its owner. When said agent acting on his own behalf behaves as if he were the owner, he becomes assumes the right of possession. Possession thus implies the right to exercise certain powers typical of ownership, such as: the right to claim, maintain, or recover the possession of property, the right to its fruits (including rents and other incomes therefrom), the right to be compensated for necessary improvements effected, and the right to retain possession.

Possession ceases when, by voluntary or involuntary means, power is no longer exercised over the asset. This may occur when the property is forfeited by abandonment, by transference, by loss or destruction; if it becomes ineligible for purchase or sale, if possession is lost to third party, in the event of failure to maintain a claim or reinstate possession, or when the party legitimately in possession transfers his right to another, maintaining the asset in his power in the name of the acquirer (*constituto possessorio*).

Right of Ownership

The most relevant of all property rights, rights of ownership are defined by the Civil Code as the right of an individual to use, enjoy, and dispose of his goods, and to recover them from whoever may unlawfully have taken possession of them. It is an absolute and exclusive right.

Full right of ownership implies that all the legal powers (to use, enjoy, dispose of the asset and to recover it from whoever unlawfully possesses it) are concentrated in the same hands. Limited right of ownership implies that some such powers are in the hands of, and may be exercised by, another person. It should be noted, however, that in cases of joint ownership, or condominium, in principle, full ownership rights, rather than limited ownership, applies. Under a condominium, each co-owner has rights to an undivided fraction of the asset. As a rule, powers deriving from the ownership can be exercised simultaneously by all co-owners.

Ownership rights may be restricted in the public interest, or in respect for the property rights of third parties, in the following situations:

- expropriation of real estate properties by the government (ownership of private property is transferred to the expropriating authority upon payment of fair compensation);

- restrictions on urban land use or zoning, including building codes, limitations on the location of industrial plants, established by a municipality master plan;

- restrictions imposed in the interests of national security, including limitations on the sale of private land in coast areas or within 150 kilometers of national borders

- the restrictions to the right of the proprietor to freely dispose of his goods, arising from insolvency, bankruptcy, or composition with creditors, with a view to protecting creditor's rights.

12.3. Acquisition and Loss of Ownership

12.3.1. General Provisions

Under Brazilian law, ownership of real estate property is constituted upon the registration of the public or private instrument (deed) whereby the sale was accomplished at a Real Estate Registry in the jurisdiction where the property is located.

Any instrument involving real estate property that has not been duly registered at the respective Real Estate Registry is only binding only between the parties to the purchase/sale agreement and, thus, is not be enforceable against third parties.

Real estate property is acquired upon registration of the deed of transfer, which may be: (i) by the sale agreement signed by the parties; (ii) by accession (i.e., expansion of a property as a consequence); (iii) squatters rights (i.e., acquisition of ownership rights by occupation and possession over a certain period of time, in law); and (iv) by inheritance.

One of the principles that govern the real estate registration system the principle of priority, whereby the person who first registers a real estate property or presents deeds for registration has priority.

Any action which modifies, extinguishes, transmits or creates rights relating immovable properties must be registered with the competent Real Estate Registry. These include: (i) court decisions enabling undivided land to be divided among various owners; (ii) court orders winding-up the estate of a deceased person or division of property for composition with creditors; (iii) public auctions or adjudications; and (iv) rulings on separation, divorce, and annulment of marriage, when settlement rights *in rem* to immovable properties is involved.

The main grounds for extinguishing real estate ownership rights are:

- expropriation, i.e., a unilateral act of public law whereby individual ownership is transferred to a government authority, upon prior payment of fair and compensation, in the public interest;

- transfer, meaning transmission to a third party, by a transaction *inter vivos* or as a legacy, for a payment or gratis;

- waiver (in the case of an heir renounces his inheritance rights); and

- neglect or destruction of the property.

12.3.2. General Considerations and Requirements Upon Purchase

Acquisition by *inter vivos* transaction of real estate property in Brazil entails a formal sales agreement between the purchaser and the seller.

If said property is acquired by an individual purchaser (as apposed to a condominium) then he/she has absolute title thereto. In the cases of multiple ownership (i.e., a condominium), each owner can exercise any rights of ownership not compromised by the indivisibility of the property (i.e., one party to the condominium can not sell the property without consent of all the other owners, and any revenues from sale of the property must be divided among them).

Prior to promulgation of the New Brazilian Civil Code, Law 4.591/64 provided for condominiums of apartments and/or offices, being an autonomous and independent unit of property, on a single piece of land. In this case, the indivisibility mentioned in the previous paragraph does not apply. Significant changes to Law 4.591/64 were introduced by the New Civil Code, including the introduction of fines on co-owners who fail to comply with their duties (i.e., paying condominium fees, not effecting construction work that might jeopardize the safety of the property, not to use the property in a manner that disturbs the peace, etc.)

Aside from specific requirements relating to the transfer of immovable property, Brazilian law requires for all types of contract, that parties to a sale agreement be capable of fulfilling the transaction. They must be of full legal age, in sound mental health, or duly represented.

12.3.3. Acquisition of Rural Land by Foreigners

Under Brazilian law, rural property ranges from rustic buildings to continuous areas, regardless of location, devoted to farming, agro-industry, or stock raising, whether in the hands of the private sector or under public land tenure policies.

Acquisition of rural property by foreigners who have permanent residence in Brazil or by foreign companies authorized to operate in Brazil is regulated by Law 5.709/71.

This law stipulates that foreign individuals with residence in Brazil cannot acquire more than the equivalent of 50 units of rural land known as *"módulos rurais"*. The size of the *"módulo rural"* varies, according to the economic and environmental characteristics of the region in which the property is located, and the type of agricultural activity to be carried out.

Foreign individuals whose permanent residence is outside Brazil cannot acquire rural land in Brazil, except if acquisition is due to inheritance rights. On the other hand, restrictions to the acquisition of rural land by Brazilian companies under foreign equity control are now being challenged, since a 1995 Constitutional

Amendment eliminated the distinction between Brazilian companies and Brazilian companies under foreign equity control. However, restrictions on foreign individuals and foreign corporate entities authorized to operate in Brazil remain in force.

According to Law 5.709/71 foreign companies can only acquire rural land for the purposes of farming, cattle-raising, and industrial or settlement projects, and such projects must be specified in the company's by-laws. Such projects must be approved by either the Brazilian Agriculture Ministry or the Department of Trade and Industry, as the case may be.

The President of Brazil may, by specific decree, authorize the acquisition of rural land beyond the provisions of the current law, in cases in which such property contributes toward priority projects under national development plans.

12.4. Taxation

Property Transfer Tax (*Imposto sobre a Transmissão de Bens Imóveis* – ITBI) is a tax assessed by municipalities, payable when real estate property or rights *in rem* to any real estate property (except those in guarantee) are transferred, or upon assignment of rights to acquisition of property, for any reason whatsoever, and in exchange for payment. For example, the rate assessed by the Municipality of São Paulo, under São Paulo Municipal Law 11.154, varies between 2% and 6%, depending on the value of the property.

ITBI is not assessed when the transfer of real estate property or of rights to any such property is used pay up capital of a company, results from any merger, consolidation, spin-off, or liquidation of the corporate entity, except when the purchasing company's main activity is the buying and selling of such assets and rights.

12.5. Real Estate Investment Funds

Real Estate Investment Funds were established to provide funding for real estate development ventures, for subsequent sale, letting, or leasing. The Brazilian Securities and Exchange Commission (CVM) is responsible for authorizing, regulating and inspecting Real Estate Investment Fund operations and management.

Real Estate investment funds are currently engaged in raising funds for construction of shopping centers throughout Brazil. Previously, Pension Funds

were the major investors in real estate projects, but currently they are investing indirectly, through the purchase of shares in real estate investment funds.

Foreign individuals and corporations may acquire shares in such undertakings. Provided the foreign investment is duly registered with the Central Bank, remittance of gains and profits from the respective investment can be sent abroad. Capital gains resulting from such investments are subject to income tax (IR) at a rate of up to 20%, assessed upon disposal or withdrawing of Real Estate Investment Fund *quotas*.

13. Environmental Legislation

Brazilian environmental legislation can be broken down into two distinct phases: before and after 1981.

Prior to 1981, "pollution" was defined as industrial emissions that did not conform to the standards set by law and technical standards. At that time, on the premise that any and all production activities cause some impact on the environment, polluting emissions were tolerated, provided they remained within certain limits.

This early system was quite coherent, and prescribed: (i) industrial zoning, confining more polluting industries to areas capable of absorbing significant volumes of pollutants; (ii) industrial licensing, to locate industrial plants geographically in keeping with industrial zoning; and (iii) guidelines for polluting emissions, drawn up to ensure that industrial zones would not rapidly deplete their capacity to absorb and metabolize pollution.

13.1. Brazilian Environmental Policy

Law 6.938 of August 31, 1981, known as the Brazilian Environmental Policy, marked the introduction of introduced an entirely new approach to the environmental. No environmental damage is exempted from the responsibility effect repair and, strictly speaking, no pollutant emissions are tolerated. The legislation takes the view that pollution tolerated under the established standards may cause environmental damage, and that the polluter should be held liable for compensation. It encompasses a concept of strict liability, which holds that damages ought not to be born by the community.

The subtle difference is that even if a company fulfills abides by all standards of legal pollution standards, it may nonetheless be held liable for any residual damages. All that need by proven is causal relationship between the company's activities and specific environmental damage suffered. This, in essence, is the concept of objective liability: it is no longer acceptable to evade the obligation to remedy environmental damage by claiming that all activities were carried out in compliance with current pollution standards (i.e., within acceptable pollution limits, relating to concentration or intensity of pollutants) since objective liability does necessarily stem commission of an illegal act. It is thus sufficient that the source of damage be identified, regardless of whether pollution standards were met.

Law 6.938/81, considering that environmental protection is of collective or "diffuse" interest, rather than individual interest, invested the Office of the Public Prosecutor (*Ministério Público*) with powers to act in defense of the environment. Law 7.347 of July 24, 1985 acknowledged the role of non government organizations (NGOs) in environmental protection activities and opened up access to the courts by means of civil public action (*ação civil pública*).

13.2. The Federal Constitution

The 1988 Federal Constitution, devotes an entire chapter to protection of the environment (Title VIII The Social Order, Chapter VI – The Environment;) and contains 37 articles relating to environmental law and 5 concerning urban law.

The Constitution established a series of obligations upon the public authorities, including (i) preservation and recovery of species and ecosystems; (ii) preservation of the variety and integrity of genetic heritage, and the supervision of entities engaged in genetic research and manipulation; (iii) environmental education at all levels of schooling and public guidance as to the need to preserve the environment; (iv) definition of areas for special protection; and (v) requirements for the environmental impact studies for any activities that may cause significant degradation or upset the ecological balance.

Another feature of the Constitution that drawn special attention concerns legislative competence of the Federal Government, the states and municipalities with regard to environmental issues. Both the Federal Government and the States have powers to legislate on environmental protection issues; and whereas the Federal Government is responsible for laying down general environmental rules, the States approve supplementary rules.

13.3. Criminal Sanctions

To bring into effect the environmental protection provisions of the 1988 Federal Constitution, Law 9.605, of February 12, 1998, establishes criminal sanctions applicable in cases of activities damage the environment, thus unifying and replacing those laid down in the Forest Code, the Hunting Code, the Fishing Code, and Law 6.938 of August 31, 1981 (article 15).

The overall objective of Law 9.605 is was to establish criteria for criminal liability applicable to parties that have polluted or degraded the environment. It does not repeal Law 6.938/81, which provides for civil responsibility in cases of environmentally damaging acts. Article 2 of Law 9.605 clearly stipulates criminal

liability to be a function of the degree of responsibility of the agent, thereby disregarding the eventuality that objective liability could also be imputed in cases of criminal behavior. The same article ascribes criminal liability not only to parties directly responsible for environmental damage, but also to who, aware of such criminal conduct, fail to impede its practice when in their power to do so. The law specifies that such parties may include directors, officers, board members and technical staff, auditors, managers, legal representatives or proxies of a corporate entity. Under a strict interpretation of this precept, technical advisors, auditors and lawyers of companies may be held criminally liable for damages caused to the environment, provided they are cognizant of this damage, if it was within their power to avoid such damages, of if they failed to take measures to do so.

Article 3 ascribes criminal liability to a corporate entity, without excluding the liability of individuals who may be considered responsible or co-responsible of the same damage to the environment. Article 4 pursues the concept of "piercing of the corporate veil", when assessing civil liability for damages caused to the environment, by invalidating corporate schemes and formal obstacles to gaining full redress of such damage. One of the devices targeted by this law is transfer of ownership to a corporate entity that most certainly incapable of bearing the cost of redressing environmental damage caused.

The law foresees penalties for individuals, including not only restriction of freedom (imprisonment or confinement) but also restriction of rights, though it also expressly states that the latter shall take precedence over the former, provided the criteria set out in article 7 are met. The first such criterion is the presumption that the crime was not intentional, or one for which the penalty foreseen is imprisonment for less than four years. The second criterion is contingent upon subjective conditions of the agent and characteristics of the damaging act and, at the discretion of the courts, imprisonment may be waived in favor of restriction of rights, this sufficing to punish the perpetrator while at the same time deterring other such crimes. Restriction of rights may entail: performing community service; temporary interdiction of rights; partial or total suspension of activities; a fine, or house arrest.

Sanctions applicable specifically to corporate entities, according to article 21, are: fines, restriction of rights, and community service. For corporate entities, restriction of rights may entail: partial or total suspension of activities; temporary interdiction of the establishment, works, or activities; and a ban on business with the public authorities, including ineligibility for subsidies, grants, or credits. Corporate entities should take note that the Law expressly foresees suspension of activities in cases of non-compliance with legal environmental-protection standards or rules, whereas the penalty of interdiction is applied when

an establishment, work, or activity has been carried out without the appropriate authorization, i.e., without the necessary installation permits and operating licenses specified in environmental law, or in violation of licensing conditions, laws, or regulations.

Under the terms of article 26, environmental crimes are liable to prosecution by the public authorities, irrespective of a formal complaint by a plaintiff. The law maintains, with minor alterations, the system established by the Law of Special Courts (Law 9.099 of September 26, 1995) which permits alternative penalties and conditional suspension of proceeding, provided two basic conditions are met: that the penalty of deprivation of freedom established for the damaging act does not exceed three years; and that the environmental damage has been redressed (articles 27 and 28 of Law 9.605/98; articles 76 and 89 of Law 9.099/95).

The Law encompasses various forms of environmental degradation caused by pollution, including the damages caused by mining activities (Section III). Administrative irregularities (such as lack of the necessary environmental licensing) and chronic urban land use problems (affecting water sources) do not escape the purview of the law, which also foresees the imposition of fines, ranging from a minimum of R$ 50,00 to a maximum R$ 50 million.

13.4. Administrative Sanctions

Decree 3.179 of September 21, 1999 regulates Law 9.605 of February 12, 1998, updating the list of administrative sanctions applying to activities and conduct that is detrimental to the environment.

Under article 2 of said Decree, the following penalties are foreseen for corporate offenders: warning; one-time or daily fine ranging between R$ 50.00 and R$ 50 million; seizure, destruction or spoiling of products and disruption of sales; embargo, suspension or demolition of irregular works or activities; reparation of damage; and penalties of restriction of rights. The penalties of restriction of rights entail: suspension or cancellation of registration, license, permit or authorization of the corporate offender; loss, restriction or suspension of tax benefits and incentives or credit from official institutions; and prohibition of nay contracting with government authorities for a period up to three years.

Unlike the other penalties prescribed in the Decree, reparation of damage as an administrative sanction should not be regarded as a sanction imposed by federal, state or municipal penalties inspection agencies, since the obligation to effect full reparation of damage stems from civil liability set out in Law 6.938/81, that can be imposed independently of administrative and/or criminal sanctions.

Thus, administrative sanctions under Decree 3.179/99 can complemented by actions determined by the Office of the Public Prosecutor (*Ministério Público*), with the aim of effecting reparation of environmental damage, and criminal liability of the offender under the terms of Laws 6.938/81 and 9.605/98. It is worth noting that, though administrative offenses and criminal liability are subject to the rules to appraise subjective liability, which in turn require evidence of malice or negligence on the part of the offender, the obligation to repair the damage does not require evidence of guilt, but only demonstration of a causal relationship between the offender's action or omission, on the one hand, and the damage caused (strict liability).

13.5. The Brazilian Environmental System

A number of federal agencies comprise a system for enforcing environmental legislation in Brazil. The Brazilian Environmental System (SISNAMA) is comprised of the Brazilian Environmental Council (CONAMA) a normative, consultative and decision-making agency; the Ministry of the Environment responsible for coordination, supervision and control of Brazilian Environmental Policy; and the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA), its executive agency.

SISNAMA also includes other federal agencies, public foundations that work with environmental protection, and state and municipal bodies (secretariats of environment etc., including CETESB/FEEMA/COPAM/IAP/CRA) in their respective jurisdictions.

14. Privatization, Concessions and Partnerships

This section, addresses means whereby the private sector has is becoming increasingly involved in activities previously performed exclusively by Government, and examines privatization, concession of public services, and other forms of partnership between governmental and private entities.

Privatization is generally defined as the transfer by the State to the private entity of the control of state-owned companies, usually by means of the sale of shares by means of a public tender. As a Privatization generally results in the transfer of majority ownership and of the responsibility for provision of utility services, by means of the signing of public concession agreement.

A concession agreement is the instrument whereby the State transfers to a private organization the responsibility for providing a public service on behalf of the State, at its own expense and risk. The concession holder is entitled to charge tariffs from users of services. The selection of the concessionaire entails a public tender.

Partnership is a broad term used to describe association between the Public Authorities and private-sector agents in pursuit of a specific goal of public interest, such as execution of public works, provision of public services, or both. Essentially, partnerships differ from concessions in their approach to remuneration of the private agent: whereas concessionaires receive tariffs paid by users of the service, companies engaged in partnerships may be remunerated by tariffs, direct payment from the State, or a combination of the two.

Thus, concessions are operated under a free enterprise system, i.e., at the risk of the concessionaire, whose profitability depends exclusively on efficiency. Partnerships, on the other hand, can not operate on a free enterprise model, since the private partner is (either partially or fully) remunerated may by the State, and thereby enjoys a higher degree of security.

14.1. The National Privatization Program

Law 8.031, of April 12, 1990, later replaced by Law 9.491 of September 9, 1997, provides for Brazil's National Privatization Program, subsequently regulated by Decree 2.594, of May 15, 1998. The Program foresees the transfer to the private sector of State-owned companies and banks, by means of public tenders, and authorizes provision of public services, formerly provided by public utility companies, by private concession holders.

The National Privatization Board (*Conselho Nacional de Desestatização* – CND), whose members are Ministers of State, reports directly to the President of the Republic, is the authority responsible for conducting the privatization process.

The National Economic and Social Development Bank (BNDES) is the manager of the National Privatization Fund, and provides administrative and operational support to the CND, through the contracting of consultants and specialists in support of privatization, and coordinating the distribution of securities through stock exchanges, etc..

Most of the privatizations carried out to date have been through auctions at Brazilian stock exchanges. Law 8.666, of June 21, 1993, which brings into effect Article 37, XXI, of the Federal Constitution establishes rules for public tenders. Subsequently, this Law was amended by Law 8.883, of June 8, 1994, by Law 9.648, of May 27, 1998, and by Law nº 11.196, of November 21, 2005, which established requirements for calls for proposals, tender proceedings, forms of payment, and acceptable guarantee. A Bill which proposes to alter public tender procedures is currently being examined by Congress.

An important development for the Brazilian Privatization Program was the General Telecommunication Law (Law 9.472, of July 16, 1997), which regulates Constitutional Amendment 8, of August 15, 1995, and allows the provision of telecommunication services by the private sector. Earlier, Congress had approved Law 9.295/96, which allowed granting of concessions to provide mobile telephony services to Brazilian private-sector companies (i.e., companies with no less than 51% of voting capital controlled, directly or indirectly, by Brazilian nationals).

Not only has the Privatization Program enabled the transfer of companies subordinated to the Federal Government, it has also led to the transfer companies controlled by states and municipalities to private management. However, privatization of state and municipality companies and the issuing of concessions at these levels is subject to local rules. The State of São Paulo has carried out one of the most successful privatization programs in Brazil. Since publication of the São Paulo State Privatization Law, the State has transferred to the private sectort companies in the fields of: piped gas distribution services (both in metropolitan areas (COMGÁS) and in rural areas (Gas Brasiliano and Gas Natural); electric-power generation (from plants on the Paranapanema and Tietê rivers belonging to CESP); and distribution of electricity (CPFL and Eletropaulo, two of Brazil's largest distribution companies).

14.2. Public Service Concessions

Law 8.987, of February 13, 1995 (Concession Law), brings into effect Article 175 of the Federal Constitution and establishes rules for all public services concessions, excepting only radio and TV broadcasting services. This statute was later amended by Law 9.074, of July 7, 1995, and by Law nº 11.196, of November 21, 2005, and brought into force by Decree 2003, of September 10, 1996, and Decree 1.717, of November 24, 1995, which established new rules for the approval and extension of public services concessions, including electric-power concessions. The Concession Law expressly requires that all concessions be the result of public tenders.

14.3. Major Industries privatized or undergoing privatization

Among the principal industries privatized to date or currently undergoing privatization in Brazil, are:

- electric power generation, transmission and distribution;
- gas distribution;
- petrochemicals;
- municipal bus services;
- highways, railroads, waterway and air transportation;
- telecommunications;
- ports, airports, aerospace infrastructure, road construction, dams, canal locks, dry docks and containers;
- financial institutions;
- sanitation, water treatment and supply, waste treatment; and
- mining and metallurgy.

14.4. Developments and Results of the Privatization Program

Since the enactment of Law 8.031, in 1990, hundreds companies formerly owned by the Federal and state governments have been privatized, bringing in revenues of over US$ 100 billion. Such companies include CSN (a steel mill); CVRD (Brazil's largest mining company); Mafersa (a manufacturer railroad equipment); Escelsa, Light, CERJ, CEEE (partially privatized), CPFL, Eletropaulo, Gerasul, COELBA, CESP (partially) (electrical utilities); the TELEBRÁS System (virtually all telephony companies); COMGÁS and CEG (gas distribution companies); RFFSA (a railroad); Usiminas, Cosipa, Acesita and CST (steel), Poliotelinas

(petrochemicals) companies; Ultrafertil (fertilizers), Embraer (the world's fourth largest aircraft manufacturer), and Banespa and Meridional (banks).
Despite inevitable delays and obstacles, the National Privatization Program implemented on the 1990's resulted on considerable gains for Public Administration. Between 1997 and 2000, the privatization of the companies in the electricity and telecommunications sectors brought in revenues of approximately US$ 70 billion for the Federal Government alone, and foreign capital investment in these sectors has risen to about 40% of that amount.

Twp of the largest privatizations ever held in Latin America, of CVRD, the mining and transportation giant, and of TELEBRAS, the holding company for the telecommunications system, attracted worldwide interest and greatly increased foreign investment in Brazil.

On 2006, further auctions are due to be held under the National Privatization Program, including concessions for portions of the highway network.

14.5. Public-Private Partnerships

Law 11.079 of December 31, 2004, set rules for Public-Private Partnerships (PPP). Under these new rules the Government aims to attract local and foreign private investment of roughly approximately US$ 13 billion for basic infrastructure projects, particularly in the fields of transport and sanitation.

These new rules enable the transfer of responsibility for execution of public works and delivery of public services to the private sector, and may be applied by all executive-branch agencies, special funds, governmental agencies, foundations, state-owned companies and other entities controlled by the Federal Government, States and Municipalities.

Furthermore, common public service concessions (described in the previous section and governed by Public Services Concession Law – Law 8.987/95), two new modalities of public services concessions were created. The first of these is the sponsored concession (*Concessão Patrocinada*) whereby the private concessionaire is remunerated not only by tariffs paid by users of the services, but also transfers of funding from the public partner. The second is the administrative concession (*Concessão Administrativa*), undertaken by means of a service provision cont, undertaken by means of a service provision contact, when the Public Administration is the direct or indirect beneficiary of the service (as in the case of construction and management of public buildings), operation of), even if it involves execution of works or supply and installation of goods.

The difference between these new modalities of concession and the common concession (alluded to earlier) is the possibility of direct payments to the private partner by the Public Administration, and if the concession does not foresee such payments by the Public Administration, it is not a PPP contract, but rather a common concession.

Under the requirements set by the law for the contracting of PPPs, such contracts are not allowed in cases where (i) where the value of contracted amounts to less than R$ 20 million; (ii) where the term of concession is shorter than 5 years; and (iii) when the purpose of the contract is solely supply of labor, or the supply and installation of equipment or execution of public construction works.

Administrative contracts under the rules established by the PPP Law foresee periods for return of capital compatible with that of investments in the private sector; never less than five and more than thirty-five years, including any possible extensions. For the signing of a PPP contract it is necessary to establish Specific Purpose Company, for the sole purpose of implementing and managing the PPP project.

A highly significant innovation introduced under the PPP law was the creation of a 2 billion dollar Guarantee Fund (comprised of shares of state-owned companies, real estate properties, liquid assets, etc.). This fund underwrites financial obligations of the public-sector partner assumed under contract to the private partner, and its assets serve as collateral against any possible claims filed against the Public Partner.

The law also innovates by foreseeing the possibility of arbitration in disputes arising under a PPP contract. Previously the law had not allowed the Public Administration participate in arbitration procedures.

The government's aim in introducing the framework for PPPs was to streamline procedures for timely execution of infrastructure works that are needed to enhance and sustain development and introduce mechanisms to speed up public tender procedures.

In addition to Federal Legislation, the Brazilian states, within their jurisdictional sphere, have also enacted laws to facilitate implementation of local projects. They also have introduced new forms of guarantees, including the founding of new state-owned companies responsible for signing and management of PPP contracts. The States of São Paulo, Minas Gerais, Santa Catarina, Bahia and Rio Grande do Sul have published laws governing PPPs.

15. Public Tenders – Contracting of Works, Services, Procurement and Transfers by the Public Administration

15.1. Introduction

Public tenders are the formal procedure whereby government bodies select the best contractor for execution of works, service provider, or source of procurement. Their purpose is to ensure that the Public Administration selects the most advantageous proposal for contracts in the public interest.

Public managers are obliged to abide by tender procedures. The 1988 Constitution article 37, inset XXI, establishes in, that works, services, purchases and transferences may be contracted by direct and indirect public administration of any of the Executive Powers, of the States, the Federal District and the Municipalities, by means of public bidding, observing the legal exceptions in specific legislation, when direct contracts may take place.

Article 175 of the 1988 Constitution, requires tenders for concession and licenses to provide public services, and Law 8.987/95, with alterations introduced by Law 9.648/98 provide the applicable standards. Prior to the new standards introduced by the 1988 Constitution, licenses were granted and revoked at the discretion of the administration and were not subject to tenders. For this reason Law 8.987/95, requires formal licensing by means of a contract, while maintaining the unilateral revocability on the part of the conceding power.

Law 8.666, of June 21, 1993 and subsequent alterations, implements provisions of the aforementioned article 37, inset XXI of the 1988 Constitution, and establishes general norms public tenders and the awarding of contracts for the Public Administration.

There are various modalities of public tender that may be used in accordance with criteria defined by law. The main factor to be considered in choosing the modality tender is the estimated value of the contract to be signed. There are, however, situations in which the complexity services or works being tendered lead to other considerations prevailing over the contracting value. Regardless of the modality of tender selected, maintaining the supremacy of the public interest must always prevail. The procedure must always seek to obtain the most efficient result for the Public Administration and preserve of its economical-financial balance, by preserving the initially-agreed relationship between the parties, ensuring fulfillment of the contractor's obligations and fair remuneration by the

Public Administration for contracted work or service.

15.2. Procurement Modalities

Modalities tender are stated in art. 22 of Law 8.666 of June 21, 1993. These are call of bids (*concorrência*); price consultations (*tomada de preços*); letter of invitation (*convite*); contests (*concurso*); and public auction (*leilão*); and the creation of new modalities or combination of those then contracted is forbidden. However, Law 10.502 of July 17, 2002 introduced procurement auctions (*pregão*).

Call of bids (*concorrência*) is used for procurement or transfer of fixed assets, concessions for use and provision of services or construction of public works, when values exceed R$ 1.500.000,00 (one million and five hundred thousand reais), and for engineering works and services valued at over R$ 650.000,00 (six hundred and fifty thousand reais). This is the modality of tender used in international tenders, when the procuring body does not have short list of international suppliers that would enable price consultations. Call for bids is the most complex modality of tender procedure and entails proof of capacity to fulfill minimum requisites called for the call for proposal and a so-called the pre-qualification phase, when the commercial proposals have already been received.

Price consultation (*tomada de preços*) is quite similar to call of bids, and is a modality whereby evaluation of bids takes place beforehand, since they must be registered before the receipt commercial proposals. The limit for contracting is R$ 1.500.000,00 (one million, five hundred thousand reais) for engineering works and services, and R$ 650.000,00 (six hundred and fifty thousand reais) for procurement and miscellaneous services engineering.

Letter of invitation (*convite*) is a procurement modality in which bids are requested, by interested parties whether registered or not, and a minimum number of three are chosen. Othes registered parties may request to participate in the proceedings. Of the modalities of tender, letter of invitation is the one used for services of lower value, worth no more than R$ 150.000,00 (one hundred and fifty thousand reais) for engineering works, and R$ 80.000,00 (eighty thousand reais) for other items.

Contests are the method used to select technical and artistic works are selected, from among any parties, and payment is effected by prizes or remuneration to the winners.

Auction is a modality reserved for the sale of assets of no use to the public authorities, seized assets, pledges, assets delivered to the courts, or given in

payment. These are sold to the highest bidder, above a minimum floor value.

Finally, procurement auction (*pregão*) was instituted to select contractors or procure common goods or services, occasionally or routinely, with no limitation on the value. Such contracts are awarded in public session by means of written proposals or verbal bids, with the aim of obtaining the most economic, safe, and efficient purchase. Procurement auctions are often conducted using information technology (electronic bidding). However, this modality is not appropriate for contracting of engineering works and services, or the leasing or transfer of real estate.

Whatever the modality of tender employed, public sector procurement must always be guided by principles of legality, neutrality, morality, transparency and efficiency, with the objective of selecting the proposal which is the most advantageous to the Public Administration, while ensuring equality of conditions to all participants prior to announcement of the winner, establishing technical and economic qualification standards, and maintaining conditions effectively expressed the proposal.

15.3. Authorization, Concession, and License to Provide Public Services

The Federal Constitution, art. 21, insets XI and XII, establishes that the following services should be exploited by the Federal Union: (i) telecommunications and radio-broadcasting; (ii) services relating to electric power and exploitation of water ways for electricity production; (iii) air and aerospace and airport infrastructure; (iv) railway and waterway transport services between Brazilian ports and borders; (v) interstate and international highway passenger transport services; and (vi) services related to sea, river and lake ports.

The execution of these services can be carried out directly or by means of authorization, concession or license. The Union is authorized to delegate provision of these services, mainly through concessions or licenses, to Corporate Entities of private law with competence to provide them.

Authorization is a unilateral, discretionary administrative act whereby the Public Authorities delegate public services provision to the private sector, and which may be revoked at any time.

A concession entails a formal administrative contract, awarded by means of a tender procedure under the call for bids modality, upon which the delegation of responsibility for providing the service is legally transferred by the Public

Authorities to a company or a consortium that, for its part, assumes the risks inherent to the business for the duration of the contract, and is remunerated by tariffs charged from users of the services. The aforementioned contract further is intended to fulfill conditions of regularity, continuity, efficiency and moderate tariffs, in the provision of services.

Standards for public service concessions are provided by Law 8.987/95, with the alterations introduced by Law 9.648/98, whereas Law 9.472/97 provides for concessions of telecommunication services.

Permission to provide a public service, as previously emphasized, is a simple, discretionary and ephemeral of unilateral delegating by the public authorities, through a contract of adhesion that can be revoked at any time or to which the public authorities can impose new conditions to the grantee.

15.4. Qualification

To institute a public tender, the Public Authorities publish a justification for the licensing procedure, defining the objective, scope and duration of the contract, prior to a call for proposals.

The tender procedure is constituted upon publication of call for proposals which serves as the bylaws of the tender must be observed by both the Administration and by bidders. The principle of binding the tender procedure to the terms of the call for proposals is foreseen in article 3rd of the Tender and Contracts Law (Law 8666/93).

Any party interested in participating in the tender must fulfill the requirements stated in the call for proposals and specific registry requirements of each modality; and present legally-required documentation demonstrating legal, technical, economic, and financial capacity, and regularity with the tax authority .

If call for proposals permits formation of consortia, each component company must present all the above-mentioned documentation as if it were an individual bidder.

Having fulfilled these requirements, bidders are qualified to present their proposals in compliance with requirements established in the call for proposals. At this point, any person can view the documentation, including certificates, decisions, contracts, or opinions relating to the tender and to the concessions or permissions in question.

It should be stressed that article 34 of Law 8666/93 (Tender and Contracts Law) provides for the possibility of maintaining a record register for qualification purposes, valid for a maximum of one year, containing the documents pertaining to participants in public tenders. Companies inscribed in this register receive a Certificate of Registration, enabling them to participate in price consultations which, according to § 2nd of article 36 of the same Law, replaces the qualification document requirements for other modalities of tender.

Criteria for appraisal of proposals are: (i) lowest price, when the selection criteria specified in the call for proposals that winning proposal shall be the one which presents the powest price; (ii) the best technical proposal; (iii) a combination of the best technical proposal and price; or (iv) highest offer, in cases of sale of assets or concession of the right to use resources.

In case of deadlock between two or more contenders, after analyzing compliance with all specified conditions in the call for proposals, selection shall be by lot, in a public session which all bidders are summoned, registered in the minutes.

15.5. Tender Waivers

The law foresees three situations in which the requirement to tender may be waived: (i) low value of the object of bidding; (ii) emergency or public disaster situations, war and or serious disorder; or, (iii) purchase or lease of real estate, which for specific reasons (*e.g.* geographic location of the property) make competitive bidding unfeasible. These, and twenty-one other exception al situations listed in article 24 of Law 8.666/93, justify direct contracting.

Article 25 of the same law states that waivers may be justified by impossibility of tendering in view of the unfeasibility competition among the participants, as a consequence of only one supplier being able to fulfill the tender requirements (though brand preference is forbidden), or in cases of renowned expertise on the part of the professionals or companies providing specialized technical services, or of a publicly acclaimed professional.

15.6. Administrative Contracts

A contract is mandatory for contracts resulting from call of bids and price consultation modalities, and when a tender waiver when the values are within the limits set for these two modalities of tender. Such contracts must contain clauses that define: (i) the parties; (ii) the objective; (iii) the scope and duration; (iv) form and conditions of provision of services; (v) quality of service parameters;

(vi) price; (vii) criteria for contractual readjustment; (viii) rights, guarantees and obligations of users; (ix) projections for expansion and modernization; (x) inspection and supervision; and (xi) penalty clauses.

Physical-financial schedules for the execution of works may be included, as well as guarantees for fulfillment of obligations, in cases of contracts relating to of public services concessions after prior execution of engineering works.

The concession holder may contract third parties to carry out inherent, accessory or complementary activities, as companies under private law. Contracting of third parties does not release the concession holder from responsibility for damages caused to the conceding power, to users, or to third parties. Provided it is foreseen in contract, authorized by conceding power, and preceded by competitive bidding, subcontracting may be accepted.

15.7. Guarantees

Guarantees are a common requirement in services, works or procurement contracts. Though not mandatory, guarantees to be legitimate and binding must be foreseen in the call for proposals. Except in situations foreseen in article 56 of Tender and Contracts Law (Law 8666/93) guarantees tend to take the form of bond, insurance or bank guarantees, at the discretion of the contractee, providing the corresponding insurance value does not exceed five per cent (5%) of the total value of the contract.

15.8. Inspection and Extinction of Administrative Contract

In defense of the consumer's interest, the conceding power bears responsibility for supervision of contract execution, and to this end it may form inspection committees that shall have access to all administrative, accounting, technical, economic, and financial information, and retain power to intervene in the concession.

Contracts for procurement and public works aim to ensure delivery of goods and investments, and likewise concessions or licenses aim to ensure adequate provision of service to the full satisfaction of customers, in compliance with such principles of continuity, efficiency and safety. Thus default or non-compliance with such principles may result in penalties and rescission of contract.

Other circumstances that might warrant rescission of contract include: conclusion of the period of duration; expropriation (in the public interest); forfeiture, for

total or partial failure to execute the service; rescission; annulment; bankruptcy or dissolution of the company; death or incapacity of the contractor in the case of individual company.

In the event of breach of contract by the contractee, sanctions foreseen in the contract clauses, the Tender and Contracts Law (Law 8666/93), and the call for proposals shall apply. If the breach of contract is on the part of the public authorities, the private party may move special court action to rescind the contract and seek fair compensation.

15.9. Other Contractual Features

With the aim of optimizing public resources and streamlining administrative contractual procedures, Government of São Paulo Decree 45.085/2000, authorized electronic contracting and on-line procurement in that State.

Electronic auctions are a procurement modality under which best price is the criterion for selection of suppliers. These can be used for contracts whose value does not exceed R$ 8.000,00 (eight thousand reais), a situation in which art. 24 of Law 8.666/93 waives the requirement of a tender. Any company, with prior registration in the system, can participate in electronic auctions.

Management contracts, introduced under Constitutional Amendment 19/98 to the article 37, § 8th of the Federal Constitution, as a means of promoting decentralization, set goals and objectives to be achieved under contracts the execution of which is subject to inspection and authorization by the Public Administration.

Leasing contracts provide a means whereby a Public Authority can transfer responsibility for management of public services to a private entity, at the latter's expense and risk, placing public property at its disposal.

Finally, under provisions of Law 9.790, of March 23, 1999, Partnership Agreements, signed between a Public Authority and an entity classified as civil society associations in the public interest, enable establishment of a bond of cooperation for execution of activities of public interest under which public resources may be transferred. When such activities imply delegation by the Public Administration of service provision, this implies a public-private partnerships (PPP).

Law 11.079 of December 30, 2004, subsequently regulated by Decree 5.385/2005, instituted general standards for the tendering and contracting of public-private partnerships.

This law defines PPPs as two modalities of concession contracts, that may be either sponsored or administrative. Sponsored concessions are contracts for the provision of services or execution of public works governed by Law 8.987/95, whereby, aside from the tariff paid by users of the service, the public partner pays fees for work performed by the private partner.

Under administrative concessions, the private partner receives payment from the governmental body that benefits from the services. Disbursement of installments by the Public Administration is conditional upon effective provision of the services, and satisfactory performance of the private partner.

Generally, under a PPP, the private sector assumes responsibility for funding the entire project, including any construction works necessary for its implementation, and begins to receive disbursements only upon conclusion of the works and start of provision of the services, either directly from the Public Authorities, or in combination with user fees.

The public entity to specify the service to be provided or the work to be executed by the private sector agent. On termination of the partnership contract, ownership of fixed assets or other property necessary for continuity of provision of the service reverts to the Public Administration, regardless of compensation.

It should be pointed out that simple contracting of public works under a common concession, i.e. delegation of public services or construction works, does not constitute a PPP, and that such contracts are subject to the rules provided under the Tenders and Contracts Law (Law 8.666/93) and the Concession Laws (Laws 8.987/95 and 9.074/95).

16. Telecommunications

16.1. Telecommunications in Brazil – Brief Overview

For over than 35 years, Law 4.117/62, of August 27, 1962, known as the Brazilian Telecommunication Code (*Código Brasileiro de Telecomunicações* – CBT), governed the provision of telecommunications services in Brazil. This law authorized the founding of the Brazilian Telecommunications Company (*Empresa Brasileira de Telecomunicações S.A.*- EMBRATEL).

Law 5.792, of July 11th 1972, authorized the creation of a public/private joint stock company, TELEBRAS *Telecomunicações Brasileiras S.A.,* to promote, through subsidiaries and associate companies, public telecommunication services in Brazil and abroad. TELEBRÁS, with its subsidiaries and associate companies, comprised the TELEBRÁS System, which eventually also incorporated EMBRATEL.

Liberalization of the Brazilian telecommunications market was launched with the promulgation of Constitutional Amendment 08/95, of August 15, 1995, which enabled the Federal Government to transfer the right to provide telecommunication services to privately owned companies, by means of authorization, concession or permission.

Shortly thereafter, Law 9.265/96, of July 19, 1996 (the Minimum Law) fully deregulated provision of value-added services [internet], relaxed requirements for provision of satellite communications and non-public telecommunications services, set rules for the tendering and licensing of B-Band mobile cellular services.

In 1997, Law 9.472/97, of July 16, 1997, (the General Telecommunication Law - LGT), created the Brazilian National Telecommunications Agency (*Agência Nacional de Telecomunicações* – ANATEL), established criteria for the privatization of the state telephone companies, and rules concerning liberalization and competition within the telecommunications markets.

The General Telecommunications Law determined that networks be organized to promote free circulation along integrated routes, and imposed compulsory interconnection between all networks and support services provided to the public (in the collective interest). Furthermore, it guaranteed integrated operation and conditioned property rights within to the networks to the duty of fulfillment of a social role. In this respect, interconnection is the major instrument for ensuring convergence.

The General Telecommunications Law also provided a legal definition of value added [internet] services which, it declared, are not telecommunication services. It further classified value added service providers as users of the underlying telecommunication service or network.

Therefore, with exception of commercial data transmission services, general internet services are outside ANATEL's jurisdiction, and may be provided without regulatory constraints.

In mid-1998, the TELEBRÁS System underwent complete restructuring, which included privatization of its subsidiaries. This resulted in huge investments for expanding telecommunication services and procurement of new technologies.

For the purpose of introducing competition into the fixed telephony market, fixed switched telephone services were separated into three different modalities of service, which were subjected to distinct licensing requirements. Brazil was divided into four Regions, and the number of competitors for each modality of service, for the period between privatization and December 31, 2001, was limited to two companies per Region: the concessionaire and a mirror-company (General Licensing Plan, approved by Decree 2.534/98, of April 2, 1998).

Provision of local telephone services was entrusted to a concessionaire and a mirror-company (under a duopoly system) in each service area in Regions I, II and III. Provision of national long-distance services was assigned to two "regional" companies (the incumbent and a mirror-company) in Regions I, II and III, and to two "national" companies (the incumbent and its mirror-company), exploiting the service throughout Brazilian territory, i.e. Region IV. International long distance licenses were granted to the two "national" companies, to take calls throughout Brazil (Region IV).

Such duopoly systems, characteristic of this first phase of the opening of the telecommunications sector, were aimed to grant companies time to establish and consolidate in the market before being exposed to free competition, as of 2002. During the transition period between privatization of the companies of the TELEBRÁS System and the total liberalization of the fixed and mobile telephony markets, competition was limited to the dispute between incumbents and mirror-companies in the fixed telephony market, and between Band A and Band B mobile telephony concessionaires.

In 2002, the second phase of the liberalization of the Brazilian telecommunications market began, with elimination of limits to the number of service operators. Nevertheless, ANATEL maintains the right to impose limits and other legal-administrative restrictions, in exceptional cases, on grounds of technically

unfeasibility, or when an excessive number of competitors might negatively affect the provision of a service of in the public interest.

16.2. Development of Mobile Telephony

The first mobile telephone services in Brazil were provided by companies of the the TELEBRÁS System (in a frequency sub-level known as Band A). Following approval of Constitutional Amendment 8/95, regulations were issued in 1996 disciplining the provision of mobile cellular services (*Serviço Móvel Celular* – SMC) in preparation for private provision of Band B services.

Initially exploited through concessions, since the entry into force of the General Telecommunications Law (LGT), mobile cellular services have been provided exclusively by private companies that hold authorizations to provide such services.

The General Telecommunications Law replaced all preexisting regulations, norms and rules on mobile communications with the current system of issued by ANATEL, Since 2000, these rules, for Personal Mobile Services (PMS) have been gradually implemented.

Between 2001 and 2003, auctions were held to award up to three additional mobile licenses per region (corresponding to Bands C, D and E). Corporate contenders were permitted to bid for PMS authorizations in each of the three regions, and permitted to acquire licenses for all three regions. However, they were forbidden to acquire more than one authorization within each region.

Any company incorporated in Brazil, even if controlled by foreign investors, may hold an PMS license.

New rules expanding the coverage areas led to mergers and takeovers of operating companies. There has been rapid growth in mobile telephony services in Brazil, especially with in the area of pre-paid cellular phones. Currently GSM is the technology most widely employed, followed by CDMA and TDMA.

Anatel is currently bidding PMS nationwide authorizations (E, M and L-Bands). This bid will not only allow new mobile service providers, it will also make possible that current service providers expand their services. The new sub-frequency Bands shall only be used after the 3G auction. Therefore, companies that obtain license for E, M and L Bands will have to wait the winning bidders of 3G or obtain an express authorization from Anatel to obtain such license.

16.3. The Telecommunications Regulatory Agency (ANATEL)

Brazil's telecoms regulator, the National Telecommunications Agency (ANATEL) enjoys administrative independence, is not hierarchical subordinated, and has financial autonomy.

Basically, ANATEL is empowered to: (i) issue rules on the licensing, provision and use of the public telecommunication services under the public regime (universal services); (ii) establish, control and supervise tariff structures for each modality of service provided under the public regime; (iii) sign and manage concession contracts; (iv) issue rules concerning provision of telecommunications services under the private regime; (v) control, prevent and enforce sanctions in the event of offenses against the economic order in the field of telecommunications, without prejudice to competences of the Administrative Council for Economic Defense (CADE); (vi) manage the radio-frequency spectrum and the use of satellite orbits; (vii) define service modalities, based on their objectives, scope, form, means of transmission, technology employed, and other attributes; (viii) supervise the provision of services and apply administrative sanctions to transgressors of the telecommunications rules.

16.4. General Telecommunications Law

The Brazilian Telecommunication Code, except for certain provisions relating to criminal offenses and broadcasting provisions, was revoked with the coming into force of the General Telecommunications Law.

This Law provides a framework for provision of telecommunication services, the establishment and functioning of a regulatory agency, and sets certain fundamental principles of Telecommunication Law.

This framework foresees free, unencumbered and fair competition among companies that provide telecommunications services, while establishing general standards for protection of the economic order. Any acts of service providers that might hamper free competition in any way or form, are prohibited.

Interconnection, as defined by the General Telecommunications Law (article 146, sole paragraph) is "the connection between functionally compatible telecommunications networks, allowing users of one network to communicate with users of another or access services available in it". Interconnection is to be ensured through contracts between operating companies. In the event of lack of agreement, ANATEL may only intervene if called upon to do so by one of the parties.

16.5. Telecoms Services Regimes

The organizational framework for the telecommunications sector established by the General Telecommunications Law is based on a system of limits and restrictions to service operators. Exploitation of any telecommunications services or network depends upon prior licensing by ANATEL, except in certain specific situations when mere communication to ANATEL will surfice. Licenses are granted according to different modalities of services, as defined by ANATEL.

Thus, exploitation of telecommunications services is conditioned either to prior concession or permission; authorization; or communication to ANATEL.

The General Telecommunications Law set two distinct criteria for classification of services. The first criterion relates to the scope of the commercial provision of the service, and distinguishes between services of collective interest; and services of restricted interest.

Services of collective interest are those which must be available to all interested persons under non-discriminatory conditions. For their part, services of restricted interest are intended for service providers, or are offered to specific classes of users, selectively, at the operating company's discretion.

The second criterion set by General Telecommunications Law classifies services depending upon the legal rules under which they are provided, as either public services or private services.

Telecommunications services provided under the public regime are those which the Federal Union has reserved powers or assumed a commitment to providing universally or continuously. Fixed switched telephony services (FSTS) provided commercially to the general public, are the only telecommunications service that the General Telecommunications Law establishes as a legal commitment on the part of the Federal Union. Thus, the only public telecommunications service subject to universalization and continuity targets for the end user is FSTS. These commitments and targets are to be met through delegation, by means of concession contracts.

Telecommunications services under the private regime are those in which the service is delivered under a free enterprise system by the private sector, through simple authorization by ANATEL, conditioned to the meeting of expansion and service-provision targets.

Concessions to provide services entail an administrative contract with ANATEL, awarded by means of a public tender procedure, without exclusivity.

Concessionaires' revenues come from billings, and are subject to business risks. The maximum term of a concession is 20 years, with the possibility of a one-time-only renewal or extension for an equal period. In January 2006, current concession contracts were renewed and underwent five-year appraisals by ANATEL, with a view to establishing new conditions, new universal service obligations, and quality parameters.

Retail prices for fixed switched telephony services under the public regime are subject to price caps. ANATEL may grant concessionaires an unrestricted tariff system, provided there is general and effective competition among service providers.

Fixed switched telephony services may also be provided by companies other than concessionaires, under a private regime and thus are not subject to universal-service obligations.

Exploitation of FSTS under a private regime is based on the constitutional principle of "economic activity", and should be guided by principles of free and unfettered competition among service providers, consumer's rights, and stimulus for the technological and industrial development of the sector.

Prices charged by the service providers under the private system are unrestricted. Nevertheless, any anticompetitive behavior or abuse of economic power may be punished.

Exploitation of service under a private regime requires prior authorization from ANATEL entailing the right to use the associated radio frequency. No limits exist to the number of authorizations that may be granted by ANATEL for exploitation of services under a private regime, except when technical limitations or excessive numbers of competitors may be detrimental to the provision of services in the collective interest. In such exceptional situations when it proves necessary to limit the number of authorizations, granting of an authorization may be preceded by a public tender procedure, similar to those for the granting of PMS licenses.

The right to use of the radio-frequency spectrum, exclusively or otherwise, requires prior authorization from ANATEL, linked specifically to the concession or authorization for the exploitation of telecommunications service. Authorization for use of a radio frequency in connection with provision of a service under the public regime is for the same term as that of the concession to which it is associated. Although authorization for the exploitation of services under a private regime is independent of the term, the right to use radio-frequencies associated thereto is for a term of up to 20 years, which can be extended once for an equal period.

Transfer of the right to use a radio frequency may only occur with the transfer of the concession or authorization to which it is linked.

Basic consumer's rights have been reinforced through the regulation of Fixed switched telephony services recently introduced by ANATEL and applicable to all FSTS providers, whether to not they are concessionaires. For the PMS users, basic consumer's rights are reinforced through the new rules recently announced by ANATEL.

16.6. Transfer of Control of Telecom Companies

Rules for the transfer of a controlling interest in a telecommunications service provider in Brazil are foreseen in the General Telecommunications Law. ANATEL, in the exercise of its role of fostering effective competition and preventing economic concentration, has the legal power to set restrictions, limits or conditions upon the purchase of concessionaires or transfer of authorizations.

ANATEL Resolution 101/99 sets rules for mergers, with a view to supervising transfers of control and limiting potential for economic concentration.

Under the terms of this Resolution, the controller is an individual or corporate entity which, directly or indirectly: (i) participates in or appoints a person or member of the Board of Directors, the Governing Body or other board with, of another company that is its controller; (ii) holds statutory or contractual veto over any matter or decision of the other; (iii) is sufficiently empowered to block the installation of a qualified quorum or decision required by force of statutory or contractual provision, with regard to the decisions of the other; (iv) holds shares of the other, of a class which grants separate voting right.

Also according to this Resolution, a company is deemed to be an affiliate of another if it holds, directly or indirectly, no less than 20% of the other company's voting stock, or if no less than 20% of the voting stock of both companies is held, directly or indirectly, by the same individual or corporate entity.

The Resolution also establishes that any legal transaction which results in partial or total transfer, by the controller, of a controlling interest in the service provider, represents a transfer of control.

Finally, any changes to the corporate structure of a company that could represent a transfer of control require prior approval by ANATEL, especially when: (i) the controlling entity or one of its members withdraws or when its participation or controlling entity drops below five percent; (ii) the controlling entity ceases

to hold a majority of the company's voting stock; or (iii) the controlling entity, through any form of agreement, totally or partially assigns to a third party powers to manage the company's corporate activities or business operations.

16.7. Taxes on the Telecoms Sector

Law 9.998 of August 17, 2000 created the Fund for Universalization of Telecommunication Services (FUST) to defray fulfillment of universal-service targets unrecoverable through efficient provision of service. As of 2001, operators have paid 1% of gross pre-tax (ICMS, PIS and COFINS) revenues from provision of telecommunications services, into the fund.

To avoid a cascade effect of FUST charges on the production chain of telecommunications services, Law 9.998 applied the tax to revenues from retail service provided to end users, exempting wholesale minutes to other carriers (interconnection) and leased lines fees. However, a recent interpretation by ANATEL (the agency that administers FUST) challenged this exemption, and the FUST charge is now applied to all services. This administrative modification to the law is being challenged, both in administrative spheres and in the courts, and the outcome will certainly impact all telecommunications service providers.

The purpose of the Telecommunications Supervision Fund (FISTEL), created by Law 5.070/66, of July 7, 1966 and reinstated by the General Telecommunications Law, is to defray ANATEL's expenses incurred in the supervision of telecommunications services. All concessionaires authorized companies and users of radiofrequencies are liable for an Installation Inspection Fee (*Taxa de Fiscalização de Instalação* – TFI) at the time of licensing of their telecommunications stations. The TFI fee is determined in accordance a table prepared by ANATEL, and varies according to the number of antennas and equipment in use. Such companies are also liable for annual payment of an Operation Inspection Fee (*Taxa de Fiscalização de Funcionamento* – TFF), calculated at on the basis of 50% the TFI fee.

Law 10.052 of November 28, 2000 instituted the Fund for Technological Development of Telecommunication (FUNTTEL), which received an endowment of R$ 100 million from the Telecommunications Supervision Fund (FISTEL). FUNTTEL receives 0.5% of gross revenues from telecommunications services plus 1% of income generated form telephony based events by authorized institutions. The aim of FUNITEL to fund technological research developed conducted by small and medium-size companies and thereby to increase the competitiveness of the Brazilian telecommunication industry.
Furthermore, telecommunications services are also subject to ICMS (Tax

on Circulation of Goods and Services), a state tax foreseen in the Federal Constitution.

16.8. Incentives

Brazilian law offers the providers of telecommunications services incentives for development of telecommunications products, through specific credit, tax, and customs policy instruments.

Thus, although the Brazilian Government has practically eliminated ex-tariff special importation regulations, significant exceptions are now in effect for certain components used in telecommunications, which had formerly been liable to import duties of up to16%.
Law 10176, of January 11, 2001, renewed the IPI tax exemption until December 31, 2000 on the items a variety of specified items. Since that date exemptions have been converted into reductions of applicable IPI rates. The percentage reduction is due to be gradually reduced until December 31, 2009, when full rates are to be applied.

16.9. The Future of Telecommunication Services

Major debate is currently in course in view of convergence. The Brazilian model of license granting by technology is under analysis as well as the issues arising from a possible segregation of infra-structure from service providers.
A variety of bills currently before the National Congress aim to promote harmonization of subscriber TV and broadcasting legislation, while promoting digital inclusion. In view of that, the delivery of content by telecommunication operators and the relevance of constitutional limitations on foreign capital in the broadcasting industry are also currently in discussion.

A bill on the powers of Brazilian regulatory agencies currently under discussion by the National Congress may significantly alter the status of ANATEL, its powers to grant telecommunications licenses, and its role of controlling and preventing breaches of the economic order and ensuring fair competition.

Another priority for the government is solution of legal impediments to the use of FUST resources to achieve universal service goals, which entails an amendment to the General Telecommunication Law.

In fact, one of ANATEL´s strategic aims for 2007 is universalization, that is, to promote the access of telecommunication services at all national territory, in

order to guarantee that all citizens and institutions of public interest have the right to utilize it, contributing to the social inclusion of population in financial difficulty, making the essential telecommunication services available.

Within the short-term ANATEL intends to have implemented numerical portability in both mobile and fixed telephone services (as of 1st march 2009). Commercial activation will last for 7 months. Service providers have committed to prepare their networks and information technology systems to support the demands derived from the implantation of portability until the deadline established by ANATEL. The numbering areas to be activated commercially in August 2008 constitute the pilot experience of the project.

17. Electric Power

17.1. Background

The Brazilian electric power sector underwent extensive and significant changes in the past decade under the Fernando Henrique Cardoso Administration[4]. These entailed a redefinition of the role of the State, gradual implementation of an economic model based on free competition, and a vast increase in private investment.

Constitutional Amendment 6 of 1965 set for these stage for these changes, by removing the requirement that only Brazilian companies of national capital could participate in the electric-power sector, thereby enabling participation of foreign capital, including ownership of concessionaires. In the same year, Laws 8.987 and 9.074 defined rules to discipline exploration of electric power concessions, provided a framework for the issuing of new concessions and for privatization of public-service concessions, and defined rules governing new entrants into the sector.[5]

In 1996, Law 9.427 announced the creation of the National Electric power Agency (ANEEL), an independent agency to regulate the electricity sector. Subsequently, Law 9.648 introduced precepts for implementation of an new framework for the Brazilian electricity sector.

Essentially, this new model sought to liberalize the energy sector, by introducing concessions or authorizations for provision of generation and distribution services by private companies, and privatization of concession holders, under the guidance of an independent regulatory agency, thus opening up the sector to private investment while introducing competition among service providers.

The model was only partially implemented, however, since although 20% of the companies in the generation sector were privatized between 1995 and 2002,, only 70% of distribution companies passed to private ownership.

In 2001, the country underwent an electric-power supply crisis, which led the

[4] President Fernando Henrique Cardoso served two presidential terms, from 1995 to 1998 and from 1999 to 2002. Significant changes in the energy sector took place during his first term in office.

[5] The Brazilian privatization process was based on: Law nº 8.031/90, which created the National Privatization Program; Law 8.666/93 (Tenders Law), which defined applicable bidding procedures; Laws 8.987 and 9.074/95, which established the general rules for concessions; Law 9.427/97, which created ANEEL and established the guidelines for concession of electric energy public services; Law 9.648/98, which, inter alia, provides for restructuring of the energy sector and privatization of ELETROBRÁS and its subsidiaries (ELETROSUL, ELETRONORTE, CHESF and FURNAS).

government to take measures to curtail electricity use and foster investments in the generation, and enactment of Law 10.438/2002 that introduced new regulations. The electricity shortage brought to light problems facing the eclectic-power sector and led to extensive debate within society, thus airing the weaknesses and strengths of the new model.

With the accession of President Luiz Inácio Lula da Silva, a new policy with new guidelines and regulatory standards for the electricity sector was announced in July 2003 by the Ministry of Mines and Energy (MME). On December 11, 2003, Executive Orders (MP) 144 and 145, subsequently transformed into Laws 10.848[6] and 10,847 of March 15, 2004, went into effect, providing the present regulatory framework.

Among the most significant changes introduced under the present model is an expansion of the powers to the MME, and a curtailing of the responsibilities of the ANEEL. Moreover, two new distinct trading environments for contracting electric power were formally introduced: the Free Trade Environment and the Regulated Trade Environment or Pool, in which all generation and distribution concession holders are obliged to participate. The Electric Power Trading Chamber (CCEE) was created to replace the Electric power Wholesale Market (MAE), established in the former Administration, and entrusted with the tasks of accounting for and settling operations not covered by bilateral contracts. The new model places emphasis on planning, carried out by the Energy Research Company (EPE) (created by Law 10.847/2004) and centralized control of the electricity-sector activities by the Ministry.

17.2. Electric Power Sector Model Adopted in the 2nd half of 1990s

17.2.1. Activities and Agents of the Electricity Sector

As the first step toward reorganizing traditional generation, transmission, and distribution activities, in 1995, concessions were redefined with the aim launching a process of liberalization of the Brazilian electric power sector.

The model sought to introduce competition, reduce mismatches between supply and demand, and open up the sector to new entrants:

- electric power Traders and the Importers;

[6] Law 10.848 was regulated through Decree 5.163/04 later amended by Decrees 5.249/04, 5.271/04 and 5.499/05.

- Independent Producers, meaning corporate entities or consortia holding concessions or authorization to produce electric power for own use or sale, at their expense and risk (i.e., without captive markets that concessionaires of electric power utilities usually enjoy and without establishing the right to set tariffs);
- so-called "free consumers", able to choose their supplier of electric power, a group that is likely to undergo progressive increases in the coming years.

Under this model, competition has been introduced into generation and trading activities, with only a minimum level of regulation, whereas transmission and distribution, regarded as natural monopolies, are strictly regulated.

Brazil's Federal Constitution empowers the Federal Government, as holder of potential hydraulic energy resources, to exploit, "the electric power services, plants, and energy from water courses"[7] either directly or by means of concessions, permission, or authorization.

Thus, within the Brazilian energy sector, activities of generation, transmission, distribution and trading are considered separately, and the licensing and contracting of the services in each segment are contracted independently of each other.

The rules fir each of these segments are summarized below:

Generation

Generation is defined as the transformation of any other of energy from any source into electric power. Hydroelectric plants account for 90% Brazilian electric power generation capacity.

Rules for the licensing of hydroelectric and thermoelectric plants take into account the modality of exploitation (provision of public utility services, Independent Producer, or Self-Producer[8]) and the potential capacity of hydroelectric or thermoelectric resources.

Transmission

Transmission is defined as a public service for transport of high-voltage electric power produced at generating plants to consumer centers. Since most of Brazil's

[7] Art. 21, XII-b, of the Federal Constitution.

[8] Law 9.074/95 and later amendments, and Decree 2003/96 established rules for activities of Independent Producers and of the Self-Producers of electric power. The Self-Producers means an individual, legal entity, or consortium of corporations that receive a concession or authorization to produce electric energy for own use, and are entitled, with a specific permission, to trade any surplus electric power.

electric-power is produced at hydroelectric plants, generation often takes place at a considerable distance from consumer markets. Brazil has thus developed one of the most modern transmission networks in the world, with a number of regional connections, that comprise the Interconnected Electrical System Network (*Rede Básica do Sistema Elétrico Interligado*) also known as the National Interconnected System (*Sistema Interligado Nacional* – SIN) Other transmission lines not connected to this system comprise so-called Isolated Systems.

From a structural standpoint, it is the Interconnected System that, by ensuring free access of all agents in the sector (including free consumers), enables free contracting of suppliers of electric power from the concessionaires or permission holders' systems, using public transmission and distribution services, against the payment of the respective transport fees.

It should finally be stressed that transmission services are carried out exclusively under public service concessions, and that the transmission segment it is unquestionably one of the most regulated in the electric power sector.

Distribution

Distribution is a public utility service for the transport of low-voltage electric power, by means of a multi-lined network, from transmission-line terminals (where high tension is transformed into low voltage) to end consumers.

Distribution services concession contracts guarantee distributors a constant supply of power to fulfill the requirements of captive consumers located in their concession areas. These so-called captive consumers are thus not entitled to purchase electric power from an other supplier. Free consumers on the other hand, depending upon their consumption and voltage requirements (at present, those whose requirements are in excess of 69 KV, and higher than or equal to 3 MW) may, though located in a concession area of a given distributor, may choose to receive their electric power from another supplier, by means of a specific contract. In such cases, the distributor is obliged to provide free access to its distribution facilities, upon reimbursement of transport costs.

Trading

Since enactment of Law 9.648/98, electricity trading has been carried out separately from other electricity-sector and entails specific securities traded by authorized brokers.

17.2.2. Electric Power Sector Agencies

Greater competition and restructuring of the electric power sector have increased the need to clear definition of (i) agencies responsible for the regulation and operation of the new model; (ii) basic characteristics necessary for implementation of an efficient and competitive model, and (iii) modalities of contracts applicable.

From an institutional standpoint, Law 9.427/96 established a regulatory body (ANEEL) as an independent authority linked to the Ministry of Mines and Energy (MME), and Law 9.648/98 established the National Operator of the Energy System (*Operador Nacional do Sistema Elétrico* - ONS), a private, non-profit corporation, comprising agents of the energy sector and free consumers, according to the relevant legislation.

In summary, it is within ANEEL's power "to regulate and inspect generation, transmission, distribution and trading of electric power" (Law 9.427, art. 2) whereas, essentially, ONS is responsible for "coordination and control activities for operation of generation and transmission of electric power in the interconnected systems" (Decree 2.655/98, art. 25).

Most of the Brazilian electricity sector is interconnected. Agents operate in coordination to ensure maximum efficiency. Such coordination, implemented back in the 1970s under the former Coordinating Group for the Interconnected Operation (GCOI) is now the responsibility of ONS, which issues generation dispatches.

Another significant development, also foreseen in Law 9.648/98, was establishment of the Wholesale Electricity Market (MAE). This market was initially based on multilateral Market Agreements, signed by energy sector agents (voluntary or obligatory participants in the MAE) under the terms of Decree 2.655/98 and applicable ANEEL Resolutions, to handle operations for purchase and sale electric power, with special emphasis on the spot market. Law 10.433/2002 authorized the establishment of the MAE as a private corporate entity, under ANEEL's regulatory supervision.

The purpose of the MAE is to oversee the commercial and ensure financial discipline in transactions for the purchase and sale of electric power. On the other hand, the dispatch and delivery of the contracted electric is mostly coordinated by ONS.

17.2.3. Contracts in the Energy Sector

Law 9.648 in 1998, provided for the following contractual models for energy

sector transactions:

- "initial contracts", typical of the transitional period, in which, based on the energy available from each plant, ANEEL balances supply and demand, and sets tariffs for the respective contracts. The applicable annual amounts specified in the initial contracts were in force in the 1998-2002 period, after which they were gradually reduced by 25% per year until termination of the contracts in 2005;

- freely negotiated bilateral contracts, under which the amounts not covered by the initial contracts or those contracts subject of a progressive liberalization may be negotiated. Article 12 of Law 9.648/98 stipulates that energy purchase and sale operations within the scope of the electric interconnected systems should be effected within the MAE; and

- short-term spot contracts, enabling the sale of power actually produced or demanded not been subject to either initial or bilateral contracts.

Thus the MAE was the environment in which processing and financial settlement of operations not covered by contracts took place, subject to a number of pricing mechanisms and periodic clearing and settlement of the transactions.

Bilateral contracts are the basic contractual mechanisms of a competitive electrical energy market. This system of free negotiation among agents is balanced against a mechanism for defense of the consumer's interest, namely, a system of "normative values" which limits of transfers to freely-negotiated prices for purchase of electric power. At present, transfer depends on the bids at auctions.

Law 10.433 of 2002, that provided for the creation of MAE under the regulatory authority of ANEEL, established that purchases and sales of all energy not subject to bilateral contracts should be conducted according to MAE Convention and Market Rules defined by ANEEL. Since 2002, the distributors have been obliged to contract energy exclusively by means of public auctions, and have been excluded from free market negotiation[9].

With regard to transmission and distribution activities, there follows a brief description of the functioning of specific contracts. In the transmission segment, lines comprising the Interconnected Electrical System Network are made available to ONS by transmission concession holders by means of Contracts for Provision of Transmission Services. The ONS, for its part, then signs Contracts for Use

[9] Law 10,604/2002.

of Transmission Systems with representative of the concession holders. In the case of transmission installations that are not connected to the Interconnected Network, facilities are made available directly to customers by the transmission concession holders, and the respective contracts mediated by ONS. In either case, a Connection Contract with the respective transmission concession holder is necessary, to determine responsibility for the implementation, operation and maintenance of connection facilities. In the distribution segment, a Contract for Use of Distribution System (CUSD) and a Contract for Connection to the Distribution System (CCD) must be signed with the local distribution concession or permission holder.

ANEEL sets tariffs for the use of transmission installations and for the use of electricity distribution systems, in line with applicable resolutions.

It is worth observing that one of the great achievements of the former model, maintained by the present model, was the guarantee of free access of electricity-sector agents to transmission and distribution lines and the establishment of rules for such access.

Between 1998 and the end of 2002, sweeping changes introduced in regulatory and organizational structure of the electricity sector.

17.3. The Brazilian Electric Power Sector since 2003.

The current electric-power sector model, instituted by Executive Orders MP 144 and 145/2003, which subsequently became Laws 10.848 and 10.849/2004, maintains many rules of the model previously in effect, but reflects a marked change in orientation. New rules are characterized by a higher degree of centralization and control on the part of the State, especially relation to energy trading and greatly emphasizing activities planning.

There follows a review of the new rules:

17.3.1. Electric Power Sector Agencies

The present model altered the balance between the powers of the Ministry of Mines and Energy (MME) and of the regulatory agency (ANEEL). Many of the powers of ANEEL (which under the previous rules had enjoyed the status of an independent regulatory agency) were transferred to the MME,[10] which

[10] The MME holds power to draft concession plans, establish rules for tenders, and to hold tenders for

now has decision-making power on most matters relating to the electricity sector. ANEEL's role is now restricted to the holding of tenders, inspection of concessionaires, and regulation of tariff and electricity trading.

The new model also created a public research and planning corporation (*Empresa de Pesquisa Energética* – EPE[11]), was subordinated to the Ministry, to conduct studies and research as inputs for formulation, planning, and implementation of actions of the Ministry. The Electric Power Trading Chamber (*Câmara de Comercialização de Energia Elétrica* – CCEE), a private non-profit corporate entity, authorized by the conceding power, regulated and supervised by ANEEL, was created to replace the Wholesale Electricity Market (MAE, which ceases to exist under the present framework), to enable electric power trading. Membership of CEEE obligatorily for all electricity-sector agents, including free consumers. ANEEL was responsible for instituting the Trading Convention establishing conditions for electric-power trading and for the basic organization of CCEE operations, and for setting trading rules and procedures.[12]

Within the Ministry, the Energy Sector Committee Monitoring (CMSE) was created to provide permanent monitoring and evaluation and ensure the continuity and safety of -power supply throughout Brazil.

Coordination and control of generation and transmission operations within the interconnected system remain the responsibility of ONS which, though it remains a private corporation, is now authorized by the Ministry (rather than ANEEL), and supervised and regulated by ANEEL.[13]

17.3.2. Electricity Sector Activities and Agents

Under the present model, organization of the electric-power system remains separated into the generation, transmission, distribution, and trading segments.[14] The new rules have, however, redefined roles of the various players in energy trading activities, especially in the generation and distribution segments.

It should be observed that under the new framework, free consumers may purchase energy only from the public generation concessionaires, independent producers, self-producers with surplus of energy, from traders, importers, and

granting concession.

11 Created by Decree 5.184/04.

12 The Trading Convention was instituted by Decree 5.177/04 and ANEEL's Regulatory Resolution 109 of October 26, 2004.

13 Law 10.484/04 amended articles 13 and 14 of Law 9.648/98. Of the 5 ONS officers, 3 (including the President) are appointed by the MME.

14 See item 17.2.1.

local distribution companies. Thus, distribution companies are no longer allowed to sell energy to free consumers, other than to those located in their concession areas.

Moreover, free consumers are now entitled to opt to be supplied under regulated conditions (like other captive consumers), [15] provided that they inform the concession holder with five years notice, though this term may be shortened at the local distributor's discretion.

17.3.3. Electricity Trading: The Pool (Regulated Environment) and the Free Trade Environment

The current model introduced significant changes into energy trading system. It has created two energy trading environments: the Free Trade Environment (*Ambiente de Livre Contratação* – ALC), and the Regulated Trade Environment (*Ambiente de Contratação Regulada*–ACR) or Pool. All the players are now required to trade energy within the interconnected system, either in the ALC, or in the Pool.

The purchase, by concessionaires, permission holders, and authorized public utilities, of electric power from the Interconnected System for distribution to regulated markets must be effected through the Pool. Thus, all sales to distributors must be through the Pool by means of auctions, and distributors must guarantee full service to their markets through regulated trading.

Purchases and sales are effected under bilateral contracts known as Energy Trading Contract in the Regulated Environment (*Contrato de Comercialização de Energia no Ambiente Regulado* – CCEAR), between each concessionaire or authorized power generator and the distribution companies. Such contracts may specify a quantity of energy or availability of energy. The distributors must provide guaranties and contracting is effected by means of a tender organized either directly by ANEEL or by CCEE. Furthermore, supply tariffs are strictly regulated in this environment and must be ratified by ANEEL.

Contracts for the purchase and sale of energy through the Pool necessarily involve long-term supplies: for current ventures that already entail a concession or authorization (known as old energy) for a term of supply of no less than 3 years and no more than 15 years, or for new ventures (known as new energy) for a term of supply of no less than 15 years and no more than 35 years. Such

[15] This regulation has created Prospective Free Consumers which, though they abide by conditions set forth in article 15 of Law 9.074, are supplied under the regulated system.

contracts, according to the Ministry (MME) ensure a stable flow of return on investment while, at the same time, contributing funding for expansion of the sector's infrastructure.

Independent Producers (both of hydroelectric and thermoelectric power) and Self-Producers that have surplus electricity to sell, may participate in the Pool, in the ALC, or in both simultaneously. If they participate and contract energy in the Pool, they become subject to all of its rules, whereas their activities in ALC are at their own expense and risk.

In the ALC environment, the only operations that con be conducted entail the purchase and/or sale of electric power, involving concessionaires and authorized generation agents, traders, importers of electric power, and free consumers.

Trading in the ALC is effected by means of bilateral contracts freely negotiated by the parties, in accordance with specific rules and trading procedures, the CCEE being responsible merely for registration and settlement of contracts. CCEE is also responsible for registration of all the contracts for the sale of energy among the trading agents, generators, distributors, and free consumers, including, among others, the Itaipu contract, and initial contracts. CCEE is also responsible for registration the settlement of purchases of energy in the spot market (not covered by bilateral contracts), and CCEE shall set forth the price of liquidation of differences that shall be valid for these operations.

Contracts registered with the CCEE do not imply the actual delivery of electric power, and energy sales by any agent must have as collateral own generation or energy purchase and/or sale agreements. Under the new model, any disputes among members of the CCEE's are resolved by arbitration.

Under the present model, concessions and authorizations for increases in generation are obtained through auctions carried out by MME (excepting very small facilities). At such auctions, full sale (or almost full sale) of energy to be produced must be ensured.

The present model does not offer prospects for privatization of the federal-government owned companies, that hold the major energy generation and distribution concessions.[16] The various energy auctions held in 2004 and 2005, for the sale of old energy (existing projects) and of new energy (through the granting of new concessions or authorization for energy generation) were carried out with significant participation of state-owned companies.

[16] Law 10.848/2004 excluded ELETROBRÁS, its subsidiaries ELETROSUL, ELETRONORTE, CHESF and FURNAS, and the *Companhia de Geração Térmica de Energia Elétrica* – CGTEE, from the *National Program of Privatization*.

Finally, under the present model, contracts for use of the distribution and transmission systems have not undergone any changes.

17.3.4. Planning

Planning and control activities are central to the present model, and the EPE conducted studies and research that provided the bases for formulation, planning, and implementation of the Ministry's activities, with in the scope of the national energy policy.

The Ministry is responsible for establishing a list of the new ventures that may be put up for tender, for licensing quantities of electric power to be contracted to meet the needs of the Brazilian market, and for preparing a list of new generation ventures to be tendered.

For their part, it is incumbent upon generation and distribution companies, traders, and free consumers to inform the Ministry as to the energy needed to meet the needs of their respective markets.

17.3.5. Unbundling

Law 10.848/2004 forbids control or association of generation concessionaires and other parties authorized to use the interconnected system with companies engaged in distribution activities. Likewise, distribution companies may no longer: engage in generation and transmission activities; sell energy to free consumers, excepting consumers located in their concession areas; perform activities beyond the scope of the concession; or maintain direct or indirect interests in other companies (with a few exceptions). Generation and transmission activities may continue to be vertically integrated. The law also sets a deadline companies to implement separation of activities.

17.4. Conclusion

The current framework was designed by the Ministry of Mines and Energy (MME) as the best institutional arrangement for achieving following objectives: (i) lower tariffs; (ii) increased quality of services; (iii) continuous supply; (iv) fair return on investment to stimulate expansion of the infrastructure; and (v) universal access to services.
A substantial portion of the rules of the new model have now been implemented, however, only time will tell how successfully the goals have been achieved.

Studies indicate that between 2008 and 2009 demand for electric power is likely outstrip supply. It will thus be necessary to construct new power plants, including thermoelectric plants, to meet this growing demand. With public funding in short supply, attracting private investment to the Brazilian electricity sector, to underpin the Nation's economic and social development goals will be a major challenge for the present model.

18. Regulation of Financial Institutions and Leasing in Brazil

18.1. Financial Institutions

The legal bases for the regulation of Brazil's financial and banking sectors is Article 192 of the Federal Constitution; Law 4.595 of December 31, 1964, that sets rules governing financial institutions; and provisions set by Law 4.728 of July 14, 1965 which provides regulations for capital markets and their development; Law 6.385 of December 7, 1976, which provides for the securities market and establishes the Securities Commission (CVM); and Law 4.131 of September 3, 1962, which regulates foreign investment in Brazil and remittances of funds abroad. In addition to these laws, the monetary authorities issue normative rules, in the form of Resolutions of the National Monetary Council, and Circulars and Circular-Letters of the Central Bank.

The national financial system is comprised of: the National Monetary Council (CMN); the Central Bank of Brazil (BACEN); *Banco do Brasil S.A.*; *Banco Nacional do Desenvolvimento Econômico e Social* (BNDES), and other private and public financial institutions. The CMN is the highest monetary authority, responsible for establishing monetary and credit policies, including matters relating to foreign exchange, and regulation of the general operations of financial institutions.

BACEN, in turn, is responsible for complying and enforcing compliance with the normative rules issued by the CMN, and for implementing all obligations contained in law, including: exercising credit control in all its forms, control of foreign capital, effecting rediscounts and loan transactions to financial and banking institutions, acting as depository for the Government's gold and foreign currency reserves and special drawing rights, supervising all financial institutions, imposing all penalties prescribed by law, issuing operating licenses to financial institutions, and setting standards for instatement of officers office and managers of private financial institutions.

18.2. Principal Financial Institutions

18.2.1. Public Sector

There are in Brazil several commercial banks and financial institutions controlled by the Federal and State Governments, the primary purpose of which is to foster economic development, especially in the agriculture and industry sectors. In addition to performing commercial banking activities, state banks perform the

role of independent regional development agencies.

Among the banks controlled by the Brazilian Federal Government are *Banco do Brasil* and BNDES (the Federal Government main agent for investment policies) and other public sector development, commercial, and multiple-service banks. *Banco do Brasil* provides a full range of banking products to both public and private sector customers, and is Brazil's largest commercial bank. BNDES is primarily engaged in provision of medium and long-term financing (either directly or through other public and private sector financial institutions) to the private sector, mainly for pursuit of industrial activities. Other federal public-sector development, commercial and multiple-service banks include *Banco da Amazônia* and *Banco do Nordeste do Brasil S.A.*, in addition to certain commercial and multiple-service banks controlled by various State Governments.

18.2.2. Private Sector

The private financial sector includes commercial banks, multiple-service banks, investment, finance and credit companies, investment banks, brokerage firms, credit cooperatives, leasing companies, insurance companies, and others. The largest participants in Brazil's financial market are financial conglomerates involved in commercial banking, investment banking, financing, leasing, securities dealing, brokerage, and insurance activities. There are a variety of different types of private-sector financial institutions in Brazil, among them:

- **Multiple-Service Banks:** private or public financial institutions that conduct banking and ancillary transactions through commercial, investment and/or development, real estate credit, leasing and credit, financing and investment portfolios. Such transactions are subject to the same laws and regulations that are applicable to institutions that operate with each of the abovementioned portfolios (a development portfolio may only be transacted by a public bank). A Multiple-Service Bank must operate with least two such portfolios, including one commercial or investment portfolio, and must be incorporated as a Brazilian corporation (*Sociedade Anônima*). Institutions with commercial portfolios may raise funds by means of at sight deposits. Their corporate name must include the word "Banco" (CMN Resolution 2.099/94).

- **Commercial Banks:** private or public financial institutions primarily engaged in short and medium-term funding for commerce, industry, service-supplier companies, individuals, and third parties in general. Raising of funds by means of freely-transferable sight deposits is a typical activity of commercial banks, which may also raise funds by means of time deposits.

Such banks be organized as Brazilian corporations (S.A.) and their corporate name must include the word "Banco".

- **Investment Banks:** private banks specialized in temporary equity interest transactions and production financing, providing fixed and working capital, and management of third parties assets. They do not manage bank accounts, but raise funds by means of time deposits, on-lending of national or foreign funds, and sale of participation (*quotas*) in funds managed by them. Such banks must be organized as a Brazilian corporation and include the expression "Banco de Investimento" in their corporate name, pursuant to Resolution CMN nº 2.624/99 (CMN Resolution 2.099/94).

18.3. Main Requirements for Financial Institutions in Brazil

Law 4.595/64 and applicable normative regulations, provide for the operation of financial institutions in Brazil. Under such regulations, financial institutions are required:

- to obtain prior approval from the Central Bank of Brazil. In the case of foreign institutions they must obtain approval in the form of an Executive Branch Decree;

- if they own or real estate, to use such property exclusively for purposes directly related to their business. In the event that a real estate property is received in payment of a debt, the financial institution must dispose of such property within one year;

- to limit exposure to a single client to 25% of Reference Equity, in credit and leasing transactions and provision of guarantees, including credits arising from derivatives transactions;

- not to grant loans to any company holding over 10% of their capital stock, except in exceptional circumstances, subject to the prior approval of the Central Bank;

- not to grant loans to any company in which they hold more than 10% of their capital stock, except for acquisition of debt securities issued by their leasing subsidiaries;
- not to grant loans to their executive officers, members of their executive or advisory boards, statutory audit committees or other like bodies, or to their respective spouses or 2nd degree relatives.
- Private financial institutions (excepting investment companies) may only hold an equity interest in another company only with prior authorization of

the Central Bank of Brazil. Applications for such authorization must include justification, and authorization is granted on an express basis, excepting cases relating to underwriting of subscription guarantees, under general conditions established by the CMN;

18.4. Minimum Capitalization Standards

CMN Resolution 2.099 of August 17, 1994, introduced changes designed to bring Brazilian banking regulations into line with Basle Accords risk-weighted capital adequacy standards. It also set minimum capital requirements for financial institutions, based upon the types of activities exercised. Subsequently, supervening regulations instated more rigorous solvency standards which are generally, more stringent than the provisions of the Basle Accords.

CMN Resolution 2.099/94, set the following minimum capitalization indices:

I – Seventeen million five hundred thousand *reais* (R$ 17.500.000,00): commercial banks with Multiple-Service Bank commercial portfolios;
II – Twelve million five hundred thousand *reais* (R$ 12.500.000,00): investment banks, development banks, with corresponding Multiple-Service Bank portfolios and savings banks;
III – Seven million *reais* (R$ 7.000.000,00): credit, financing and investment companies, real estate credit companies; leasing companies and corresponding Multiple-Service Bank portfolios;
IV – Three million *reais* (R$ 3.000.000,00): mortgage companies;
V – One million five hundred thousand *reais* (R$ 1.500.000,00): securities brokerage companies and securities dealership companies managing investment funds regulated by the Central Bank (BACEN) (excepting mutual funds) or investment companies authorized to carry out matched transactions, firm commitment underwriting of securities for resale, margin account and/or swap transactions, through assumption of counterpart rights and liabilities;
VI – Five hundred and fifty thousand *reais* (R$ 550.000,00): securities brokerage companies and dealerships engaged in activities not mentioned in the previous item;
VII – Three hundred and fifty thousand *reais* (R$ 350.000,00): foreign exchange brokerage companies.

For institutions with a branch, principal place of business, or headquarters, and at least ninety percent (90%) of operating establishments outside of the States of Rio de Janeiro and/or São Paulo, the paid-up capital and net equity requirement is reduced by thirty percent (30%).

For institutions operating in the foreign-exchange market, the paid-up capital and net equity requirement demands an additional six million and five hundred thousand *reais* (R$ 6.500.000,00).

Aside from minimum capital and net equity requirements, financial institutions must maintain adjusted net equity values that are compatible with the degree of risk inherent to their asset structure, in accordance with risk classification standards established in CMN Resolution 2.099.

Lastly, under the terms of CMN Resolution 2.815/01, in the event of noncompliance with minimum capital and net equity criteria, the Central Bank may demand information as to measures adopted to normalize the situation. Should compliance with such criteria not be achieved, the financial institution is liable to penalties under the terms of Law 6.024, of March 13, 1974.

18.5. Foreign Investment in Brazilian Financial Institutions

Article 52 of the Temporary Constitutional Provisions Act of Brazil's Federal Constitution establishes that "…the installation of new branches of financial institutions domiciled abroad; and increases of percentual participation of individuals and legal entities resident or domiciled abroad in financial institutions with headquarters in Brazil" is forbidden except when such authorization "results from international agreements, from reciprocity or from the interest of the Brazilian Government". Such foreign investments are subject to registration with the Central Bank, in the same manner as foreign investments in other sectors of the economy, under the provisions of Law 4.131/62.

Furthermore, authorization for the establishment of foreign financial institutions in Brazil can only be granted by Executive Branch Decree, and such institutions are subject to the same limitations and restrictions applied to Brazilian banks currently (or prospectively) established in the host country of said foreign financial institutions.

18.6. Leasing

Leasing transactions are governed by Law 6.099, of September 12, 1974, as amended by Law 7.132 of October 26, 1983, and by CMN resolutions, especially Resolution 2.309, of August 28, 1996.

Brazilian leasing companies

Only leasing companies authorized to operate by the Central Bank may operate

in the Brazilian market. For foreign investment in leasing companies the same regulations apply as for financial institutions in general.

To be eligible to perform leasing transactions, a company must be organized as a corporation (*Sociedade Anônima*). It must meet minimum capital requirements set by the National Monetary Council. Such companies must limit their activities exclusively to leasing, and the corporate name must include the words *"Arrendamento Mercantil"*

Under current legislation in Brazil, the minimum term for financial leasing transactions varies between two and three years, depending on the usable life of the asset. The value of installments must be stipulated in Brazilian currency, and may be adjusted by floating interest rates, or changes in internal-market funding costs or, in the case of operations with funding originating abroad, the dollar (or other currency) exchange rate,.

The aforementioned regulations regarding minimum terms and adjustments to installments do not apply to operational leasing agreements. Operating lease transactions can only be operated by Multiple-Service Banks with a leasing portfolio, or by leasing companies, regulations for which are contained in CMN Resolution 2.309, of August 28, 1996.

International leasing

Resolution 1.969, of September 30, 1992, which provides for international leasing transactions, allows international lease operations for any asset produced abroad and which, under prevailing legislation, may be imported into Brazil.

International leasing may be authorized for minimum terms of two or three years, depending on the usable life of the asset.

Circular 3.025, of January 24, 2001 stipulates that, for purposes of registration of external leasing transactions, the Central Bank of Brazil considers the useable life of the asset informed by: (i) the manufacturer in the case of new assets/goods; (ii) by the manufacturer or a specialized Brazilian or foreign organization, in the case of used assets/goods; or (iii) by specialized company in the case of real estate property. When appraising the conditions of international leasing transactions, the Central Bank of Brazil applies criteria similar to those used for import financing transactions.

19. Electronic Commerce

19.1. General Aspects

Electronic commerce consists of the sale of products or provision of services over electronic systems such as the Internet and other computer networks. It is based upon electronic exchanges of information among three basic groups of participants: businesses, governments and individuals.

M-Commerce and T-Commerce stand among the most recent forms of electronic commerce. M-Commerce entails commercial operations performed through mobile devices (cellular phones, palmtops, among others), whereas T-Commerce is a form of E-Commerce conducted by means of digital television connected to the web, working as a communication device for the purchase and sale of any product, by touching a remote control.

M-Commerce transactions have considerable potential for expansion in Brazil. According to a survey conducted by E-Consulting, around ten million *reais* worth of goods were traded in 2003, and this is expected to rise to between R$ 30 million and R$ 50 million *reais* in 2004-005.[17] For T-Commerce, prospects are a mater of controversy. According to worldwide forecasts, 100% of the American and British homes will have digital TV in 2010. In the USA, all commercial broadcasting stations started digital broadcasting in 2002, and it is foreseen that, in 2006, all analog broadcasts will terminated. In Brazil, it is expected that within 10 years (counting as of selection of the technological standard to be adopted, be it American, European or Japanese) – more than 80% of all TV receivers in Brazil will have been replaced by digital sets.[18]

Electronic commerce in Brazil is currently developing rapidly, rising from approximately 40% of total Internet usage in 2003, to its current level of around 74.5% of the total e-commerce transactions throughout Latin America. Estimates predict that the Brazilian e-commerce market will grow exponentially in the next few years, with increasing use of business-to-business (B2B) and business-to-consumers (B2C) transactions (despite the bursting of the dot com bubble in 2000-2001). Indeed, since 2001, electronic retail trade has soared 355% and growth is expected to be of the order of R$ 3.9 billion in 2006. [19]

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[17] Ministry of Science and Technology, in <http://www.mct.gov.br/Sepin/Imprensa/Noticias_4/Comercio_4.htm,>, February, 2006.

[18] "Brazilian Chamber of Electronic Commerce "<http://www.abert.org.br/D_mostra_clipping.cfm?noticia=27430>, February, 2006.

[19] "Brazilian Chamber of Electronic Commerce "< http://www.camara-e.net/interna.asp?tipo=1&valor=3523>, February, 2006.

To respond to developments in electronic commerce, in May 2001 the Brazilian Electronic Commerce Chamber (*Câmara Brasileira de Comércio Eletrônico*) was founded, with the aim of promoting, representing and defending the collective rights of companies, entities and associates engaged in e-commence transactions.

In response to this trend, governmental electronic services have assumed increasing importance, and have entailed considerable investment and planning. In October 2000, the Electronic Commerce Executive Committee was founded, for purpose of drawing up guidelines, coordinating and promoting activities for implementation of Electronic Government services, for provision of services and information to citizens.

Electronic Government Service (E-Gov) entails the use of information technology for use in government-to-government (G2G), government-to-business (G2B), and government-to-citizens (G2C) applications, and ushers in important changes in relations between government and society. Implementation of E-Gov systems demands investment in technological infrastructure, so as to provide the minimum necessary security to guarantee citizens privacy and promote transparency of Government.

At present, there are more than 3,500 Brazilian governmental websites. Examples of online programs offered in these sites are: federal electronic auctions and public tenders; the *Rede Governo* website which offers around 900 services and over 5000 items of information), *Portal Minas* which houses the websites of 133 state government bodies; Dutch auctions on the website of the Municipality of São Bernardo do Campo; and *Comprasnet*.[20]

19.2. Legal Aspects

Currently, there is no specific law in Brazil controlling e-commerce, and currently industry experts and Government authorities are discussing the scope of legislation required. They concur, however, on the need for specific legislation to ensure the legality of business carried out in a virtual environment.

At present, several bills providing for electronic commerce are under review Congress. These include Bill 1.589/99 (that is being examined jointly with Bill 1.483/99), and Bill 3.303/00 (that is being examined jointly with Bill 3.016/2000) that are currently before the Chamber of Deputies, and Bills 672/99 and 4.906/01, introduced by the Federal Senate.

[20] Brazilian Chamber of Electronic Commerce (www.camara-e.net.)

Bill 1.589/99, drafted by the Special Committee on Computer Law of the São Paulo chapter of the Brazilian Bar Association, takes its inspiration from a European Community Draft Directive (1999/93/CE) and proposals set out in the Model Law on Electronic Commerce (1996) by the United Nations Commission on International Trade Law (UNCITRAL). Bill 1.589/99, in short, addresses the following topics: (i) dispensation of special prior authorization for displaying goods or services in an electronic environment; (ii) requirement of proper identification of the seller, the host, the access provider, and the security systems used for recording the electronic agreement; (iii) rules of utilization of private information; (iv) security and certification in transactions; (v) liability of the intermediary, carriers, and hosts of information; (vi) applicability of consumer protection laws to consumers; (vii) legal validity of electronic signatures and electronic documents; (viii) publicly-issued and privately-issued electronic certificates; (ix) liability of notaries public in connection with electronic certification; (x) electronic records; (xi) powers of the courts to authorize, regulate and supervise the practice of business certification; (xii) powers of the Ministry of Science and Technology to regulate technical features of certification; and (xiii) administrative and criminal penalties.

Bill 3.303/00 proposes regulations for operation and use of the Internet in Brazil, and proposes rules on issues such as: (i) classification of the service provider as a seller of a value-added service to the telecommunication service; (ii) creation of security mechanisms, users databases before the services providers, and proper means for identifying illegal activities on the internet; (iii) registration and coordination of domain names by the Brazil Internet Steering Committee (*Comitê Gestor da Internet do Brasil*); and (iv) creation of the Internet Ethics Council (*Conselho de Ética da Internet*).

Bill 672/99 was introduced just a few months after Bill 1.589/99, and features nearly all of the provisions of the proposed in the UNICITRAL Model Law. More concise than the former, it deals with: (i) legal effect of data messages; (ii) equal validity of electronic and printed messages; (iii) equal validity of authentication methods and signatures; (iv) authentication of information in the electronic environment; (v) obligations related to the retaining of electronic messages; (vi) lawfulness of binding statements and contracts made by electronic messages; (vii) principles applicable to identification of the sender and the addressee, and to determining time and venue of messages.

Finally, Bill 4.906/01 introduces rules to govern electronic commerce within Brazil, in view of the need to standardize rules relating to the electronic commerce at the international level, setting out provisions for application of legal validity to electronic messages and electronic messages, including execution and validity of contracts signed within a virtual environment.

19.3. Brazilian Laws on Virtual Transactions

In view of the lack of specific legislation on virtual transactions, electronic commerce is governed by existing rules of law applicable to traditional commerce, either by direct application or by analogy. Relevant parts of the Brazilian Law for Introduction of the (New) Civil Code also apply, in view of the international nature of electronic commerce.

Rules applicable to contracts

Just as with any other legally binding commitment (applicability of which requires that a capable party has entered into a legal obligation, with a lawful objective, through a format recognized in law) under the Brazilian Civil Code legal obligations assumed in an electronic environment are also valid, provided such requirements are met.

Consequently, electronic contracting between parties in direct contact is considered to have been effected when proposals and acceptance are effected immediately (on-line), in which case article 428, I, of the new Civil Code shall apply. Conversely, electronic contracting between parties may be deemed to have been effected when proposal and acceptance are effected by e-mail between parties not directly connected online, in which case article 434 of the new Civil Code shall apply.

Applicable law and jurisdiction

Under article 435 of the new Brazilian Civil Code, contracts are deemed to go into effect into at the place where the proposal is presented. Article 9 of the Law for Introduction to the Civil Code states that obligations arising out of a contract shall be governed by the laws of the country in which it was entered into, and that said obligations shall be deemed entered into in the domicile of the proponent. Thus, an electronic commercial agreement between parties located in different countries shall be governed according to the laws of the country of residence of proponent. In other words, if an offer is made by a company or individual resident abroad, and is accepted by a company or individual resident in Brazil, the governing law shall be that of the foreign country and, conversely, if the offer is made by a company or individual resident in Brazil, and is accepted by a company or individual resident abroad, the governing law shall be the Brazilian law.

The matter of jurisdiction for resolve disputes arising from electronic contracts

has not been addressed by any law in Brazil. The absence of boundaries or physical references on Internet trade makes it difficult to identify the competent court for settlement of such disputes. Bill 672/99 adopts the basic provisions of the UNCITRAL Model Law which, with regard to jurisdiction, proposes that the place of remittance or receipt of an electronic message shall be deemed physical location of the parties, unless (i) the addresser and addressee have no physical venue which (for purposes of jurisdiction) can be considered their domicile, or (ii) the contracting parties have more than one address, in which case the venue most closely related to the transaction shall be considered.

General international jurisdiction of Brazilian courts, when a contract is entered into by parties located in different countries, is governed by articles 88, 89 and 90 of the Code of Civil Procedure, which states that the Brazilian courts shall be competent when: (i) the defendant, regardless of nationality, is domiciled in Brazil (including corporate entities that maintain branches, affiliates or agencies in Brazil), (ii) the obligation is to be performed in Brazil, and (iii) the lawsuit arises in connection with an event that occurred or an act performed in Brazil.

Thus, electronic contracts executed between two companies located in different countries, where proponent has headquarters in a foreign country and does not have offices or branches in Brazil, shall be governed by the law of the foreign country. If, on the other hand, the obligation arising out of the contract is to be performed in Brazil, Brazilian courts shall be competent to adjudicate the dispute.

Rules on documentary evidence

Under the Brazilian Code of Civil Procedure, all morally and legally acceptable means may be pursued to uphold the truth. Under article 225 of the new Civil Code, any electronic reproduction of facts or things e acceptable as evidence, provided the other party does not claim a lack of accuracy. Therefore, should the other party dispute the veracity of electronic evidence, expert examination of that said evidence may be required. Nonetheless, no specific legal rules govern matters relating to alteration of content of electronic documents or uncertainty of authorship.

Responsibility of suppliers of goods or services

Liability, in connection with goods and services sold by electronic means, is subject to the same rules as other forms of commerce.

Electronic transactions involving sales to consumers are subject to the Consumer Protection Code (Law 8.078/90). The Code applies to all transactions, involving a consumer (individual or corporate entity that acquires products or services as end user) or the supplier of goods or services (individual, corporate entity or unincorporated entity, whether national or foreign, engaged in manufacturing, assembly, creation, construction, transformation, import, export, distribution or trade of products, or provision of services) in a business transaction.

Provisions of the Consumer Protection Code apply to consumer transactions conducted over the Internet, especially in connection with: (i) the right to information about the seller and features of the offered good or service; (ii) protection against unfair business practices and misleading advertising; (iii) databases and consumer records; (iv) the right to return a purchase, and (v) the binding nature of the offer.

Provisions of the Consumer Protection Code do not apply to business-to-business transactions, whether effected through the Internet or by electronic mail (electronic data interchange), given that the company is not considered the end consumer.

Under article 9 paragraph 2nd of the Law for Introduction of the Civil Code, obligations arising in connection with a contract shall be deemed to arise in the domicile of the proponent, and this applies also to cross-border consumer transactions. Thus, in the event that the proponent company is domiciled abroad and has no branches or offices in Brazil, the consumer is not be entitled to protection under the Brazilian Consumer Protection Code, and the governing law shall be that of the proponent's venue.

Some controversy still surrounds this matter, as there have been cases on international consumer transactions where the supplier has a branch in Brazil, and claims based on the Brazilian Consumer Protection Code have been filed against the said branch, in view of the joint and several liability applied to consumer transactions.

Spam

Sending unsolicited e-mails is forbidden under the Brazilian Consumer Protection Code, which establishes that the supplier may only deliver or send products upon request. Suppliers that send spams are liable to penalties under articles 6-V, and 84, of the Brazilian Consumer Protection Code. Presently, bills addressing the problem of spam are under discussion in Congress: Bills 21/04 and 36/04 (to be examined jointly with Bill 367/03), Bills 2.766/03 and 757/03 (of spamming by cell telephone) and Bill 2.186/03 (to be examined jointly with Bills 1.483/99,

2.423/00, 3.731/04, 3.872/04 and 2.423/03).

19.4. Tax Issues Relating to Electronic Commerce

Electronic commerce implies a variety of transactions with tax implications that are a matter of worldwide concern.

The Tax on Circulation of Goods and Services (ICMS) is applicable to goods supplied by means of electronic commerce, even where the products are imported, under the provisions of article 155, § 2nd, IX, of the Federal Constitution.

With respect to software products, the Supreme Federal Court (STF) ruled that softwares produced for sales to the general public (off-the-shelf) are subject to ICMS. In the case of custom software developed to client specifications, the appropriate tax is ISSQN (a services tax).

Wit respect to provision of Internet access (though some controversy exists as to whether or not ICMS or ISSQN should be applied) recent court rulings have stated that ICMS does not apply to Internet access services, which are not deemed a communication service under Supreme Federal Court (STF) resolution 456.650/PR, 6/24/2003.[21] The matter is of some importance, in view of rates that vary by as much as 20%: for electronic transactions ICMS may be as high as 25%, whereas the maximum ISSQN rate is 5%.

The Federal Constitution grants to Municipalities powers to levy taxes on certain services (ISSQN) outside the scope of ICMS. However, Internet access services were not listed in Enabling Law (LC) 116/03 (in effect since August 1, 2003), makes specifies services subject to ISSQN. Thus, besides not being liable for ICMS, Internet access services are not deemed taxable events for purposes of ISSQN.

Bill 3.303, currently under review in the Coordination Standing Committee of the Chamber of Deputies, features classification of Internet providers as service providers, under the terms of the Consumer Protection Code.

19.5. Intellectual Property

Provisions of the Copyright Law (Law 9.610, of February 19, 1998) and of

[21] Confirmed by subsequent decisions (MC 10388/SP, Justice Luiz Fux, DJ 20/02/06, Resp 736607/PR, Justice Francisco Falcão, j. 25/10/2005; Resp 511390/MG, Justice Luiz Fux, j. 19/05/2005).

the Software Law (Law 9.609, of February 19, 1998) apply to authorship of works traded in the electronic commerce environment (texts, music, drawing, photographs, computer programs, etc). At least four types of intellectual property may apply to media currently used for electronic commerce: (i) computer programs, (ii) multimedia works, (iii) websites, and (iv) databases.

Computer programs are protected under the Software Law and Copyright Law. Multimedia works, which encompasses several forms of expression, are also protected under Copyright Law, through provisions relating specifically to each form of expression. Websites are also protected under said law, in that the law protects each component work of authorship (graphics, sounds, computer programs, etc.). Electronic databases are protected under the Copyright Law when, by virtue of the disposition, selection or format of its contents, they constitute a work of authorship; however, when such requirements they are not protected. Whether or not extra protection is needed to cover other forms of creative work incorporated into websites (e.g, structure and business methods), aside from database contents (data considered *per se*) have been the subject of discussions among specialists, and have not yet been adequately provide for in law in Brazil.

19.6. Domain Names

Each virtual establishment is identified by a domain name, which identifies the venue where the consumer can order a product or a service. By delegation of the Internet Steering Committee(*Comitê Gestor Internet do Brasil*), since December 2005, registration of domain names in Brazil has been the responsibility of Dot BR Information and Coordination Center (*Núcleo de Informação e Coordenação do Ponto Br* - NIC.br), subject to rules established by Committee Resolutions 01/2005 and 02/2005.

These two resolutions provide that domain names shall be granted on a first-come-first-serve basis (provided that the applicant meets the relevant requirements). Unacceptable domain names include those containing swear words, names on the reserved lists of Steering Committee and NIC.br, any name which might be misleading, or well-known trademarks marks (except when requested by the lawful owner). [22]

Domain names must respect third-party industrial property rights. Thus the holder of a trademark registered with INPI may bar its use by third parties

[22] According to the Steering Committee, "intellectual property and domain name shall be treated differently" (in <http://www.cg.org.br/faq/problemas-03.htm>).

as a domain name. Unlike trademark registration before INPI, domain name registration at NIC.br does not imply intellectual property rights. The purpose of registration of domain names is merely to avoid duplication and to enable the technical procedures for allowing accessibility over the Internet.

Registration of a domain may be canceled, in the event of infringement of rules established by the Steering Committee, or by a court order (Item 5 of the Regulation for Internet Domain Names in Brazil). There have been various lawsuits seeking the cancellation, enjoinment, or suspension of a domain name, or assignment thereof to a plaintiff along with prohibition of use by the defendant. In most such lawsuits, when sufficient grounds were demonstrated, plaintiffs have been granted provisional remedies. Neither NIC.br nor the Steering Committee offers the public an administrative procedure for reviewing or requesting cancellation of domain names that have been granted.

19.7. Electronic Documents as Evidence

19.7.1. General Theory of Evidence

Evidence is a means whereby litigants seek to convince a Judge of the justness of their claims. Judgments in most litigation depend upon clarification of questions of fact. Generally, the court's determination of the facts depends upon the evidence. Theoretically, the probability of obtaining a favorable decision is proportional to the strength of evidence presented.

The purpose of evidence is to convince the Judge. Article 128 of the Code of Civil Procedure Rulings states that rulings are based upon evidence presented to the court. A judge's decision is based upon the truth reflected in the record, not natural truth. This limitation is justified in that it reduces scope for arbitrary decisions.

During the fact-finding phase, a judge must be extremely cautious while seeking ample access to all the necessary means for appraising and examining all evidence brought to his attention. Unwarranted dismissal of evidence by a judge constitutes curtailment of the right to defense (article 5, LV, of the Federal Constitution). A Judge, based upon criteria established in Law (rational persuasion), must attempt to reconstruct the facts on record to determine how they occurred. He is free to examine the facts. Such freedom can not, naturally, extend to judicial arbitrariness.

Article 332 of the Code of Civil Procedure does not specifically list types of

evidence, but rather accepts "all legal and morally legitimate means, even if not specified herein." It even accepts, "atypical" or "un-named" types of evidence, but repudiates "illegitimate" evidence, i.e., which violates Procedural Law, having been illicitly or improperly obtained.

Documentary evidence is that which represents and serves to reproduce a manifestation of thought. Since events and ideas are held in court to be "facts", a document is the representation of a fact and, as such, a document has no natural existence of its own, but forms a part of an action, and is thus a form or medium.

Documents may be written or non-written, public or private. Some scholars further classify documents according to authenticity, origin, signature, form of preparation (direct, indirect; written or graphic), content (narrative or constructive), form (formal or otherwise) etc.. A document is *"ad solemnitatem"*, when indispensable to the very substance (nature, form and constitution) of the act; and *"ad probationem"* when it constitutes mere evidence of an act or of its effects. Public documents, if signed by a public official (authority) are presumed to be authentic (*juris tantum*) excepting when evidence exists as to their (material or ideological) falsity.

With respect to private documents, the question of their value as evidence is controversial, bearing in mind the diversity of forms in which they may be presented. For example, in the case of a private document that has been written and signed, or merely signed, there is a legal presumption that any declarations therein contained are true. According to article 388, I, of the Code of Civil Procedure, a private document ceases to merit credence when the signature is contested and when its veracity can not be attested. To refute the veracity of any public or private document, the interested party need only argue that it is false, (*"principaliter"* or *"incidenter tantum"*) with the aim of having it declared so in court. A private document must necessarily be written by one of the parties, or by another, or it may even be unsigned. Under traditional doctrine, the author of a private document is he who signed it, such signature being unnecessary only in cases where such documents are not usually signed, i.e., commercial records.

It is against the background of these arguments that the question of electronic documents and their use as evidence is discussed. The use of electronic media in the commission of juridical acts is a reflection of the progressive replacement of writing and printing by electronic impulses or transmissions. The signature of the author does not necessarily accompany the document, in view of its replacement with individual passwords and codes.

19.7.2. Classification of Electronic Documents

Legal doctrine has had to abandon traditional notions of documentary evidence, to take into account a new form of expression which is neither oral, nor written, but rather digital [23]. All documents serve as a declaration, or representation of a present or past event. The same applies to digital documents, the only difference being that the sensorial perception of the receiver/observer is not immediate. Moreover, to put said representation into an accessible and intelligible form, an appropriate (intermediary) electronic device (hardware) is needed. Within a broad classification of documents, digital documents are categorized as indirectly representative documents. Thus the category of digital documents encompasses all and any information that, when processed through the appropriate electronic device, is capable of transmitting a representation of a present or passed event.

19.7.3. Documentary Media

In view of the immaterial nature of electronic documents, their content must necessarily rest upon a medium (i.e., a floppy disk, magnetic tape, compact disk, etc.). This invokes issues relating to legal standards for preservation of documents.

Legal doctrine, in principle, regards the magnetic medium (representative) as the original of the document [24], rather than the information contained therein in digital form. This position is now considered outmoded, and the medium is today regarded merely as the means of storage of the document, the importance whereof resides solely in its content.

In Western European countries in the 1980s [25], and especially in Belgium and France, any transcription of the content of an electronic document onto paper was always considered a copy. Nonetheless, this does not imply that copies (meaning in this context print-outs of an electronic document onto paper) could not be produced in court. An interpretation provided under French legislation (art. 1.348, line "a", of the French Civil Code) allows the use of "a faithful and durable copy", provided the original is either nonexistent or irrecoverable.

Since the 1980s, the doctrinal position of European legislation has undergone considerable change. No longer is the medium regarded as the original of a

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[23] Graziosi, Andrea, "Premesse ad una teoria probatoria del documento informático", in Rivista Trimestrale di Diritto e Procedura Civile, Anno LII, n. 2, June/98, Milan, Giuffrè, p. 487.

[24] Cf. Amory, Bernard e Poullet, Yves, "Le droit de la preuve face a l'informatique et à la télématique", in Revue Internationale de Droit Comparé, n. 2, April/June 1.985, pp. 340/341.

[25] Amory, Bernard e Poullet, Yves, op. cit., p. 341.

document. Directive 97/7 of the European Parliament for Distance Selling provides rules for contracts between consumers and suppliers using communications media and without physical presence of either of the parties[26] . Article 5 of this Directive, foreseeing the insecurity posed by data stored on magnetic media, and with the aim of affording protection to contracting parties, provides that declarations in distance selling contracts should be confirmed in writing or on another durable medium. This new EC legislation distils a doctrine with regard to means for preserving electronic documents. In 1998, the European Union's Prospective Uniform Commercial Code (UCC), in article 2B, uses the term "record" rather than "writing" since, for the purposes of the UCC, "record" is equivalent to information on a tangible medium or filed on electronic media, or in any other intangible recoverable form[27] .

19.7.3.1. Types of Evidence

Analysis of the value of an electronic document as evidence in court rests upon three principal aspects: evidence of the existence of the document; evidence of provenience of declarations contained therein; and evidence of the content of the document.

19.7.3.2. Evidence of the Existence of the Document

If, on the one hand, telematics have the advantage of being swift, their drawback is their ephemeral nature. This may raise difficulties for presentation in court of proof of the very existence of documentary evidence. Thus, under archaic features of the Brazilian legal system (such as article 333, I and II of the Code of Civil Procedure) the burden of proof of the existence of documentary evidence lies with the party claiming its existence.

As a rule, Brazilian law, provides great freedom to use various forms of evidence, whether or not provided for in law (article 332, II of the Code of Civil Procedure). However, exceptions to this rule include certain juridical acts (*e.g.*, contracts with a value higher than established by law).

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[26] Silva, Ricardo Barretto Ferreira da and Paulino, Valéria in "Relevant issues in conducting commerce on the Internet", paper presented at the 10th Annual Conference on Legal Aspects of Doing Business in Latin America, 1.998, pp.10/11.

[27] Selected Provisions and Comments from Proposed Article 2B – September, 1997, p. 14, apud Silva, Ricardo Barretto Ferreira da and Paulino, Valéria, op. cit., p. 15. Other new EU directives on the issue: Directive 21/2002 – institutes a common network and services framework for electronic communications; Directive 65/2002 provides for distance selling and banking services; Directive 58/2002 - preservation of privacy in the electronic communications sector.

Italian doctrine, in practice and for purposes of evidence, holds that a declarative document (a category that encompasses electronic documents) is equivalent to a private document under the terms of article 2.702 of the Italian Civil Code[28] . This article also provides hypotheses in which a private document acquires the status of evidence.

Common law systems acknowledge two basic rules that could pose obstacles to proof of the existence of an electronic document, namely, the hearsay rule, and the best evidence rule[29] . Examination of these two rules provides a general view of the treatment of these issues in countries such as England and the United States.

As a consequence of the hearsay rule, testimony of a witness (one of the most important forms of evidence under Anglo-Saxon legal systems) is allowed only if he has direct and personal knowledge of the facts of his testimony. When this rule is applied to written documents, it is held that a document can not be considered a trustworthy source of evidence, if its author (issuer) is not present to testify to it. Since when the issue is an electronic document, the original information may involve various people, then clearly the hearsay rule poses an obstacle to proof of the existence of the document.

According to the best evidence rule, in principle, a document is only valid as evidence if presented in its original version. In its original form, an electronic document requires support of a digital electronic device in order to materialize. Thus, in principle, the best evidence rule poses an obstacle to the use of computer documents as evidence.

Under Anglo-Saxon law there are, nonetheless, numerous exceptions to the hearsay rule and best evidence rule that reduce the difficulty of presenting electronic documents as evidence. The British Civil Evidence Act of 1968 and the United States Business Records Exception are two such exceptions.

19.7.3.3. Provenience of Declarations and Electronic Signatures

Another relevant theme arises when doubt exists as to the identity of the declarant. This theme is closely linked to the issue of electronic signatures, also discussed herein. Clearly, a name simply typed at the bottom of a document does not have the same value as a conventional signature. A conventional

[28] Graziosi, Andrea, op. cit., p. 501.
[29] Amory, Bernard e Poullet, Yves, op. cit., p. 335.

signature has features (and reflects the handwriting of the signatory) that inhibit or preclude forgery.

Commercial practice has come up with some solutions to these problems. A secret user code of access to the electronic system provides one means of identification often used in electronic transactions. A criticism of this means of identification is that it does not enable physical identification of the individual making the declaration. To this end, it is necessary that techniques for verifying the physical characteristics of the individual at a distance, such as finger-printing or voice recognition, be developed.

Advances in IT have been accompanied by modern techniques for identifying the "author" of an electronic document. What are commonly referred to today as "electronic signatures" are in effect special computerized procedures for controlling the provenance of electronic documents. This entails addition of a cryptographic system, the value of which as evidence is comparable to a traditional signature[30] . This is how it works: the user of an electronic system is provided with a pair of asymmetric keys, one of which is private and the other public. Each is made up of an alphanumeric code, the difference being that the code of the private key is secret and known only to the user. The code corresponding to the other key is in the public domain and is part of a list accessible to other users. The two keys are reciprocally compatible and identifiable, which enables their use as electronic signatures[31] .

For the purposes of evidence, electronic signatures are quite different to conventional signatures, since the latter constitute documentary proof, thereby enabling a judge to move on to direct examination of the evidence. In the case of a digital signature, other necessary steps include verification of the provenance the declaration which depends upon the availability of an electronic device, so that the above-described method of control can be verified. Thus, an electronic signature is not directly representative evidence. This results in a curious conundrum: evidence of a declaration in an electronic document is documental, whereas proof of provenience is *constituenda*[32] .

19.7.3.4. Evidence of the Content of a Document

The crucial issue relates to credibility of the content of documents. As is well known, electronic documents can be easily manipulated without leaving any trace.

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30 Grazuisi, op. cit., "l'apposizione della firma digitale integra un atto di volontá, giuridicamente rilevante, di assunzione di paternitá della dichiarazione cui si riferisce".

31 Graziosi, Andrea, op. cit., p. 507.

32 Graziosi, Andrea, op. cit., p. 510.

There are two types of risk to which electronic documents are subject: errors and fraud. Errors may be of various types: human, technical or external. A major portion of human errors result from flaws in manipulation of the data. External errors are generally due to environmental factors (*e.g.*, temperature, humidity). Technical errors are usually a result of software flaws, or failure of the electronic device on which they are being run. Fraud is different from errors, in that it is maliciously intentional.

There is no easy solution to such problems. Proposals for typifying new crimes and stiffer sentences, have been suggested. In Brazil, an example of this is Bill 84/99 (proposed by Congressman Luiz Piauhylino) which has now been approved in the Chamber of Deputies, and its counterpart Bill 89/03 currently before the Federal Senate, and Bill 407/2005 that provides penalties for 'hackers' and 'crackers'.

19.7.4. Legislative Responses

The British Civil Evidence Act of 1968 was the first law to provide for electronic evidence and its validity in courts. It foresaw certification of a document, to be signed by the person responsible, attesting to the veracity of its content, for use in court.

In the United States, the Uniform Business Records as Evidence Act and the Uniform Rules of Evidence, both of which date from the 1960s, contain exceptions to hearsay and best evidence rules, under which electronic evidence is admissible in cases in which the content is of a commercial nature. Moreover, under the Business Records Exception, documents of electronic origin are admissible without accompanying testimony of the author.
In France, a law of July 12, 1980, ratified the case-law understanding that not only "written" documents were acceptable as evidence.

One of the most complete and modern approaches to the issue was the Italian Law 59 of 1997, which provided detailed rules on conditions of admissibility of an electronic document as evidence, and express provisions on cryptographic signatures, digital copies, etc.

In Brazil, examples of recent regulations characterized by advances in relation to electronic documents include: Law 9.800, of May 26, 1999, which authorizes parties to submit electronic documents and send petitions for certain procedural purposes by fax; Federal Revenue Secretariat Normative Instruction 156 of December 22, 1999, that rules on electronic documents used in relations between the tax authorities and taxpayers; Law 10.259/2001, article 8 § 2 of which

authorizes the courts to serve summonses and receive petitions by electronic means; STJ Procedural Amendment 6, which authorizes parties to incorporate into their appeals, a high-court sentence published on the internet, provided it is accompanied by a declaration from their lawyer assuming responsibility for the authenticity thereof.

The following Bills of Law are under discussion in the Brazilian legislature: Enabling Bill (PLC) 5.828/2001 (as counterpart to Bill 71/2002 in the Senate) which "provides for computerized legal records and other measures", sponsored by the Association of Federal Judges of Brazil; Bill 5.732/2005 and Bill 1692/2003 on the use of e-mail; and Bill 7.316/2002 on the use of electronic signatures.

The Brazilian courts, for their part, have been adapting to such new legislative standards. In July 2003, the Regional Federal Court (TRF) of the 4th region, adopted electronic records in four specialized federal courts, including paperless records, and distance dispatch of petitions and documents by e-mail. Certain Courts, however, still discourage the use of electronic documents. The Superior Court of Justice (STJ), for example, acknowledges the validity of electronic documents only: (i) if the electronic file has been correctly received by the Court, and (ii) if the originals were duly filed in accordance with the terms of Law 9.800/99.[33]

Decree 3.505, of June 13, 2000, that instituted an Information Security Policy for bodies of the Federal Public Administration, issued the first standards for electronic communications. Subsequently, Decree 3.587 of September 5, 2000 (revoked by article 6 of Decree 3.996 of October 31, 2001) set standards for the Key Public Infrastructure for the Federal Executive Branch (ICP-Gov), with the aim of creating and using digital signatures through asymmetric cryptography.

In the private sphere, Executive Order (MP) 2.200-2, of August 24, 2001, instituted a Key Public Infrastructure (ICP-Brasil) to ensure the authenticity, integrity, and legal validity of documents in electronic formats, support applications, applications that use digital certification, and the conduct of secure electronic transactions.

19.7.4.1. Executive Order (MP) 2.200-2 and Other Bills

Under the terms of Executive Order (MP) 2.200-2, of August 24, 2001, ICP-Brasil is

[33] Resp 594.352/SP, Resp 594.352/SP, Resp. n.º 525.067/ES, j. 19.02.2004; to the contrary: Ordinary Appeal to Writ opf Mandamus nº 11.960/RJ - the Superior Court of Justice (STJ) deliberated and accepted the juridical validity of electronic documents (procedural information) obtained by a party on the court website.

an organization made up of a Policy Steering Committee (linked to the Presidential Staff - *Casa Civil* - of the Presidency of the Republic) and certification authorities (i.e., entities responsible for issuing electronic certificates, and for establishing the identities of persons and organizations requesting certification).

Although Executive Order (MP) 2.200-2/01 does not require digital certification for the validation of electronic documents, in article 10, §1 it attributes "presumption of relative authenticity for digital signatures on documents electronically certified by a Certification Authority (AC) accredited by the ICP-Brasil Steering Committee".

If the parties choose to use another Certification Authority (not accredited by the Steering Committee) to authenticate their electronic documents, in order to ensure their juridical validity before third parties, article 10 § 2 of the aforementioned Executive Order recommends that there be a contract stipulating that the parties accept that AC for authentication purposes. This procedure is important to ensure the juridical validity of a document if, for example, it is needed as evidence in court.

This Executive Order was issued three times, before assuming its present form as MP 2.200-2/2001. It overrode various Bills circulating in the National Congress. Such Bills addressed the same issues, and some were even more comprehensive. Bill 4.906/2001, for example, aside from providing for digital signatures and electronic certification, deals in a more comprehensive manner with relationships and responsibilities stemming from Electronic Commerce.

In the same context, Bill 7316/2002 (proposed by the Secretariat for Parliamentary Affairs of the Presidency of the Republic), inspired by European Parliament Directive 1999/93/EC, fills gaps in Executive Order (MP) 2.200, with provisions on civil liability of certified service providers, procedures to be observed in the event of failure of a certificating authority, and the juridical value of certificates issued abroad.

The aforementioned Bill distinguishes between the categories "electronic signatures" and "qualified electronic signatures" (the latter having the same juridical and evidence value as a traditional signature, provided requirements of the standard are met), and between "certification" and "qualified certification".

19.7.5. Conclusions

Brazilian law has sought to introduce adequate instruments for settling new issues stemming from the rapid adoption of new technologies. Executive Order

(MP) 2.200, provided standards for two aspects of juridical and evidence value of electronic signatures. On the one hand, advanced electronic signatures can produce the same effects as conventional signatures; on the other, the juridical and evidence value of electronic signatures can not be refuted, provided that the parties have previously agreed to accept their validity. In the latter case, the validity of an electronic signature derives from the express will of the contracting parties.

Rules are still lacking for many aspects relating to electronic documents. Nonetheless, the initial legislative and jurisprudential inertia seems to have been overcome, and this in itself must be regarded as significant progress.

There is truth in the saying that Law is always left behind by advances of Science. This justifies the approach whereby legislative regulations on issues of a scientific nature must always be sufficiently generic to encompass the greatest possible number of hypotheses while leaving space for further developments.

An electronic document is thus fully admissible as evidence (the rule established in article 332 of the Brazilian Code of Civil Procedure being no exception), provided that guarantees of individual freedom, foreseen in the Federal Constitution, and the principles of public order are observed. Furthermore, through the Key Public Infrastructure (ICP-Brasil) initiative, instituted under Executive Order (MP) 2.200-2/01, Brazilian legislation has, to a great degree, adopted a system capable of providing security and validity to operations conducted by electronic means.

20. Information Technology

20.1. National Information Technology Policy

Brazil's first law on information technology policies, Law 7.232/84, dates back to 1984.

With the aim of enhancing national capabilities in this field, and leveraging social, economic, and cultural development, this law authorized the Executive Branch to impose restrictions on imports, production, operation, and trade in IT goods and services and provided the basis for tax and financial incentives for Brazilian companies.

This set the stage for a market reserve, monitoring of imports of IT goods and services, governmental intervention in the manufacturing of IT goods, and exclusive privileges for Brazilian companies, i.e., those permanently, effectively, and unconditionally under control of individuals resident and domiciled in Brazil.

Sweeping changes were introduced with the enactment of Laws 8.191 and 8.248 in 1991, and further amendments introduced in 2001 and 2004. Constitutional Amendment 6/95 abolished the market reserve and privileges reserved for Brazilian companies, and established the framework for the current Brazilian IT policy.

The aim of this policy is to foster international competitiveness of Brazil's IT sector, by steering incentives toward companies in the sector, regardless of whether they are Brazilian or foreign owned, and to promote the manufacture of high-technology goods with high levels of Brazilian value-added content. Such companies are expected to meet rules pertaining to the Basic Production Process (PPB), to meet quality production standards, and to invest in Research and Development (R&D) in IT related activities.

Primary responsibility for Brazil's IT policy rests with the Ministry of Science and Technology (MCT) and its respective Secretariats, and with the Ministries of Finance, and of Development, Industry and Foreign Trade (MDIC).

Laws 10.176/01 and 11.077/04, and Decrees 3.800/01 and 4.401/02 establish rules governing incentives for the IT sector. The main such incentives are (i) simplified requirements for inclusion of new product lines under the incentive program; (ii) tax incentives for companies that develop or produce information-technology and automation-related services or goods, and requirements for companies seeking

such benefits; (iii) incentives for R&D in Brazil's North (Amazon Development Agency - ADA, the successor of SUDAM), Northeast (Northeast Development Agency– ADENE, the successor of SUDENE) and Central-West regions; and (iv) exemption of small and medium-size companies from the requirement of making investment in third-party R&D projects.

20.2. Incentives for Development and Local Production of It Goods and Services

Essentially, incentives for companies engaged in local production of IT goods and services are as follows:

- preference in procurement by agencies and entities of the Federal Public Administration, government foundations, and other organizations under the direct or indirect Federal Government control, other conditions (delivery deadlines, support services, quality, compliance with specifications, compatibility, performance, and price) being equal;
- accelerated depreciation of new machines, equipment, and instruments to be used in the manufacturing process; and
- Tax on Manufactured Products (IPI) rebates.

There follows the schedule for IPI rebates follows:

- 95% from January 1, 2001 through December 31, 2001;
- 90% from January 1, 2002 through December 31, 2002;
- 85% from January 1, 2003 through December 31, 2003;
- 80% from January 1, 2004 through December 31, 2004;
- 75% from January 1, 2005 through December 31, 2005; and
- 70% from January 1, 2006 through December 31, 2009.

Ventures in the North (*Agência de Desenvolvimento da Amazônia* – ADA), Northeast (*Agência de Desenvolvimento do Nordeste* – ADENE) and Central-West, are subjected to specific rules and special dispensations with regard to the IPI reduction schedule.

IPI credits apply to raw materials, intermediate products, and packaging material used in the manufacture of IT goods eligible for incentives.

The list of information technology and automation products and services eligible for incentives is as follows:

- electronic components for semiconductors, optical-electronics, and their

respective electronic input materials;
- digital-technology machinery, equipment, and devices, with the following functions: information gathering, processing, structuring, storage, switching, transmission, recovery or presentation, and their respective electronic input materials, parts, components, and hardware;
- computer programs, machines, equipment, information-processing devices, and their respective software; and
- technical services correlated to goods and services specified above.

As a general rule, audio, audiovisual, leisure and entertainment goods do not fall under the category of information technology and automation goods, even if they have a digital component. Decree 3.801/01 provides a list of goods eligible for incentives.

To be eligible for incentives, a company must submit a project, with the following information: company name, legal representatives, billings, number of employees, projects to be developed (in compliance with PPB rules), the manufacturing process of eligible products, quality-control program, and profit-sharing program for employees. Applicants must also provide certificates of regularity issued by the federal tax authorities (*Certidão Negativa da Dívida Ativa da União* and *Certidão Negativa de Tributos e Contribuições Federais*) and certificate of regularity with Time of Service Guarantee Fund (*Fundo de Garantia por Tempo de Serviço* - FGTS).

PPB rules are issued jointly by the Ministry of Science and Technology (MCT) and the Ministry of Development, Industry and Foreign Trade (MDIC).

Corporate investments in R&D must follow the schedule submitted by the company, and should amount to no less than 5% of the company's gross revenues from sales of IT goods and services on the domestic market, excluding taxes and the value of purchases made under the incentive program.

Of the sum to be invested in research and development, no less than 2.3% of gross sales revenue must be directed toward:

- officially accredited Brazilian research centers, institutes, or educational facilities;
- officially accredited Brazilian research centers, institutes, or educational facilities, based in the regions encompassed by ADA and ADENE or the Central-West region (excluding the Manaus Free Trade Zone); and
- the National Scientific and Technological Development Fund (FNDCT).

As mentioned earlier, the new rules on targeting of R&D investments enable

better distribution throughout the various regions of Brazil.

The required percentages of investment in R&D decline progressively as IPI incentives decrease. These R&D investment requirements do not apply to companies with gross annual revenues of less than R$ 15 million.

Companies manufacturing of information technology and automation goods in regions encompassed by ADA and ADENE and in the Central-West region are generally subject to more favorable specific rules; *e.g.*, under Law 11.077/2004, IPI rebates have been extended until December 2019.

20.3. Tariff Policy and MERCOSUR

Information technology and automation goods are on the list of exceptions to MERCOSUR common rates for imports from third-party countries. CMC Decision 39/2005 authorizes application of special rates for technology and telecommunications goods in 2006.

Trade in IT goods among MERCOSUR countries enjoys a 100% reduction, provided that agreed rules of origin are observed.

20.4. Software Legal Protection

Legal protection is currently afforded to computer programs under Law 9.609/98 and Decree 2.556/98. There follows a summary of their provisions:

- software is defined as an organized set of instructions in usual or codified language, contained on physical media of any type, required by automated data-processing machines, devices, instrument or peripheral equipment, using digital or analog techniques to make them run in a certain way and for certain purposes;
- software is protected by Law 9,610/88 (Copyright Law) and provisions set forth in specific legislation;
- the employer, contractor of services, or public body shall have exclusive rights to software developed under a services-agreement or contractual relationship expressly for research and development purposes, by an employee, contracted party, or civil servant, or that results from obligations undertaken through such relationships;
- the use of such software in Brazil shall be the object of a license agreement. In the absence of a license agreement, the tax document referent to acquisition or licensing of copies shall be deemed legal evidence of regular use of said

software;
- licenses and agreements for the right to sell foreign software shall apportion responsibilities for payment of taxes and charges, and payments due to the software owner resident and domiciled abroad;
- with regard to the previous item, any clause that provides limits to production, distribution, or sales, in violation of current rules, or which exempts any of the contracting parties from the responsibilities arising from third-party claims, resulting from defects or copyright violation, is null and void;
- the software license agreement, corresponding tax document, media, or respective packaging must clearly indicate the expiry date of version sold;
- any person who sells software, whether as the owner of software rights, or as owner of the sales rights within Brazil, shall undertake during the technical validity of the respective version, to ensure users complementary technical services to ensure proper running of the software. This obligation shall apply even in the event of discontinuity sales during its period of validity;
- foreigners domiciled abroad shall be ensured protection of software ownership rights, regardless of registration, provided that the country of origin observes equivalent rights of Brazilians and foreigners domiciled in Brazil;
- although not mandatory, software may be registered with the National Institute of Industrial Property (INPI) to facilitate the protection of rights related thereto, in which case data submitted to INPI shall be deemed confidential;[34]
- software shall enjoy protection for 50 years, counted as from January 1 of the year subsequent to its publication, or from the date of its creation, regardless of whether it is registered with the INPI; and
- the penalty for violation of software copyright is imprisonment from six months to two years or fine. In the event that said violation consists of the reproduction for sale, the penalty shall be imprisonment from one to four years and fine.

20.4.1. Taxes Applicable to Operations Involving Software

The Supreme Federal Court (STF), in deliberating a case[35] as to whether Services Tax (ISS) or the Tax on Circulation of Goods and Services (ICMS) should apply to software, has made a distinction between types of software. It differentiates between different types of tax treatment applicable: (i) to software produced on

[34] The Registration of a software license agreement with INPI is not mandatory, but such registration has the following benefits: (i) validity before third parties, and (ii) possibility of tax rebates on payments made to the licensee. Only license agreements which involve technology transfers are subject to registration. Therefore, a license agreement is subject to registration only if the object code and the software specifications are available to the licensee. INPI Resolution 58/98 establishes rules and procedures for registration of software.

[35] Extraordinary Appeal 176.626 (DJU November 10, 1998) and 199.464 (DJU April 30, 1999).

a large scale and in standardized form for the consumer market, on which ICMS should be imposed; and (ii) to personalized, custom software, produced to fulfill specific specifications, on which ISS should be imposed, since it fulfills criteria of service provision.

Thus the STF issued its position on sales of off-the-shelf software (i.e., software sold on the retail market without transfer of technology or payment of copyright licenses).

Although the distinction between off-the-shelf software and custom software seems simple, in certain cases the difference between the two is difficult to determine.

Moreover, the tax assessments based upon classification of software in one or another category result in significant price differences.

20.4.1.1. Taxes on Sales of Off-the-Shelf Software

Imports

Imports of off-the-shelf softwares are subject to the Import Tax (II), IPI, Contribution toward the Social Integration Program on Imports (PIS-*Importação*), the Contribution toward Funding of Social Security on Imports (COFINS-*Importação*), and ICMS.

On import transactions, II and IPI are levied by applying tax rates that vary according to the tax classification of the imported products. Moreover, it is worth mentioning that, when providing the calculation of the II and IPI applicable to imports, the Normative Rule nº 181/89, issued by the Ministry of Treasury, allows a segregation of the value of the software from the value of the hardware containing such software, in such a way that the II and the IPI are paid only on the value of the hardware (physical support or physical media). If no such segregation is made, the II and IPI are levied on the total value of the transaction.

Law 10.865/04 created the imposition of PIS-*Importação* and COFINS-*Importação* on the import of goods and services from abroad by a Brazilian individual or corporate entity at the rates of 1,65% and 7,6%, respectively.

With regard to the ICMS (tax imposed by the States of the Federation), in the State of São Paulo, article 50 of Decree 45.490/00 (ICMS Regulation) sets forth that in transactions involving software, whether personalized or not, the taxable

basis for its calculation is twice the value of the physical support. The applicable ICMS tax rate depends on the State in which the importer is located.

Internal transactions

Domestic transactions with off-the-shelf softwares are subject to the ICMS on the sales value, and to the PIS and COFINS assessed on billings from the software sales. IPI, is assessed on the manufacture of software, but not on sales.

20.4.1.2. Taxes on Customized Software

Imports

Imports of customized softwares are subject to II, IPI, PIS-*Importação*, COFINS-*Importação* and ICMS, assessed on the physical media value, provided that this value is segregated in the import documentation. Otherwise, the entire transaction (value of the software program plus value referent to the physical media) is assessed for taxation

ICMS is assessed on twice the value of the physical support, since article 50 of Decree 45.490/00 makes no distinction between customized and non- customized software.

Licensing fees

Payments of royalties to non-residents for the use of a licensed software are subject to the Income Tax withheld at source (IRRF) at a rate of 15% (or 25% in the event of a non-resident located in tax haven jurisdictions) over the amount of royalties remitted abroad.

In addition to IRRF, the remittance abroad of royalties and software licensing fees, payment for acquisition of technology, technical know-how, administrative technical assistance or similar services is subject to a charge known as the Contribution for the Intervention in the Economy (CIDE), at a rate of 10% on all sums transferred abroad.

With regard to the applicability of PIS-*Importação* and COFINS-*Importação* (charges applicable to imports of goods and services) to customized software licenses, the Brazilian courts have not as yet provided a final ruling as to whether software licenses classify as services for purposes of such charges.

Finally, ISS is due on the licensing or assignment of the computer programs (both imports domestic) since it included on the list of services attached to the Enabling Law (LC) 116/03. Since ISS is a municipal tax, the liability must be examined in the light of legislation of the venue in which the purchase is carried out, in case of import operation, or where the sale is made, in case of domestic sales. There is controversy as to whether software licensing should be regarded as provision of service and thus liable to ISS.

Domestic transactions

ISS is due on the domestic software licenses, as are also PIS and COFINS at the rates of 1.65% and 7.6%, respectively.

Finally, it is needs to be mentioned that disputes over the applicability of such taxes are not infrequent it is not always clear just exactly what the appropriate tax treatment applicable to imports and sales of software on the Brazilian market should be. The background these controversies relates to the degree to which technology-transfer payments should be regarded as services or goods.

20.4.2. Software Related Remittances

Remittances abroad of payments for software are the subject of Title 1, Chapter 8 of the of a Regulation of the Exchange and Foreign Capital Market (RMCCI), set forth in Central Bank Circular 3.280/05.

According to RMCCI, any bank authorized to operate in the exchange market can accept remittances for payment of royalties/services resulting from the following operations:

- copyright for computer programs;[36]
- updating, leasing, maintenance, and customization of software; and
- render of technical software related services.

The bank that accepts such remittances is responsible reporting the operation to BACEN (classifying the operation in one of the RMCCI categories) providing the necessary remittance documents.

[36] Remittance of royalties relating to license agreements registered with INPI is subject to documentation of registration.

20.5. Internet

MCT Inter-Ministerial Order 147/95 created the Brazilian Internet Steering Committee (CGIbr).

Decree 4.829/03 set new rules for the role of CGIbr. Among these, the Committee was transformed into a corporate entity and awarded greater autonomy for the registry of domain names and collection of fees. It also invested the CGIbr, with responsibilities:

- to draft rules and procedures relating to regulation of Internet activities;
- to recommend operational standards and technical procedures for internet in Brazil;
- to set strategic guidelines for Internet use and development in Brazil;
- to promote studies and recommend technical procedures for security of networks and services;
- to coordinate assignment of Internet Protocol (IPs) and registration of domain names using <.br>; and
- collect, organize and disseminate information on internet services, including statistics and indicators.

CBIbr Resolution 1 determined that the assignment of Internet Protocols and Registration of Domain Names is now the responsibility of the Dot BR Information and Coordination Center (*Núcleo de Informações e Coordenação do Ponto BR* – NIC.br), rather than the São Paulo State Research Foundation (*Fundação de Amparo à Pesquisa do Estado de São Paulo* - FAPESP). Resolution 2 of CGIbr defines the attributions of NIC.br.

Finally, Executive Order (MP) 2.200-2/01, currently under examination at the National Congress for subsequent presentation as a Bill, refers to Brazilian Public Key, and aims to ensure authenticity, integrity, and legal validity of documents in the digital formats, by means of digital signatures and the digital certification procedures.

20.6. Bills of Law

In the light of rapid development in the IT area, numerous bills are currently before the Congress. Among the matters addressed are computer crime, regulations for development and use of databases, electronic commerce, electronic documentation, and digital signature.

State of São Paulo Decree 50.504/06 has taken initial steps toward implementing

a technology park. This project aims to create in Campinas, a town near the City of São Paulo, a cluster of companies and research institutions IT companies. Direct investments in research and tax benefits to companies in the region are among the measures envisaged by this project.

20.7. Final Comments

In recent years Brazil has made significant progress in preparing legislation for the IT sector. Issues and controversies that are not covered under specific legislation are subject to Civil, Consumer, and Tax Laws, to which further certain changes have already been made to address issues raised by the digital era.

21. Commercial Representation and Agency Agreements

Law 4.886, of December 9, 1965 and Law 8.420 of May 8, 1992 govern Commercial Representation in Brazil. Under these laws, Commercial Representation is defined as intermediation activity, performed on a permanent basis by any person or company (referred to in Brazilian law as a Commercial Representative or Agent) contracted to act in the market for goods or services on the behalf of a company or several companies (depending on whether the contract specifies exclusivity).

Commercial Representatives (or Agents) gather buying proposals from prospective customers and submitting them for the approval of the represented company. When a proposal is accepted, the Commercial Representative is entitled to a previously and contractually agreed percentage of the transaction (commission), conditioned to the effecting of payment by the purchaser, unless the contract stipulates that the commission shall be paid independently of the payment by the purchaser. Moreover, the Agent is entitled to be a commission for all sales in contractually defined area of intermediation activities, unless otherwise specified in the agency contract.

The above mentioned laws also specify that every Agent must be registered with the Council of Commercial Representatives of the respective Brazilian State where activities take place, bearing in mind that these Councils have regulatory powers over the profession. Moreover, companies that provide Agency services must register their articles of incorporation with the Board of Trade, where free-lance Agents must also register.

Furthermore, under section 27 of the Law 8.420, Agency contracts must be in writing, and must, in addition to the specific provisions agreed upon by the parties, contain the following topics: (i) general conditions of Representation; (ii) indication and features of products; (iii) duration of the contract; (iv) indication of the area, or areas where the representation is to be performed, and permission (or otherwise) for the represented company to perform direct sales in the indicated area or areas; (v) granting of (total or partial) exclusivity in the sales area; (vi) commissions due to the Commercial Representative and payment schedules, conditioned (or not) to effective receipt of the purchaser's payments; (vii) exclusivity (or not) of the represented company's products; (viii) compensation for the Commercial Representative in the event of unjustified termination of contract, which shall be less than the equivalent of 1/12 of total remuneration paid to the Commercial Representative throughout the contractual relationship.

It is very important to emphasize that, despite the provision found in article 1 of Law 4.886 (which provides for that no employment relationship shall exist between the contracting parties), the scope of Brazilian Labor Law is such that that represented company may find it is liable for labor claims from former Commercial Representatives – except if the representative is a company. Such claims may be based, among other allegations, on legal presumption of an employment relationship, which requires the concomitance of personalty, salary dependence, habitualness, and subordination.

Thus, so as to avoid such claims and its liabilities, it is of crucial importance that the represented company include the following restrictions in all Commercial Representation Contracts: (i) the Commercial Representative must always be established as a company formed by at least two partners; (ii) the represented company must avoid issuing orders directly to staff of the representative company, and such orders must be limited to performance of obligations of the representative, as foreseen in contracts drawn up in compliance with Laws 4.886 and 8.420.

22. Distribution Agreements

The Distribution Agreements in Brazil may be divided in two similar but not identical categories: (i) commercial distribution agreements, and (ii) ordinary distribution agreements.

22.1. Commercial Distribution Agreements

Commercial distribution agreements are governed by Law 6.729 of November 28, 1979 (amended by Law 8.132 of December 26, 1990) and its scope is limited to relations between Producers of Automobiles and Spare Parts (Auto Makers) and their Distributors (Dealerships).

Under article 2 of Law 6.729, only automobiles, trucks, busses, agricultural tractors and motorcycles are considered as subject to these provisions, what leads us to conclude that any other sort of automotive vehicle, such as boats or non-agricultural tractors, are not encompassed, and thus belong to the second category, i.e., Ordinary Distribution Contracts.

Under article 3 of Law 6.729, the Dealership's role in Commercial Distribution Agreements encompasses: (i) sales the automotive vehicles described in section 2; (ii) their spare parts, manufactured or furnished by the respective makers; (ii) technical assistance to the customers; (iii) concession for the use of the Maker's trademark.

Among the provisions of article 3 of Law 6.729 is the possibility of the Commercial Distribution Agreement forbidding sales of new automobiles produced by other makers.[37] On the other hand, Dealerships have the right to trade in new spare parts manufactured or furnished by third parties, while abiding by so-called loyalty levels.[38] Moreover Dealerships are entitled to trade in second-hand automobiles and original spare parts produced by other makers, as well as other goods and services compatible with the Agreement.

Article 5 of Law 6.729, specifies basic provisions which must be present in all Commercial Distribution Agreements, namely: (i) definition of the area of the

[37] In Brazil, it is common to find such prohibitions in agreements of this kind.

[38] The fidelity level is defined in Section 8 of the Law 6.729 as the minimum quantity of the maker's spare parts which Dealers are obliged to acquire, according to provisions foreseen in the Dealers' Convention.

Dealership; [39] (ii) minimum distances between the different Dealerships[40] ;

Also, the Dealership Company is committed to trade the maker's automobiles and spare parts, an to provide technical assistance for customers, in compliance with the respective Commercial Distribution Agreement. Nevertheless, the Dealership is forbidden, personally or through third parties, to perform such activities outside its area.[41]

Despite the fact that the area is defined in the Commercial Distribution Agreement, article 6 of Law 6.729 allows the maker to contracting a new Dealer, provided that the market in operational area proves able to sustain it, or in the event of a vacancy or termination of an agreement.[42]

Under article 7 of Law 6.729, the Commercial Distribution Agreement must also encompass a binding quota automobiles to be acquired by the Dealerships, defined in accordance with the following items: (i) estimates of the maker's production;[43] (ii) the quota must correspond to a part of estimated production[44]; (iii) mutual agreement as to the Dealer's quota;[45] (iv) definition of the quota must not take into account the Dealer's inventory[46] and be revised annually. [47]

Article 10 of Law 6.729 leaves open the option for the contracting parties to include in the Commercial Distribution Agreement an obligation on the part of the Dealership to maintain inventory a previously stipulated level, proportional to its turnover of new products.[48]

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[39] The operational area may be reserved for more than one Dealer, except when exclusivity is granted to a specific Dealer.

[40] These distances are established in accordance with marketing potential criteria.

[41] In any case, consumers are always entitled to choose any Dealer in order to purchase goods produced by the maker, whereas, on the other hand, a Dealer has the right to be reimbursed for any technical assistance given to a customer who has purchased the product from another Dealer.

[42] However, in any such event, Law 6.729 prohibits any new contracting which may jeopardize Dealers who are already contracted, although it grants no preference to a Dealer already established in that particular operational area, once the new contracting has proven feasible in terms of market prospects within that operational area.

[43] This estimate is calculated per product and limited to the domestic market, in the subsequent fiscal year, and in accordance with market prospects.

[44] The part of estimated production is comprised of a diversity of different and independent products.

[45] The quota may correspond to the Dealer's business capacity and trading performance, the operational area, and sales prospects.

[46] As foreseen in section 10 of Law 6.729.

[47] If no adjustment has been made before then, due to discrepancies between the maker's present production and previous estimates.

[48] Nevertheless, whenever a Commercial Distribution Agreement establishes such a minimum inventory obligation, the dealer is entitled to set the following limits:

- For Automotive vehicles in general : 65% of the corresponding monthly portion of the annual quota foreseen in section 7 of Law 6.729, commented above;
- For Trucks: 30% of the corresponding monthly portion of the annual quota;
- For Tractors: 4% of the total annual quota;
- For Spare parts: (i) 5% of all sales in the past 12 months for Implements; (ii) any agreed value which cannot

Article 12 of Law 6.729, forbids Dealerships from selling new automobiles to other dealers (for resale) rather than to final consumers. This is due to the fact that the law does not countenance sales for purposes of resale, except in the following cases: (i) trades between Dealerships linked to the same Maker limited to 15% and 10% of the quota of trucks and of other automobiles, respectively; (ii) international trading.

Furthermore, under Law 6.729, the Maker is bound to preserve the equality of prices and conditions of payment among all Dealerships which, for their part, are free to set their own consumer prices.

Although Makers are bound to respect Dealerships' operational area, they may perform direct sales in the following cases:

- independently of Dealer's performance or request: (i) to the Public Administration or Diplomatic Corps; (ii) to consumers considered as "Special Purchasers" under Industry Agreements;
- through the Dealerships: (i) to Public Administrations or Diplomatic Corps; (ii) to owners of automobile fleets; (iii) to consumers considered as "Special Purchasers" under Industry Agreements, when so requested by a specific Dealership.

The level of direct sales and its repercussion on the Dealerships' quota must be always present in the Industry Agreement and any act which may lead to a Dealership's subordination or to interference in its business management is expressly forbidden.

In accordance with articles 17 and 18 of Law 6.729, the Industry Agreement is inherent to the Commercial Distribution Agreement and may be defined as a General Agreement, which must be made between the civil entities representing the Makers and the National Representatives of the Dealerships. Likewise, in accordance with Law 6.729, this Industry Agreement is legally binding upon

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exceed the purchase price from the maker relating to the Dealer's previous 3 months retail sales, for other components.

If the Commercial Distribution Agreement contains a minimum inventory provision, besides the Dealer's right to above mentioned limits, Law 6.729 also provides that :

- Concerning Automotive Vehicles, Trucks and Tractors: every six months there must be a comparison between the above cited "Automotive Vehicles Quota", foreseen in section 7 of Law 6.729, and the Dealer's actual market conditions at that time, and his trade performance for the purpose of reducing minimum inventory limits;
- In the event of products' being altered or breaches of delivery conditions, the maker is obliged, in a period of no more than one year from the event, to buy back the Dealer's inventory of auto parts (except for tools) at the current price offered to all Dealers, or, alternatively, replace it with new products, at the Dealer's discretion.

signatory parties, and serves to regulate their relationship.

Furthermore, pursuant to Law 6.729 all Commercial Distribution Agreements must observe a standard written form and their content, according to articles 20 and 21, must contain provisions on: (i) product specification; (ii) definition of the operational area; (iii) minimum distances between dealerships; (iv) dealership *quotas*; (v) standards for the financial status, management, equipment, specialized personnel, facilities, and technical capacity of dealerships; (vi) indeterminate duration of the agreement, which can only be terminated in accordance with provisions of Law 6.729, after an initial duration of no less than five years.[49]

Finally, the Commercial Distribution Agreement may be terminated in the following circumstances: (i) by consensus between both parties; (ii) by written notice (mentioned above) during the course of an initial five-year agreement; (iii) by initiative of the aggrieved party, in the event of breach of contract, violation of the Industry Agreement, or of Law 6.729.[50]

Moreover, if Maker sends to Dealership written notice to terminate the initial five-year agreement under articles 23 up to 25 of Law 6.729, the Maker is bound to: (i) buy back the Dealer's entire inventory of automotive vehicles and spare parts at a price offered to Dealerships on the day of payment of such compensation; (ii) buy all Dealer's equipment, machinery, tools and plant (except real estate) at market prices, provided that their acquisition was determined or not contested by the Maker upon receipt of written notice from the Dealer concerning such acquisitions; (iii) pay an compensation to the Dealer corresponding to 4% of Dealership's gross billings of goods and services projected for the remaining period of the prematurely terminated contract, plus three months, based on the two years prior to termination or actual duration of the agreement, if termination should come to occur before then.[51]

The consequences of termination of a Commercial Distribution Agreement of indeterminate duration, set forth in articles 24 to 27 of Law 6.729, are as follows:

- Termination caused by the Maker: (i) the Maker must buy back the Dealer's entire inventory of new automotive vehicles and new spare parts, at the price offered to consumers on the day of termination of the agreement; (ii)

[49] After the five-year period the agreement will automatically become one of undetermined duration, unless a written termination notice is sent to the other party within the 180 days prior to termination.

[50] Also foreseen in section 22 of Law 6.729, termination based on events described in this item must always be preceded by gradual penalties. Also, in case of termination, the parties must be granted a minimum period of 120 days after termination to fulfill any pending operations.

[51] On the other hand, if Dealer issues termination notice as foreseen in section 21 of Law 6.729, according to section 23 of the same Law, the Maker will not have right to any compensation whatsoever.

the Maker must buy all Dealer's equipment, machinery, tools and plant (except real estate) at market prices; (iii) the Maker must also pay the Dealer compensation for the next 18 months corresponding to 4% of his latest gross billings of goods and services, plus three months for each five years of the duration of the agreement, based on the two years prior to termination.[52]

- Termination caused by the Dealer: the Dealer must pay compensation corresponding to 5% of the total value of all merchandise purchases in the four months prior to termination.

Regardless of which party caused the agreement to terminate, all sums owed to the aggrieved party must be paid no later than 60 days as of termination of the agreement'.

22.2. Ordinary Distribution Contracts

Unlike Commercial Distribution Agreements, under Ordinary Distribution Contracts, no specific law governs the relationship between the parties, and thus such contracts are governed by general provisions of the New Civil Code.[53]

Thus, contracting parties may define their relationship almost exclusively by contract, provided they comply with the general provisions and obligations of the Civil Code.[54]

On the other hand, if the relationship between the parties should involve intermediation by the Distributor rather than an obligation to purchase products for resale, regardless of the denomination for the contract, it will be deemed a Commercial Representation (or Agency) contract governed by Laws n 4.886 and 8.420, as described above. [55]

Nevertheless, it should be stressed that, if the parties' distribution relationship concerns products considered automotive vehicles under Law 6.729, parties may not sign contracts governed any other law.

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[52] The Maker must also pay the Dealer additional compensation if so foreseen in the Commercial Distribution Agreement or the Category Convention.

[53] Section 710 up to section 721.

[54] If the contract has no duration provision, it is legally assumed to be undetermined, and its termination may occur at any time by means of a simple 90 days notification.

[55] On the other hand, some eminent Brazilian Scholars, such as José Alexandre Tavares Guerreiro, accept the possibility that Law 6.729 applies to Distribution Contracts, in addition to those which deal with the automotive vehicles as defined by that specific law.

23. International Intellectual Property Contracts

23.1. General Features

As a signatory of the Stockholm Convention, of July 14, 1967 (and thus of the World Intellectual Property Organization – WIPO), Brazil subscribes both to the Paris Convention (for protection of industrial property) and to the Bern Convention (for protection of literary and artistic works).

Intellectual property is the genus of which copyright and associated rights are species; and in Brazil, is governed under Law 9.610/98, which aims to protect literary, scientific and artistic works, and also industrial property rights, that safeguard industrial and commercial utilization of inventions, trademarks, patents, and industrial designs.

Law 9.279 (the new Industrial Property Code) that went into effect on May 14, 1997, encompasses inventions, utility models, industrial designs, manufacturers' brands, trademarks, and service marks that are distinctive and indicate the origin and source of the relevant products. The new law also contains provisions on crimes against industrial property. Law 10.196, of February 14, 2001, introduced changes and extended the scope of Law 9.279/96.

The National Institute of Industrial Property (INPI) is the government body responsible for industrial property rights, for formal examination of requests for patents, and registration of trademarks.

23.2. Patents

Patents are granted for the protection of inventions, utility models, and industrial designs. Patent protection extends for 20 years for inventions, 15 years for utility models and 10 years (extendable for three five-year periods) for designs, counted as of the date the filing of the request with INPI. By means of a Certification of Addition, enhancements to a patented invention may be protected and as such protection is extended for the same term as the patent.

Applying for a patent may be a lengthy and time-consuming process. The application submitted to INPI must contain: the inventor's claims, a full description of the invention, drawings of the invention (when applicable), and evidence of compliance with all legal requirements. Once the application has been presented, a preliminary formal examination takes place, and a certificate of filing is issued. The application will be considered confidential for 18 months,

at the end of which the application is be officially published. The inventor may request early publication, thereby avoiding the 18-month waiting period. After filing of the application, within a 36-month period the inventor or any interested third party may request formal examination of the application. Failure to request formal examination causes the application to be considered withdrawn, whereupon the patent passes into public domain. Within an additional 60-day period a request for restoration of the application may be made, upon payment of a fee. Until the end of the formal examination period, the inventor or by any interested third party may submit further information and documentation in support of the examination. Once the technical examination has been conducted, a formal decision is published, determining the granting, denial, or shelving of the application. If no appeal is field, the final certificate is issued after the payment of specific fee.

The holder of a foreign patent may file an application for a corresponding patent in Brazil within a priority claim as stipulated under the Paris Convention, namely: 12 months for patents of invention and utility models, and 6 months for industrial designs, as from the date of application in the country of origin.

Commercial use of a patent must commence within three years of approval, otherwise the patent may be object of a Compulsory License. A patent may lapse in the following cases: (i) expiry of its legal term; (ii) caducity; (iii) failure by the inventor to pay the required INPI fees; (iv) waiving of the inventor's privilege; (v) in the event of foreigner inventor, the absence of a duly qualified attorney domiciled in the country, or (iv) administrative cancellation or court annulment. Once the patent has lapsed, it falls within the public domain.

On patents for medical drugs, article 68 of Law 9.279/96 provides for compulsory licensing of patents registered in Brazil in cases of abuse of economic power, i.e., anti-competitive practices or failure to manufacture the product in Brazil three years after granting of the patent. Article 71 of Law 9.279/96 also establishes that, in cases of national emergency or in the public interest, compulsory licenses may be granted.

The Doha Declaration, of November 2001, added strength to these articles of the Industrial Property Code. Article 31 of the Declaration cites events such as national emergencies, extreme urgency, and anti-competitive behaviors as grounds for a WTO-member country breach patent rites without permission of the lawful holder.

On February 5, 2004 Bill 2.401/03 for a new Bio-Security Law was approved by the Chamber of Deputies and is now awaiting approval the Federal Senate. This law will replace Law 8.974/95.

Provisions of the new Bill of Law, forbid genetic experiments and research on human cloning, and establish standards for research and planting and marketing of genetically modified seeds. Approval of patents in these areas must comply with requirement stipulated in the Bio-Security Law.

23.3. Trademarks

Trademark applications may request registration of a foreign or a Brazilian trademark. Foreign trademarks are registered under the terms of the Paris Convention, which establishes an exclusive priority term of six months, from the date of the application in the country of origin, for its holder to apply for registration of this same trademark in other countries which are signatories to the Convention.

In order to file this application in Brazil, a certified copy of the trademark application in the country of origin, or a certificate of registration, must be submitted to INPI.

The aim of registering a trademark within the period of priority to the convention (apart from securing protection) is to enable the trademark to be licensed or transferred in return for payment of royalties

Any interested party (Brazilian or foreign) may apply for registration of a Brazilian trademark. The application and registration for such trademarks must abide by provisions of the Brazilian Industrial Property Code.

If a foreigner patent holder applies for a Brazilian trademark, without the priority claim established in the Paris Convention, it is considered a Brazilian trademark and thus not eligible for benefits afforded under the Convention.

Under Brazilian law and regulations, royalties can not be charged for trademark and patent license agreements in the following cases:

- if the trademark or the patent is not duly registered/granted in Brazil;
- if the trademark or the patent was not filed in Brazil within the priority term, mentioned above;
- if the registration of the trademark has not been renewed;
- if the trademark registration has extinguished or is facing nullity or cancellation proceedings;
- if the license agreement is between a foreign parent company and its Brazilian branch;
- in the case of transfer, if the previous owner was not entitled to remuneration.

Brazilian law requires that the owner of the trademark licitly and effectively exercises the activity for which protection for the goods or services covered by such trademark is claimed. In order to apply for registration of a trademark in Brazil, evidence that the applicant is a company in good standing under the laws of its parent country and of the company's field of business is required.

Trademark registration affords protection for ten years. This period may be extended for further subsequent ten-year periods.

Actual use of the trademark is essential for such protection in Brazil, registration of which might lapse if not used within five years as of the date of concession, or if its use interrupted for more than five consecutive years.

The owner of a trademark in Brazil can provide proof that he uses it, or that a licensee uses it.

With respect to international trademark registration foreseen in the 1999 Madrid Protocol, which updates the Treaty of Madrid, the principal aim is to concentrate trademark registration in a single place, thereby enabling a company using a unified international application, to effect registration of its product trademarks in every country that currently participates in the system.

The signing of the aforesaid protocol is still elicits debates in Brazil. It is likely that Brazil will become party to the agreement in 2006.

23.4. Technology Transfer Agreements

Technology transfers involving Brazilian parties or industrial property rights registered in Brazil are governed by provisions of INPI Normative Act 135, of May 15, 1997.

The aforesaid Normative Act 135/97 aims to regulate annotation and registration of contract that contain provisions relating to technology transfer, patent and trademark licensing, supply of technology, technical and scientific assistance, and franchise agreements.

Such contracts must be registered with the INPI if they are to generate effects between contracting parties or be binding upon third parties, and for currency exchange and tax deduction purposes or remittance payments abroad.

Other valid documents to demonstrate technology transfer and compliance with regulations (including operational expenses) must be submitted for INPI

approval, to enable application of tax rebates on transfer-related payments.

Technology transfer agreements must clearly specify purposes, remuneration, term and means of execution, and other industrial property rights involved.

Such agreements must stipulate (i) actual conditions for commercial exploitation of patents applied for and granted in Brazil; (ii) licensing of trademarks applied for the granted in Brazil; (iii) acquisition of know-how and technology not protected by industrial property rights; and (iv) techniques, planning methods and programming, research, surveys and projects for execution or provision of specialized services.

Although not an express requirement, it is advisable to indicate whether licensing or commercial exploitation is on an exclusive basis, and whether subcontracting is permitted. The period of the agreement should not exceed the term of registration of the relevant trademark or patent.

Technology transfer agreements may contain confidentiality clauses and provisions pertaining to non-availability of the technology to be assigned. Such agreements may also contain provisions on responsibility of parties for tax liabilities arising from the transfer. It is incumbent upon the assignor to provide the assignee with all relevant technical information, as well as technical assistance required for assimilation of the transferred technology

Technical and scientific service agreements must refer specifically to the period required for provision of such specialized services, the number of technicians required, specialization programs and training, as well as their remuneration.

Remuneration for technology to be transferred may be in any of the following forms: (i) pre-set at a fixed price for each item sold; (ii) a percentage of the profit or of the net sales price, net of taxes, duties and other expenses, previously agreed between the parties. INPI shall take into account domestic and international prices for similar operations when determining relevant remuneration.

With respect to tax rebates, it must be clarified that only royalties for technical assistance up to the limit of 5% calculated on the net income of production will be allowed deduction from the gross profit. This may be deducted in accordance with the degree of relevance of the recipient industry, i.e., the more vital the industry for the economy, the higher the applicable tax rebate.

Rebates on royalties for use of patents shall not be granted when these are to be paid by a Brazilian subsidiary to its parent company abroad.

Payments to corporate entities for technical assistance may only be deducted in the first five years of introduction of a technology, though this may be extended for an additional period if need can be demonstrated, at the discretion of the National Monetary Council (CMN).

Applications for approval must be submitted to INPI by means of a specific form, accompanied by the original contract or equivalent documentation, in translation when drafted in a foreign language. In addition, an explanatory letter justifying the contract, data on the technology assignee or franchisee, and other appropriate documents provided by the parties, proof of payment of appropriate fees, and power of attorney in compliance with provisions of articles 216 and 217 of Law 9.279/96.

INPI may, at its discretion, request additional documentation. INPI's decision approving or rejecting registration shall be issued within 30 days, counted as of receipt by the Technology Transfer Board (DTC) and assignment of a system number.

Should INPI require additional documentation, the party will be given 60 days to submit it, failing which the application will be cancelled. Upon submission of the required documents, INPI reviews the application within the deadlines set forth above. Failure by INPI enter approve an agreement in within the deadline shall result in automatic approval of the contract or equivalent document.

INPI may, at its sole discretion, monitor technology transfer procedures.

23.5. Franchising

In Brazil, franchising system is governed by Law 8.955, if December 15, 1994. To complement law (the Brazilian Franchising Association (ABF), the entity which represents the interests of franchises in Brazil, has drafted a self-regulation code of that provides rules that apply to franchising systems, and resolves issues arising from this activity.

Aside from defining the franchising system Law 8.955/94 sets rules for the relationship between franchiser and franchisee, ranging from preliminary negotiations to formalization of a franchising agreement, and sets penalties for non-compliance with certain conditions.

Unquestionably, the key point of Law 8.955/94 is embodied in its article 3, which establishes the obligation of the franchiser to furnish the potential franchisee with a Uniform Franchise Offering Circular (UFOC). This, according to article 4,

consists of a summary of conditions and duties of the potential franchisee that must be delivered 10 days prior to signature of the franchising agreement, pre-franchise agreement, or prior to payment of any kind charges by the franchise".

Article 3 of the Franchise Law determines that the Offering Circular contain, among other information:

- a brief background, modality of company, full name and trade name of the franchiser and all associate companies, thus providing the franchisee with references about the franchiser;
- balance sheets and financial records of the for the past 2 fiscal years. Please not that a company with less than two years n the market is not barred from contracting, however, financial records must be provided;
- a list of all judicial liabilities involving the franchiser, the controller companies and owners of the trademarks, patents and copyrights, involved in the operation, which might hamper the franchise;
- a detailed description of the franchise, of the business and of activities to be performed by the franchisee;
- a profile of the ideal franchisee, with details of experience, schooling level, and other relevant characteristics, to be appraised by the franchiser;
- requirements concerning direct involvement of the franchisee in operation and management of the business;
- a detailed description of the initial investment necessary to implement the franchise, affiliation fees, or collateral, and estimated costs of installations, equipment, and initial supplies;
- precise information on periodic charges (royalties, rents, insurance, etc.) and other sums to be paid by the franchisee to the franchiser, or to third parties indicated by the franchiser;
- a complete listing of all franchisees (name, address, telephone number …), sub-franchisees and sub-franchisers, including those one that have left the net in the preceding twelve months;
- a model of the agreement to be signed.

The law further establishes that the Offering Circular and Franchising Agreements must be drafted in clear and accessible language so as to avoid confusing and dubious texts, susceptible to various interpretations.

Law 8.955/94 also repeats guidelines that had previously been in effect, including the consensus of the courts that no employment link should exist between franchiser and franchisee or between the franchiser and the franchisee's employees, except in cases in which dissimulation is evident in the employment agreement, with or without collusion between the parties involved.

The Superior Court of Justice (STJ) recently determined that franchising operations shall not be liable for Services Tax (ISS).

It is worth noting that a Franchising Agreement need not be registered with any governmental authority to be valid. However, to be executable against parties, it must be registered with INPI, under the terms of Normative Act 135/97 and, if the franchiser is a foreign party, it has to be registered with the Central Bank of Brazil if remittances of payments foreseen in the contract, and tax rebates are to be allowed.

24. International Treaties

24.1. Overview

Treaties are international agreements concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments. Treaties may be entered into by States, between States and international organizations, or between international organizations themselves, provided the parties are represented by qualified agents, and seek to regulate legal relations that are freely entered into, for legal and feasible ends, to assure that contracting parties fulfill and respect provisions contained therein.

Negotiated and signed by the Head of the Executive Branch, the President of the Republic, prior to being ratified at the international level, international treaties and conventions should first be submitted for the approval of the National Congress: first by the Chamber of Deputies and then by the Federal Senate, the President of which issues a formal Legislative Decree, thus imbuing the treaties with efficacy and ranking them in the domestic legal system, followed by promulgation and publication. These stages are requisites for treaties to be enforceable within the domestic legal system.

Finally, treaties are registered with the UN Secretary General, whereupon they are acknowledged by other countries, and under International Law.

24.2. Trade

Brazil is a member of the World Trade Organization (WTO), which replaced the General Agreement on Tariffs and Trade (GATT) upon ratification of the Marrakech Agreement, in 1995, and was one of the original signatories of the Bretton Woods agreement which instituted the International Monetary Fund (IMF) and the World Bank (IBRD). Brazil is a founding member and shareholder in the Inter-American Development Bank (IDB), and has the status of Observer State at the European Economic Community and maintains permanent representation in Brussels. It has signed bilateral trade treaties with Austria, on March 13, 1993, with the European Union, on January 31, 1994, with Turkey on April 10, 1995, with Uruguay, on June 6, 1997, as well as supplementary arrangements with Peru, on July 21, 1999 and with Costa Rica, on April 4, 2000, and a protocol with Argentina, on October 29, 1999.

24.3. Intellectual Property

Brazil is a founding member of the Paris Union and has been a member of the World Intellectual Property Organization (WIPO) since 1975. Brazil has signed the Paris Union Convention for the Protection of Industrial Property, including the Hague Revisions of 1935 and the Stockholm revisions of 1967. In 1970, in Washington, Brazil signed the Patent Cooperation Treaty (PCT), which was subsequently ratified by Congress and incorporated into Brazilian domestic legislation. The Strasbourg Agreement of 1971, which sets standards for International Patent Classification has also been incorporated into Brazilian domestic law. Bilateral agreements in the field of industrial property issues, have been signed with various countries, including: Sweden (1955), to protect both industrial and commercial brands; with France (1983), concerning industrial property; with the former USSR (1982), for scientific and technological cooperation; with the United States (1957) and Italy (1963), concerning copyright.

24.4. Taxes

In the field of tax-related international trade issues, Brazil has signed, ratified and incorporated into its domestic law a variety of international double-taxation agreements with such countries as: Argentina (1982), Austria (1976), Belgium (1973), Canada (1986), Chile (2003), China (1993), South Korea (1991), Denmark (1974), Ecuador (1988), Spain (1976), Finland (1998), the Philippines (1991), France (1972), Hungary (1991), India (1992), Italy (1981), Japan (1967 and 1978), Luxembourg (1980), Norway (1981), Portugal (2001), the Netherlands (1991), Sweden (1976 and 1996), Slovakia, and the Czech Republic (1991). Brazil has also signed international income-tax exemption treaties for maritime and air transport companies with the following countries: South Africa, Chile, France, Italy, England, Ireland, Switzerland, and Venezuela. Under these double-taxation agreements Brazil overrides the withholding tax rates established in Brazilian domestic legislation, for anticipated earnings, including interest on acquisition of goods purchased though long-term financing. Such tax rebates are also allowed when responsibility for the tax has been assumed by the payee under contracts signed in Brazil or abroad, with resident or non-resident parties.

Furthermore, with the aim of promoting technical cooperation projects and actions in the fields of tax and customs administration, on May 27,1998, Brazil signed a supplementary accord with Cuba which placed priority on: (i) tax collection, procedures and systems to enhance ties between the tax administration and banking networks; (ii) adaptation or development of a revenue classification system; and (iii) the development of IT systems to manage tax collection, through network technology and systems development.

24.5. Latin America

After World War II, Brazil played a major role in efforts to establish a free trade zone in Latin America, and was one of the founders of the Latin American Free Trade Association (LAFTA), created under the Montevideo Treaty of February 16, 1960, signed by Brazil, Argentina, Bolivia, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela.

With the signing of the Montevideo Treaty of August 12, 1980, those same states founded the Latin American Integration Association (LAIA), "in order to advance the integration process, and to promote economic and social development, harmony, and balance throughout the region".

Within the scope of limited trade agreements (enabled under the LAIA Treaty of 1980) Brazil and Argentina signed important bilateral treaties, laying the groundwork for a fast growing bilateral common market area. These included: the Integration Development and Cooperation Treaty, signed in Buenos Aires on November 29, 1988; twenty-four Protocols, followed by other bilateral agreements on specific topics, including a Treaty for the Establishment of a Statute for Brazilian-Argentine Bi-national Companies, signed on June 6, 1990.

In 1995, Brazil signed multilateral agreements of an economic nature with Argentina, Chile, Mexico, Uruguay and Venezuela. It has also signed bilateral Economic Assistance Agreements with Chile (1996), Bolivia (1997), Mexico (2002) and a Limited Economic Assistance Agreement with Suriname (2005).

24.6. MERCOSUR

The Treaty of Asunción, signed in Paraguay, on March 26, 1991, announced the creation of the Common Market of the South - MERCOSUR (MERCOSUL in Portuguese) - with the aim of establishing a common market between Brazil, Argentina, Uruguay, and Paraguay. Venezuela, which was an Associate Member since 2004, signed the Framework Agreement on July 4th, 2006 and is now waiting for Paraguay and Brazil's congressional ratifications to join MERCOSUR as full member.

The Treaty of Asunción set the following goals, which still remain in force:

(a) free circulation of goods, services, and production factors among the component nations, by means of elimination of tariff and non-tariff barriers to trade among member countries;

(b) setting a common external tariff, and adoption of a common trade policy at the regional and international levels;

(c) coordination of macroeconomic sectoral policies among member countries, in such areas as foreign trade, agriculture, industry, tax issues, foreign exchange, capital, services, customs policy, transport and communications, and any other items that might subsequently be agreed upon;

(d) commitment on the part of Member States to harmonize their laws, with a view to achieving full integration.

Associate members of MERCOSUR include Chile and Bolivia (both since 1996), Peru (since 2003), Colombia, and Ecuador (since 2004). By signing Economic Complementation Agreements, a free trade zone in which special tariff conditions are to prevail, will be established between MERCOSUR and each of these countries. .

Five Annexes have been added to the Treaty of Asuncion, under the terms of article 3 thereof, namely: I) Trade Liberalization Program; II) General Rules of Origin; III) Settlement of Disputes; IV) Safeguard Clauses; and V) Working Groups of the Common Market Group. Moreover, specific Protocols on the aforementioned issues have been signed.

The institutional framework of MERCOSUR is based upon rules established under the Treaty of Asuncion and the Ouro Preto Protocol, and aim to promote consolidation of the common market. The institutional bodies of MERCOSUR are:

(a) The Common Market Council (CMC) – made up of Ministers of Foreign Relations and of the Economy (or equivalent) of the Member States. As the highest institutional body with decision-making power within MERCOSUR, the CMC is responsible for ensuring compliance with rules established under the Treaty of Asuncion. Moreover, the CMC is the body that represents MERCOSUR in negotiations, and that is authorized to sign agreements with non-member states, international institutions, and other nations in general;

(b) The Common Market Group (GMC) - made up of four permanent members and four deputies appointed by each of the Member States, representing the following bodies: I) Ministry of External Relations, II) Ministry of the Economy (or equivalent), and the Central Bank. It is the executive body of MERCOSUR and is responsible for implementing decisions made by the CMC, supervising activities of the MERCOSUR Trade Commission (CCM) and of administrative bodies, proposing measures for implementing a trade

liberalization program, coordinating macroeconomic policy, participating in negotiations with international agencies and non-member States with regard to the signing of agreements and, if necessary, in the settlement of disputes within the scope of MERCOSUR, and for organizing and coordinating Working Groups;

(c) The MERCOSUR Trade Commission (CCM) - made up of four permanent members and four deputies appointed by each of the Member States, and coordinated by the Minister of External Relations of one of these countries. The CCM is responsible for ensuring deployment of instruments relating to implementation of the common trade policy. It is also the body authorized to speak on behalf of Member States on any issue relating to the common external tariff, or objections raised by the private sector;

(d) MERCOSUR Parliament (PM) - Based in Montevideo, the Parliament is to be instituted in two distinct phases, beginning on December 31, 2006, and culminating in 2010, when Members of the MERCOSUR Parliament are to be elected by direct universal suffrage and secret ballot, on the same day, by citizens of all the Member States. The PM is made up of 90 (ninety) members (already including Venezuela). Each of the Member States appoints eighteen (18) members from their respective National Legislatures;

(e) The Secretariat of Mercosur (SM) and the Consultative Economic and Social Forum (FCES). The SM is responsible for publication of the MERCOSUR Official Bulletin and for the safekeeping of relevant documents. It is also responsible for disclosing activities of the GMC. For its part, the FCES is a consultative body that represents economic and social areas of the Member States;

(f) Work Groups (SGTs), subordinated to the GMC. Their tasks include commissioning studies on specific issues of interest to MERCOSUR, and drafting decisions and resolutions for the appreciation of the CMC. There are currently fifteen (14) workgroups on the following issues:

SGT Nº 1 - Communications;
SGT Nº 2 – Institutional Aspects;
SGT Nº 3 - Technical Standards;
SGT Nº 4 – Fiscal policies;
SGT Nº 5 - Transport;
SGT Nº 6 - Environment
SGT Nº 7 - Industry;
SGT Nº 8 - Agriculture;
SGT Nº 9 - Energy;

SGT N°10 – Labor, Employment, and Social Security;
SGT N° 11 – Health;
SGT N° 12 – Investments;
SGT N° 13 – Electronic Commerce;
SGT N° 15 – Mining.

Since January 1, 1995, there have been no tariff barriers between the member countries. The vast majority of products traded between the four countries (though there are still some exceptions) pay no customs duties. Moreover, a Customs Union has been in effect since January 1, 1995. With a view to fostering the competitiveness of products of member countries in external markets, a Common External Tariff (CET) was introduced.

As in the European Union, the CET is one of the cornerstones of the MERCOSUR integration process. The tariff covers a majority of products imported into MERCOSUR from non-member countries, with the exception of products regarded as "sensitive" in each country which, in the case of Brazil, include capital goods, and information and telecommunications technology.

With a view to avoiding diversions of trade flows, the common external tariff has been set at a level ranging from 0% to 20%, based upon 11 different rates. Under CMC Decision 22/94, a CET level of fourteen percent (14%) for capital goods was set forth for Brazil and Argentina. According to certain political and economical circumstances, the CMC authorizes certain Member States to practice different CET for a certain period of time.

CMC Decision 34/2003 introduced the "Common Import Requirements for Capital Goods not produced in MERCOSUR". The aim of importation of such goods is to foster modernization of productive sectors in Member States and stimulate investment. With this in mind, two types of product lists were drawn up: the Common List, on which the duty is zero percent (0%); and National Lists, on which the temporary duty is two percent (2%) for products not on the Common List. Goods on these lists will remain under import protection for a period varying from a minimum of twenty-one (21) months, to a maximum of twenty-seven (27) months, counted as of their inclusion on the List, extendable for a like period upon request to the CMC. CMC Decision 40/2005 extended the initial period for the entering into force of these rules from January 1, 2006, to January 1, 2009. Until them, Member States are free to maintain their national rules on importation of new capital goods.

Similar regulations altering CET rates for capital goods produced in the region are awaited, and were due to be presented by the Member States to the Trade Commission before June 30, 2001. After several delays, CMC Decision 37/06

set the last GMC meeting of 2007 as the deadline for the High Level Group to examine the consistency and dispersion of the current common external tariff and present a proposal for alterations to the CET on capital goods.

With respect to Telecommunications and Information Technology, CMC Decision 07/1994 established that, as of January 1, 2006, the maximum tariff would be sixteen percent (16%). However, CMC Decision 33/03 provided that the Trade Commission should negotiate Common IT and Telecommunications Regulations, to be approved by the Common Market Group by December 31, 2005. CMC Decision 27/2006 extended this deadline to December 31, 2007, in line with recommendations of the High Level Group to Examine the Consistency and Dispersion of the Common External Tariff, which is due to draft a review of the CET on IT and Telecommunications Goods by event of the last GMC meeting, and which will subsequently go into effect on January 1, 20010. These planned changes are supposed to follow a schedule for convergence due to go into effect on January 1, 2008. Until that time, Member States are free to apply duties that are different to the prevailing CET or even a zero percent (0%) rate, provided they have carried out four-party consultations.

As next steps, the Member States, in line with CMC Decisions 69/2000 and 33/2005, have agreed to eliminate completely, by December 31, 2007, the special customs regulations for importation adopted unilaterally by each. CMC Decision 03/06 presented the list of special customs regulations of each Member State that are exempted from this elimination This commitment encompasses Special Customs Areas, and regulations and benefits that provide partial or total exemption of customs duties on temporary or permanent imports of goods that are not intended for beneficiation or subsequent export to other countries. Products made using such imports benefit from free trade within MERCOSUR, until December 31, 2007, provided they comply with MERCOSUR Rules of Origin. Otherwise, the CMC has established that goods for the conduct, coordination, or foment of scientific or technological research shall be admitted by the Competent Authorities in each country since, under the terms of CMC Decision 36/2003, they are not subject to the CET.

Under CMC Decision 68/00, MERCOSUR Member States may establish and maintain a list of one hundred (100) items of the MERCOSUR Common Nomenclature (NCM) as exceptions to the CET, up until December 31, 2002. CMC Decision 38/2005 extended this deadline to January 31, 2008, after which, Brazil and Argentina are scheduled to reduce the maximum number of exceptions to seventy-five (75) as of August 1, and to fifty (50) as of December 31 of the same year. Member States may, at six-month intervals, change up to twenty percent (20%) of the products on their lists of exceptions, provided they have secured prior authorization from the GMC.

The Common Market Council recently approved rules for the elimination of double taxation, and distribution of customs revenues (CMC Decisions 54/2004 and 37/2005). Thus, goods imported from a third-party state into the territory of a MERCOSUR Member State since January 1, 2006, shall receive the same treatment as local products when crossing borders between MERCOSUR countries, provided they are subject to: (i) a CET of zero percent (0%); or (ii) a one hundred percent (100%) tariff preference, in the four countries, and are subject to the same rules of origin, within the scope of agreements signed by MERCOSUR, without *quotas* or temporary requirements of origin, if such goods originate from a country or group of countries to which the preference has been extended. A list of such products can be found in Annexes I and II of the aforementioned CMC Decision, and are periodically updated by the Common Market Council. Elimination of multiple CET charges will provide a solution to most of the problems associated with the MERCOSUR customs regime.

Advances in the consolidation mechanisms of MERCOSUR are proof that the integration process in Latin America, or at any rate in the southern portion of the continent, are no longer merely theoretical, but have indeed brought about concrete results.

25. Antidumping in Brazil

25.1. Introduction

Burgeoning globalization has increasingly resulted in recourse to antidumping measures in recent years, as national companies demand protection for their domestic markets. Leaving aside the economic implications of dumping and antidumping, this text addresses the issue from the perspective of current Brazilian laws and regulations (notably Law 9.019 and Decree 1.602, of August 23, 1995), and the provisions of Article VI of the General Agreement of Tariffs and Trade (GATT).

With respect to the legal concept of dumping and its core elements, it is important to underscore that antidumping rules may be used by companies to mitigate or counteract the effects of dumping, however, duties imposed must never exceed dumping margin calculated.

Since some confusion exists with regard to dumping vis-à-vis other forms of protection of the economy such as subsidies and countervailing measures, it is necessary to distinguish the differences.

A description will be provided of antidumping procedures and of their termination or suspension, including termination requested by third-party petitioners, at the government's behest in the national interest, and of price agreements with a company accused of dumping.

25.2. Concept and Core Elements of Dumping

Legally speaking, dumping is the export and sale of products at prices lower than usually practiced by the exporting company for similar products in its domestic market. However, although the price difference alone may be regarded as an unfair business practice, in order for the price difference to be deemed unacceptable, it must be demonstrably harmful or a threat to national industry.

Thus, the following constitute core elements of dumping:

Export price lower than that practiced in the exporter's domestic market

Export prices that are lower than those practiced on the exporter's domestic market are an intrinsic element of dumping, and in themselves sufficiently characterize dumping without, however, providing grounds for declaring it

unacceptable. When assessing prices for calculation of the dumping margin, the *ex works* price (i.e, free of taxes) and cash price are considered.

The dumping margin is determined by the comparison between the export price and the price practiced on the domestic market of the exporting company. The difference in the marketing conditions of the same product must be eliminated by means of the corresponding adjustments in the price.

Similar products

A similar product, as defined in Brazilian laws and regulations is an "identical product, a product equal in all respects to the product of reference or, in the absence of such a product, another product that might not be exactly the same in all respects but which has similar characteristics to those of the product of reference". This rather subjective and unclear definition affords authorities investigating dumping practices broad discretionary powers in determining which products can be considered similar within the scope of antidumping proceedings.

Assessing damage to national industry

Under Brazilian law, grounds for damages may include both material damage and any threat of material damage to domestic industry, including retarding of implementation. Under Brazilian law certain tangible parameters can be used to determine damage, including: (i) volume of dumped imports; (ii) effects of said imports on the price of similar products in Brazil; and (iii) resulting impact on the domestic industry. The law also provides for objective analysis of the following: (i) the volume of dumped imports; (ii) market share of dumped product imports as a proportion of overall import volumes and consumption; (iii) price. To be deemed a threat, the following aspects are taken into account: (i) significant growth of imports; (ii) sufficient idle capacity or imminent substantial increase in the foreign producer's productive capacity; (iii) imports at prices that cause a drop in domestic prices or prevent price increases; (iv) stocks.

Causal connection between damage and dumping

In a dumping investigation, the authorities seek to determine whether and to what extent dumped imports are responsible for damage to domestic industry, while taking into account other factors that may have caused damage within the same timeframe.

To this end it is necessary to establish a distinction between dumping and other trade protection mechanisms, especially safeguard measures and subsidies.

Safeguard measures, as foreseen in Article 19 of the GATT, are emergency tools used to protect national industry and avoid damage resulting from increases in import volumes. Unlike antidumping, safeguard measures aim to protect national industries, irrespective of any unfair business practices, and are usually taken when a national industry lacks competitiveness in face of foreign products. Safeguards are applied by States as a concession to industries upon exports of other States that are thus discriminated against.

Subsidies consist of advantages granted by a State to specific companies or industries, that end up artificially reducing their production costs.

Another common misperception is to confuse dumping with underselling and predatory pricing. Underselling consists of sale for less than the cost price, which does not necessarily constitute dumping. Dumping implies export for sale at a lower price than practiced in country of origin, whether or not such prices are higher or lower than the cost prices. For its part, predatory pricing consists of sale of products at low prices with the aim of eliminating competition; an intention that does not need to be proven to characterize dumping. Another basic difference between dumping and the other two practices is that whereas defense against underselling and predatory pricing is generally foreseen in domestic anti-trust laws, dumping is a foreign trade issue.

25.3. Anti-Dumping Investigations in Brazil

In Brazil, an anti-dumping investigation is initiated when Brazilian producers or their business associations file a written petition with accusations of dumping on the part of a certain company or companies in their exports into Brazil.

This petition must contain sufficient evidence of dumping, damage, and causal connection between them. Should the accusation not be clearly substantiated, the petition it will not be accepted.

For a petition to qualify for review, it must also contain the following information: (i) identification of the petitioner, indication of volume and production value of the corresponding national industry; (ii) estimated volume and value of national production of the similar product; (iii) a list of known domestic producers of similar products, who are not represented in the petition and, if available, estimates of the volume and value of their overall production, and a statement of support for the petition; (iv) a full description of product allegedly imported at dumping

prices, name of country of origin or exporting country or countries, identification of each known exporter or foreign producer and a list of product importers; (v) full description of the product manufactured in Brazil; (vi) information the sales price in the exporting country (normal price); (vii) information on the representative export price or, if unavailable, the representative price at which product is first sold to an independent buyers located within Brazilian territory; (viii) information on the development of volume of allegedly dumped imports, and the effect of such imports on similar-product prices on the domestic market, and negative impact of imports on Brazilian industry.

Once the petition has been accepted, questions of merit are reviewed and an investigation initiated.

The petition may be rejected and the investigation cancelled in the event that: (i) dumping or damage caused thereby is insufficiently substantiated or no reasonable justification for investigation is presented; (ii) the petition is not prepared by or on behalf of domestic industries;[56] or (iii) domestic producers, that expressly support the petition, represent less than 25% of national overall production of the similar product.

Investigations must be completed within one year as of the opening date, an additional 6-month extension being permitted under exceptional circumstances. The dumping period shall be the nearest 12-month period prior to the opening date of investigation and may, under special circumstances, extend more than 12 months, but never less than 6 months. On the other hand, the period for determining damages shall be sufficiently long as to allow adequate assessment, but never less than 3 years, and must encompass the dumping-investigation period.

During the initial hearings, when the facts are being determined, interested parties shall have an opportunity to submit, in writing, any evidence that might be relevant to the investigation.[57] For that purpose, additional or complementary information may be requested or accepted, in writing, and hearings may be scheduled. However, attendance at such hearings is not compulsory.

Should required information not be presented to the Brazilian authorities by any of the parties concerned, a preliminary or final opinion may be prepared on the basis of the best information available. Furthermore, the parties may request

[56] Any petition supported by producers whose aggregate production volume represents over 50% of domestic production of a similar product is deemed to have been filed by national industry or on its behalf. Such elements are critical for commencement of an investigation.

[57] Interested parties are: (i) domestic producers and any association representing them; (ii) importers and any association representing them; (iii) exporters and any association representing them; (iv) exporting country's Government.

special treatment for to information classified as confidential, provided that the request is substantiated.

As part of the anti-dumping proceedings, a questionnaire is forwarded to all interested parties, who have 40 days (subject to an additional 30-day extension) to return them duly completed. Aside from these questionnaires a defense petition contesting the initial petition should be circulated, and the opinion of the Department of Commercial Defense (DECOM) notifying the opening date of an investigation.

Prior to completion of the initial hearings, but no less than 60 days after the start of the investigation, Brazilian authorities may impose temporary measures on imports under investigation, provided that all parties have been heard, that dumping and damage to the domestic industry have been characterized on a preliminary basis, and the authorities decide that such measures are necessary to prevent damage during the course of the investigation.

Following publication by the Brazilian authorities of preliminary findings of damage and dumping, the exporter may undertake voluntarily to adjust prices or cease importing at dumping prices. Should the Secretariat for Foreign Trade (SECEX) accept and the Chamber of Foreign Trade (CAMEX) approve this undertaking, the dumping proceeding may be terminated or suspended with no imposition penalties. The investigation may, however, procede if the exporter or any authority deem it desirable.

The Brazilian authorities may acceptance or rejection any price agreement at their discretion, but generally justify a rejection. Moreover, although national industry is not required to express formal views on the issue, SECEX generally requests that it do so.

Prior to issuing a final opinion, SECEX holds a hearing to inform the parties of the essential facts in support of its opinion, and the parties then have 15 days to register their views. Upon expiry of the 15-day period, the initial facts finding phase of process ends and no further information may be received.

Upon the closing of the investigation antidumping duties may or may not be imposed. Such duties are defined as "a charge imposed on the imports at dumping prices, with a view to counteracting their deleterious impact on the Brazilian industry".[58] Accordingly, an investigation may be closed without imposition of antidumping measures in the event that: (i) insufficient evidence of dumping or damage resulting therefrom has been demonstrated, (ii) the

[58] Manual of Trade Protection, prepared by SECEX, page 24.

dumping margin is minimal, (iii) the volume of imports that characterize actual or potential dumping is insignificant. Alternatively, investigation shall be closed and antidumping measures imposed in the event that SECEX finds evidence of dumping, damage, and the causal connection between them.

National authorities may impose antidumping duties and stipulate the amount, which will never exceed the dumping margin. Under Brazilian law, antidumping duties may be levied on goods shipped for consumption no earlier than 90 days prior to application of provisional antidumping measures, provided there is: (i) a history of damage caused by dumping, or if the importer was or should have been aware that the producer or exporter was engaged in potentially-damaging dumping behavior; or (ii) damage has been caused by large volumes of imports of a given product at dumping prices in the relatively short period of time.

Antidumping duties and price agreements proposed by exporters remain in full force only so long as is necessary to mitigate damages resulting from dumping. However, such duties shall elapse within 5 years of imposition, and their extension shall only be authorized if evidence shows that their that extinction could result in renewed dumping and consequent damages to national industry.

An antidumping procedure may be withdrawn either by the petitioner or by the Brazilian authorities. Indeed, the petitioner may, at any time, request withdrawal of the proceedings. However, SECEX may determine the continuation of an investigation or, under special circumstances, in the national interest, call for suspension of duties.

25.4. Conclusion

Antidumping is a relatively new process that has increasingly been used to defend Brazil's commercial interests.

Brazilian antidumping regulations, based on GATT and WTO agreements, go into considerable detail to allows all parties in antidumping proceedings to contest allegations and submit evidence. Nonetheless, in view of rapid developments in this relatively new field, hitherto unforeseen situations are constantly arising, that require careful deliberation on the part of trade authorities to ensure fair treatment both for importers and for local industry.

26. Commercial and Civil Litigation

26.1. Jurisdiction in Civil and Commercial Cases

The new Civil Code, enacted on January 10, 2002 (which revoked the previous Civil Code of 1916 and the first part of the Commercial Code of 1859) provides the basis for judicial decisions on commercial and civil matters. The Commercial Code is now relevant only to matters relating to maritime trade.

Civil and commercial must be filed at State Courts, which have general jurisdiction, presided by a single judge, and are always subject to appeal if the aggrieved party so wishes by a State Court of Appeals. Brazilian Constitution does not provide for jury trial in commercial and civil cases.

Procedural rules are provide for in the Code Civil Procedure, a federal statute. Under Brazil's federative system, the courts system and specific venue rules are governed by State legislation. In general, State Courts are not specialized, and have jurisdiction over civil, commercial, criminal, and family cases.

As a general rule, applying both to individuals and corporations, venue for lawsuit depends upon the domicile of the defendant. Consent of the parties for a different jurisdiction, when stated in a contract, is also accepted when establishing venue, provided this is not barred by a specific ruling or the choice of venue is deemed abusive. All court proceedings in civil and commercial cases are deemed non-confidential and open to the public, except when they involve family matters.

26.2. Litigation Costs

Litigants must pay court fees, which vary from State to State. As a general rule, an initial payment must be made by the plaintiff, usually calculated as a percentage of amount in dispute. In the event of appeals subsequent payments must be made by the party presents the appeal.

Lawyers' fees for the services performed for clients is usually established on the basis of a percentage of the amount in dispute or to be recovered. This percentage is set in an agreement between the lawyer and his client, and is calculated taking into consideration a number of factors, such as the amount of the expected recovery, the complexity of the work to be executed, the length of the lawsuit, the capacity of the client to pay, and the competence and reputation of the lawyer. In most cases a retainer is negotiated and, in case of success, it is offset

against the final fees.

The Code of Civil Procedure provides that all court costs and attorney's fees incurred by a winning party be paid by the loser. This includes reimbursement of fees charged for the court costs experts witness fees, and lawyers' fees. Such costs are set by the court, according to the statutory rules, and transferred to the lawyer, independently of the compensation agreed between the lawyer and his client.

26.3. Initial Proceedings

Though a variety of proceedings exist, only the most common (*processo ordinário*) used in contract or tort cases will be described here. This is the appropriate type of proceedings for cases valued at not less than 60 minimum wages, when no other specific proceeding is indicated by law.

Civil or commercial action is launched when the plaintiff's lawyer files a petition before a court with jurisdiction over such cases, under the terms of State legislation. Next, the defendant receives summons, which may be served by mail or by a court official. In either case a copy of the complaint is be delivered to the defendant, who must respond to the summons within a short period of time (generally 15 days). In the event that the defendant can not be located, the summons may by served publication in a newspaper.

It is then advisable that the defendant seek the services of an attorney, who will then submit to the court a petition contesting the allegations of the plaintiff. This petition may confirm or deny the allegations, offer a different interpretation for them, or argue against legal premises the plaintiff's claims. The plaintiff then files another petition, known as a Reply, responding to the defendant's factual and legal points. The judge will then ask the parties to list evidence they wish to produce before the court. The next step is a reconciliation hearings, at which the judge asks if the parties can settle their differences.

Should the reconciliation prove unsuccessful, the judge will proceed to make an interlocutory ruling on all procedural formalities and issues raised by the parties, except the merits of the case *per se.* The judge may, at this point, dismiss the case should he find that the plaintiff lacks grounds, or in the absence of statutory prerequisites (legitimacy, interest, and cause. Otherwise, the judge determine the kind evidence he wishes to see presented by the parties.

26.4. Evidence

The entire proceeding, and specifically the production of evidence, is conducted by the presiding judge. In principle, documentary evidence should be presented to the court together with the complaint. Likewise, the defendant should present documentary evidence together with his response. As a general rule, other documents which may prove relevant its can be presented by the parties at any time, provided the other party has opportunity comment upon them.

All non-documentary evidence should be accompanied by expert witness reports, signed by an accountant, engineer, doctor, appraiser or other specialized professional. The judge appoints the court's experts, and questions and replies to and from the parties must be in writing. The parties may also appoint assistant experts of their own choice, to meet requirements and comments on the court experts report.

The next step is the examining trial, at a place and date determined by the presiding judge, after the parties have had the opportunity to discuss documentary evidence and examine the expert reports.

The parties previously submit to the judge a list of the witnesses they want examined. During the trial, the judge first examines the witnesses and then lawyers of the parties have the right to pose questions. Such questions are addressed directly to the witness, but rather to the judge, who may repeat, restate or reject such questions. Either party may give testimony but, in this case, the party is not considered a witness. Only witnesses are under oath. A written record is transcribed of the entire trial.

The court's decision may be proffered immediately, unless the parties submit a brief commenting on the testimonies and all evidence produced, in which case the presiding judge re-examines the record prior to delivering his ruling.

Under the Brazilian system of *processo ordinário*, there is no one trial at which all evidence is produced. Indeed, evidence is produced step by step and is progressively incorporated with the aim of instructing the judge's decision.

26.5. Court Rulings

The judge's decision is delivered in writing and contains a brief description of the parties and the issues involved, a summary of claims and counterclaims, a brief description of the facts, and the judge's opinion on each of the issues. The decision may award a party compensation, may order a party to take certain

measures, or may provide a precise interpretation of a contractual clause.

26.6. Provisional Remedies

When a plaintiff's lawyer files a petition, he may, in specific cases, ask for a temporary restraining order (*tutela antecipada*) to bring into immediate effects the final decision. For this the plaintiff must demonstrate his claim that irreparable damage may result from delay.

Furthermore, the plaintiff may such relief during the course of the proceedings, when one or more of his claims are uncontested.

The Brazilian legal system also foresees a writ of prevention (*medida cautelar*) which can be filed before or after the main lawsuit. In either case, plaintiff seeks to protect a right that is in jeopardy if a provisional measure is not granted. The judge may grant a provisional measure if he deems that both *fumus boni iuris* and *periculum in mora* are present.

26.7. Appeals

The Brazilian system allows an assortment of appeals, both to final and interlocutory decisions (i.e., those that do not dismiss the case).

Recently, an alteration to the Code of Civil Procedure was enacted limited the scope of interlocutory appeals. Now, a party can appeal to an interlocutory decision only if serious jeopardy or threat of irreparable damage exists (i.e., inadmissibility on appeal to a final decision). Nevertheless, in such instances, the appeal is not forwarded immediately to the court, but is placed on the record to be examined in the event that the final decision is appealed.

An appeal dose not generally suspend the proceedings. The same lawyer may plead the case in the higher courts. Appeals are submitted to a panel in the State Court, composed of an even number of judges. They may review the decision in the light of their interpretation of the law and the facts.

The parties may appeal further to the federal high courts, i.e. the Superior Court of Justice (STJ) and the Supreme Federal Court (STF). If a party claim violation of a treaty, a federal law, or an interpretation in conflict with federal law by the State Courts, he can appeal to the STJ. Should the claim involve a violation of the Federal Constitution, he can appeal to the Supreme Court. Both type of appeals may be filed, but the admission is highly restricted.

Such appeals do not entail any discussion of the facts, and only the legal principles are subject to review in the federal high courts whose hearings are before a panel. Appeal to a high federal court does not suspend the proceedings, and the winning party can initiate the enforcement proceedings.

26.8. Enforcement of Court Rulings

Once the winning party has secured a final decision, he has the right to start the executory action to enforce the ruling in his favor. Executory action is launched when a petition is filed before the same case that proffered the ruling.

A recent change in the Code of Civil Procedure has speeded up enforcement of rulings.

The plaintiff should state the amount of his claim, however, in many cases the ruling merely states that damages must to be paid and provides a basis for their calculation. Thus, prior to actual recovery, there may be need of a discussion between the parties as to calculation of the values. The debtor then receives notification through his counsel. At this, the defendant may file objections he deems necessary, but must nonetheless deposit the full amount in escrow, or give asset to guaranty of property for execution of the ruling.

In the event of an award with adjudication that a certain or uncertain asset must be delivered by the defendant, the judge determines measures that assure a practical result equivalent to payment. In the event that it refers to positive or negative covenant, the judge sets a deadline for the defeated party to comply with the sentence. In either instance, no impugnation is admissible and the debtor may to defend himself only incidentally.

In the event of an executory action when a debtor fails to pay the debt and does not appeal within 15 days of the notification to his counsel, the compensation award is increased by 10% (ten per cent). In this case, the creditor is allowed the opportunity to appoint assets owned by the debtor that he wishes to be attached in guaranty.

Once the record and evaluation of attachment has been carried out, the debtor is once again notified through his counsel, and may, if he so desires, submit impugnation.

Such impugnation does not affect the enforcement proceedings, unless the judge determines otherwise. Even in cases where suspensive effect is granted, enforcement may temporarily proceed, if the creditor presents a guaranty in the

amount of the debt.

Finally, if the defendant is unable or unwilling to pay the award or to perform the action required by court, the attached property shall be appraised and sold in a public auction, and the proceeds used to pay the winning party.

The Brazilian legal system does not provide criminal sanction against debtors, in view of the provisions on personal liberty enshrined in the Federal Constitution. Only alimony debtors or a negligent bailee may be imprisoned if they fail to pay their debts. The question of imprisonment of negligent bailee has been challenging in the light of an international treaty ratified by Brazil.

26.9. Collection Proceedings

Collection of bills of exchange, promissory notes, debentures, checks, and other documents defined in law as extra-judicial executable securities (*título executivo extrajudicial*) may be executed under action against a solvent debtor.

Such proceedings seek expropriation of the debtor assets to pay the creditor. To this end the debtor is summoned to deposit the sum in escrow, or present assets to be attached in guaranty, prior to discussion of collection of the debt.

When a creditor has a credit represented by a document which does not fulfill all legal formalities, he may file a monitory action (*ação monitória*) requesting a declaration that this document is an executable security (*título executivo judicial*).

27. Consumer Rights

27.1. General Definition

The definition of a consumer as someone who merely purchases a commodity or service has a broader interpretation in Brazil, considering that the Brazilian Federal Constitution guarantees public interests over private rights (see Art. 5, XXII of the Federal Constitution).

27.2. Background

In the past, consumer rights protection in Brazil was covered by a variety of laws and decrees, and principally by the Commercial Code (1850), the Civil Code (1917), and other specific laws.

The Consumer Protection and Defense Code (Law 8.078) came into effect on March 12, 1991, with the aim of encompassing a full range of consumer's rights. Such a law had been foreseen in articles 5-XXXII and 170-V of the Brazil's 1988 Constitution 1988. Thus, today, the Brazilian law governing consumer rights is fully in effect and has its bases enshrined in the Federal Constitution.

The Brazilian Consumer Code regulates the relationship between costumers/consumers and industry, commerce, service providers, and importers, all of which of obligations to fulfill.

Even with the entering into effect of the new Brazilian Civil Code (2003), consumer relations are still subject to the Consumer Protection Code, since it is the specific law that governs consumer relations.

27.3. Scope

Brazil's Consumer Protection and Defense Code covers subjects ranging from safety and health protection of consumers, to access on specific information regarding goods, assets and services (*e.g.*, validity or use-by dates). It has served to eliminate abusive clauses from contracts, especially those which might lead a consumer to enter into onerous obligations (involving the *rebus sic stantibus* principle). It also includes specific provisions for recovery of damages, in the event of wrongful acts, breach of contract, violation of general or specific consumer rights regulations.

The law has changed the balance in favor of consumers, removing from them the burden of proof. It is now incumbent upon the manufacturer to produce evidence that his goods are in compliance with standards, rather than upon the customer responsible to prove that goods are defective or dangerous. This is a feature can be invoked when deemed appropriate by a judge, line with l requirements established in law.

Other new features implemented by the law are: (i) the adoption of the doctrine commonly known as "disregard of the corporate entity" (with a broader scope than found in US and European models); (ii) a new treatment of civil liability in cases of product failure, in which the producer or manufacturer liable is held responsible even without malice or specific intention to cause damage (a different principle is invoked in the case of services provided by such professions as dentists, engineers etc.); (iii) particularly strict advertising rules. In all cases, the basic constitutional principle of "due process of law" is maintained.

As a consequence of these protective regulations, manufacturers and service providers must now be much more careful with their products or output. Legal counsel is recommended and often required, from the pre-manufacturing phase to actual on-shelf exhibition.

27.4. Enforcement

From the standpoint point of view of a foreign lawyer, Interpreting Brazilian Consumer Law is a most demanding process. The key to understanding and mastering this law is accepting that it brings together in a single package, civil, administrative, and criminal sanctions.

Indeed, many behaviors are now regarded as criminal, yet the code reaffirms the constitutional right of a defendant to due process of the law. Even the drafting of contracts is now a much more intricate task, in view of heavy penalties for abusive clauses. Advertising has also been targeted by policy-makers, raising great need for caution in pre-contractual commitments implied by press or media releases.

27.5. Trends

The Brazilian consumer protection code is compatible with the world's most modern legislations. Brazilian courts have been cautious in applying the law, and have so sought to ensure that it attains its main objective, i.e., protecting consumers whilst at the same time enhancing healthy competition between

the players in the supply market. For Brazilian industry, it has helped create a development environment for manufacturers, enabling them to outstrip competitors based outside Brazil and, at the same time, interface with potential partners both in Brazil and abroad. Understanding consumer rights in various jurisdictions has helped businesspeople integrate better, faster, and more profitably.

28. Arbitration and Upholding of Foreign Court Rulings and Arbitration Awards

28.1. Purpose and Rules

Law 9.307/96 (the Brazilian Arbitration Law) entitles individuals and entities legally qualified to enter into agreements to resort to arbitration for settlement of disputes concerning property rights. In other words, disputes involving private property rights may be submitted to arbitration if the parties agree to do so.

Legal rules applying to submitted to arbitration may be freely established by the parties, and may include general principles of law, custom, usage, or international trade rules.

An arbitration clause inserted into an agreement, i.e., a provision stating that any and all disputes arising under said agreement shall be resolved by arbitration, is legally binding upon the parties. The Brazilian Arbitration Law provides foresees that a party may make a judicial demand that arbitration take place, in the event that the other party fails to comply with the arbitration clause.

28.2. Arbitration Proceedings

The parties may, by mutual agreement, define a procedure for selection of arbitrators. Alternatively, the specific rules of an institutional arbitrator or specialized entity may be adopted. The arbitrator is competent to rule on matters of fact and of law. Arbitration awards are not subject to appeal or validation by the Judiciary.

Arbitration is deemed to have been instituted when an arbitrator (or arbitrators) accepts his/their appointment. The parties may put forward their claims through their attorneys, but are at liberty to designate other persons to represent or assist them in arbitration proceedings.

An arbitration award produces is has the same binding effect upon the parties and their successors as a court decision, and such an award has the same effect as a executable deed.

An arbitration award must include:

- a report, containing the names of the parties and a brief summary of the dispute;

- grounds for the decision, describing questions of fact and of law involved, and expressly indicate whether the arbitrators ruled on equity (if applicable);
- the ruling, when arbitrators decided the issues submitted to them and a deadline for compliance (if applicable); and
- the date and place of the award.

28.3. Upholding and Enforcement of Foreign Arbitration Awards

Brazil has ratified the Geneva Protocol on Arbitration Clauses of 1923, and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards United, of June 10, 1958.

The Brazilian Arbitration Law establishes that for a foreign arbitration award to be upheld and enforced in Brazil it need only be ratified by the Supreme Federal Court (STF).

A request for ratification should be filed by the interested party, accompanied by the original arbitration award or a certified copy thereof, duly notarized by the Brazilian Consulate and translated into Portuguese by a sworn translator in Brazil, and (ii) the original agreement to arbitrate or a certified copy thereof duly translated into Portuguese by a sworn translator.

Under the Brazilian Arbitration Law, the ratification of a foreign arbitration award follows the rules of the Code of Civil Procedure and the House Rules of the STF on ratification of foreign judicial awards.

Under the STF House Rules, ratification of a foreign arbitration award is not be subject to retrial or re-examination of merits of the original arbitration proceedings.

A foreign arbitration award shall not be ratified by STF, under the following circumstances:

- parties to the arbitration agreement do not have legal capacity;
- if the arbitration agreement is not valid under the laws of the jurisdiction chosen by the parties or, if tacit, under the laws of the jurisdiction where the award was made;
- the defendant did not receive proper notice of the appointment of arbitrators or of the arbitration procedure, or full opportunity to defend its case;
- the arbitration award exceeded the terms of the arbitration agreement, and it was not possible to separate the portion within the scope of the arbitration

agreement;
- commencement of arbitration proceedings was not in accordance with the arbitration agreement;
- the arbitration award is not binding upon the parties, or its effects must have been annulled or suspended by a court in the jurisdiction in which it was issued;
- under Brazilian law, the matters submitted to arbitration are not eligible for arbitration;
- the arbitration award runs contrary to Brazilian public order.

When confirmed by STF, the arbitration award is eligible for enforcement by court order.

28.4. Foreign Sentences

Foreign sentences may be upheld and enforced in Brazil, irrespective of reciprocity on the part of the country where it originated or of any specific international treaty or convention between said country and Brazil. To be enforceable in Brazil, however, a court sentance made in another country must be ratified by the Brazilian Judiciary.

Under article 102 (h), of the 1988 Federal Constitution, the STF is responsible for analysis and decisions on the ratification of foreign sentences. This question is addressed by provisions of the Introductory Law to the Civil Code which contains rules for the interpretation of international private law, by the Code of Civil Procedure, and by STF House Rules.

When ruling on the ratification of a foreign court sentence, the STF verifies whether the formal procedural requisites have been fully met, in all instances up until final ruling.

Under Brazilian Law, a sentence (be it on a civil, commercial, or criminal matter) made by a judge or a court, in compliance with the due process of law, is not subject to any further appeal.

Provided that these basic conditions have been fulfilled, STF verifies compliance of the foreign sentence with the following requisites, according to Article 217 of STF House Rules, based on the provisions of Article 15 of the Introductory Law to the Civil Code:

- The foreign sentence must have been proffered by a competent judge:
STF does not check whether the foreign judge had jurisdiction over the

matter, as this could be construed as undue interference into a sovereign matter of a foreign country. What is examined by STF is whether the case, from the standpoint of Brazilian law, falls within the exclusive jurisdiction of Brazilian courts. By way of example, ratification of a ruling regarding a real estate property located in the Brazilian territory would not be admissible, since Article 12, § 1º, of the Introductory Law to the Civil Code, provides that "only courts of Brazil" have jurisdiction over such matters.

- The parties must have been served proper notice of process:
Service of process is the act whereby a party is summoned to respond to a legal suit filed against it. It ensures the right of full defense and the summons must be delivered in accordance with guidelines set forth in laws of the place in which the ruling was made. Should the defendant be domiciled in Brazil, the summons should be delivered by means of letters rogatory.

- The sentence must be final and in proper form for its execution at the place where it was rendered:
For the purposes of expediting enforcement proceedings, insofar as possible it is advisable that evidence be produced to show that the decision is final, by certification by the competent judge, stating that no further appeal is admissible in any jurisdiction.

- The foreign sentence must be authenticated by the nearest Brazilian Consulate and must be submitted to STF with a sworn translation.

- The foreign ruling will not be ratified in the event that it is deemed contrary to national sovereignty, public policy, or good customs, in accordance with Article 17 of the Introductory Law to the Civil Code, this being the only aspect of merit in a foreign sentence ruled upon by the STF.

Ratification is obtained by means of action instituted by the foreign plaintiff before STF, which shall then issue a summons upon the defendant, who is entitled to challenge the request for ratification.

The STF shall only acknowledge challenges by the defendant if they relate to: (i) the authenticity of the documents produced by the plaintiff, (ii) interpretation of the foreign sentence, or (iii) the compliance with the statutory requirements regarding ratification or the filing of the request, in accordance with Article 221 of STF House Rules.

Once the foreign sentence has been ratified, it becomes eligible for enforcement through the Brazilian lower courts.

29. International Aspects of Brazilian Jurisdiction

29.1. General Jurisdiction of Brazilian Courts

According to Article 2 of the Brazilian Federal Constitution "the Legislative, the Executive, and the Judicial Branches are independent and harmonious among themselves and are powers of the Union". Moreover, article 5 of the Federal Constitution states that "the law shall not exclude any injury or threat to a right from appreciation by the Judicial Branch". Jurisdiction to adjudicate is, therefore, deemed a matter of sovereignty.

In view of the federative structure of the Brazilian State, the jurisdictional powers of the Federative States also emanate from their respective State Constitutions. For its part, article 1 of the Code of Civil Procedure states that that civil jurisdiction is exercised by judges throughout national territory. Furthermore, article 86 of the Code of Civil Procedure states that civil cases shall be adjudicated by judicial courts, according to their respective competence, without prejudice to the right of parties to submit disputes to arbitration.

The limits of Brazilian jurisdiction in relation to other jurisdictions are established by Brazilian laws, whenever cases are brought in a Brazilian venue. In other words, Brazilian courts abide by *lex fori*, embodied in the Code of Civil Procedure. In that respect, the Code of Civil Procedure draws a clear distinction between concurrent jurisdiction (article 88) and exclusive jurisdiction (article 89). In the case of concurrent jurisdiction, the Brazilian Judiciary may exercise its jurisdictional power whenever (i) the defendant is domiciled in Brazil, regardless of his/her nationality; or (ii) the obligation was contracted in Brazil, or (iii) the law suit originates from an event or act in Brazil. In the cases of exclusive jurisdiction, only Brazilian courts (and not those of other States), may exercise jurisdiction over law suits relating to real estate property, or to probate and succession of assets located in Brazil, whether or not the deceased was a foreigner and had lived outside Brazil.

29.2. Choice of Forum

Brazilian case law is generally hesitant on the autonomy of the parties to select a foreign venue. Rulings of the Superior Court of Justice (STJ) have swung both ways. Some justices sustain that the parties declaration of intent may not remove Brazilian jurisdiction, given that the rules of court jurisdiction are based upon national sovereignty, and therefore are not subject to the parties autonomy. Thus, the parties are free to modify the internal territorial competence, they

may not modify the extension of national jurisdiction.[59] Other justices, however, understand that there is not any prohibition to select the forum in an international contract. [60]

In view of the yet undefined position of Brazil's highest court for infra-constitutional cases on this matter, a clause establishing choice of a foreign forum in an international contract entered into parties domiciled in Brazil, or having an obligation to be performed in Brazil, or under which an act or a fact may be performed in Brazil, should be carefully negotiated and carefully written.

29.3. Judicial Cooperation

Brazilian laws are generally favorable towards cooperation with the courts of other countries. Article 12, § 2º, of the Introductory Law to the Civil Code (LICC) provides that Brazilian courts shall proceed with the judicial acts requested through a letter rogatory by a competent foreign court, provided that an *exequatur* has been granted.

Under article 105, I, i of the Brazilian Federal Constitution, an *exequatur* of the letter rogatory is required in order to determine the serving of a summons on a defendant resident in Brazil, as well as for obtaining evidence, by a Brazilian first-level court. Constitutional Amendment 45, of 2004, has shifted competence for granting of an *exequatur* from the Supreme Federal Court (STF) to Superior Court of Justice (STJ), and new procedural rules for such proceedings were recently established. [61] The President of STJ shall notify the defendant of the request contained in the letter rogatory, and the defendant may seek to impugn the request if an offense to Brazilian public policy is found, or if formalities have not been properly fulfilled.

Besides statutory rules on judicial cooperation, that apply to any foreign State, there are also bilateral treaties signed between Brazil and such States as France (1985), Spain (1991), Italy (1995), Argentina (1995) and Uruguay (1995). Such treaties are not identical, but most contain provisions that expedite, to a certain extent, measures for obtaining and *exequatur* from STJ. [62]

Multilateral treaties signed by Brazil regarding judicial cooperation with

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[59] Resp 498835/SP, 3ª T., Rapporteur Min. Nancy Andrighi, DJ 29/5/05; Resp 251438/RJ, 4ª T., Rapporteur Min. Barros Monteiro, DJ 8/8/00.

[60] Resp 242383/SP, 3ª T., Rapporteur Min. Humberto Gomes de Barros, DJ 21/3/05; REsp 505208/AM, 3ª T., Rapporteur Min. Carlos Alberto Menezes Direito, DJ 13/10/03.

[61] See full text of STJ Resolution 9, of May 4, 2005, at http://bdjur.stj.gov.br/dspace/handle/2011/368.

[62] For the full text of the bilateral treaties, see http://www.mj.gov.br/drci/cooperacao/acordosinternacionais.htm

countries that have special political or economic ties with Brazil. Such is the case of countries of the South, Central and North American continent, joined under the Organization of American States (OAS), and the countries of the Common Market of the South (MERCOSUR).

OAS member-States have signed a series of agreements on private international law (known as CIDIP's), some of which deal with judicial cooperation. This is the case of the Inter-American Convention on Letters Rogatory (CIDIP-I, Panama, 1975) and its Additional Protocol (CIDIP-II, Montevideo, 1979), [63] both ratified by Brazil in 1996.

Under these treaties, notifications and service of summonses may be processed by initiative of the parties, through the court system, through consular or diplomatic agents, and through the central authorities of the requesting and the requested States.

The main innovation introduced by the Convention on Letters Rogatory was the use of central authorities as intermediaries between the courts of the countries involved, making it possible to convey requests for cooperation through a less formalistic procedure than is normally employed by national courts and diplomatic channels. A certain degree of uniformity of procedural rules has also been achieved under the Convention, so that requirements for processing letters rogatory may be approximately the same in the countries where it is in force. However, certain of its provisions have been deemed unenforceable, such as the one that provided for a direct communication between the courts of neighboring countries, which cannot be applied in Brazil due to the constitutional rules that require granting of an *exequatur* by STJ as a condition for letters rogatory.

The issuing of an *exequatur* to a letter rogatory does not imply automatic recognition of the jurisdiction of the requesting court, neither does it imply an obligation to recognize or to enforce a foreign sentence that may be issued by the foreign court.

The procedures for fulfillment of a request contained in letters rogatory must follow the rules of the requested State, but may follow any special request made by the requesting State, provided that it is not incompatible with public policy of the requested State. In any event, the requested State may refuse to execute the letter rogatory where it deems that the request is in manifest violation to its own notions of public policy.

[63] For the full text of the Convention and its Additional Protocol, see http://www.mj.gov.br/drci/cooperacao/Acordos%20Internacionais/Conven%E7%E3o%20interamericana%20sobre%20cartas%20rogat%F3rias.pdf

Within the framework of MERCOSUR, a multilateral treaty on judicial cooperation – the Las Leñas Protocol, of 1992, [64] - contains rules to facilitate the serving of letters rogatory among the MERCOSUR Member States. The Las Leñas Protocol deals with the serving of summonses, notifications, and similar acts, as well as evidence. It provides that the letter rogatory must be served *ex officio* by the requested authority, except when a public policy issue is at stake. It also states that the serving does not imply automatic recognition of the jurisdiction of the requesting court. The procedures arte those of the requested State, and central authorities are the preferred intermediaries within the Judiciaries involved.
The Las Leñas Protocol waives the obligation to post a bond in guaranty for court costs and attorneys fees, normally required from a foreign party litigating in Brazil.

29.4. Recognition and Enforcement of Foreign Judgments in Brazil

Recognition and enforcement of foreign judgments has long been a feature of Brazilian law. In the present legal framework, it is contemplated by article 102 of the 1988 Federal Constitution as amended by article 15 of the Introductory Law to the Civil Code, by articles 483 and 484 of the Code of Civil Procedure, and by the Resolution 9 of the Presidency of STJ.

The applicable rules stipulate that, in order for a foreign judgments to be enforced in Brazil, it must: (i) have been proffered by a competent court, (ii) the defendant must have been served notice of process, (iii) be *res judicata* and ready for execution in the State of origin, (iv) have been translated by a Brazilian sworn public translator, and (v) have been recognized by the Superior Court of Justice.

The procedure for recognition by STJ of a foreign judgment requires that the interested party file a petition requesting such recognition, together with a copy of the foreign judgment and other documents necessary for the understanding of the request, all duly translated and authenticated.

When a foreign judgment is incompatible with Brazilian public policy, it shall not be recognized; however, if incompatibility is only partial it may be partially recognized. Anticipatory or interim measures may also be granted in proceedings for recognition of a foreign judgment, so that the defendant may not frustrate the

[64] For the full text of the Las Leñas Protocol, see http://www.mj.gov.br/mercosul/RMJ/Documenta%E7%E3o/3_Protocolo%20de%20Las%20Len%E3s%20_espanhol_.pdf

purpose of the recognition during the period in which the process is underway.

If a defendant wishes to contest a request for recognition of a foreign judgment, the only admissible arguments are based upon: authenticity of documents, interpretation of the judgment, and the compliance with requisites of STJ Resolution 9. No discussion of merits is allowed, excepting on public policy matters.

Once it is recognized by the STJ, the foreign judgment may be executed by a first-level federal court.

Various bilateral and multilateral treaties have attempted to harmonize legal standards with the aim of reducing uncertainties generated by the various national laws that may apply to recognition and enforcement of foreign judgments. Within the scope of both OAS and of MERCOSUR Brazil has signed a number of international treaties relating to recognition and enforcement of foreign judgments and arbitral awards.

The Inter-American Convention on the Extraterritorial Validity of Foreign judgments and Arbitral Awards, signed in Montevideo in 1979 and ratified by Brazil in 1997[65], provides extraterritorial validity to any foreign judgment or award in civil, commercial and labor cases, issued by judicial authority in the signatory States, provided that (i) the judgment/award is considered authentic in the State of origin, (ii) the judgment and accompanying documents have been duly translated to the language of the State of recognition, (iii) it has been duly certified as required by the laws of the State of recognition, (iv) it was proffered by a competent court in the international sphere, according to the laws of the State of recognition, (v) the defendant has been served notice of process in a form substantially equivalent to that accepted under the laws of the State of recognition, (vi) the parties have had the opportunity to submit a defense, (vii) the judgment it final or has the effect of *res judicata* in the State of origin, and (viii) the judgment is not manifestly against public policy principles and norms of the State of recognition.

Though the Convention on Extraterritorial Validity goes into considerable detail on bureaucratic requirements, it fails to define how international jurisdiction of the State of origin is to be ascertained. To fill this gap, another convention – the Inter-American Convention on Jurisdiction in the International Sphere for the Validity of Foreign Judgments[66]–, was signed in 1984, but has not yet been ratified by Brazil. This convention has been criticized for its extremely narrow

[65] For the full text of the Convention, see http://www2.mre.gov.br/dai/arbitral.htm.
[66] For the full text of the Convention, see http://www.oas.org/juridico/portuguese/treaties/B-50.htm

focus, and to date only two States of the region (Mexico and Uruguay) have ratified it.

To address disparities in inter-American conventions on recognition of foreign judgments, the Member States of MERCOSUR signed the Las Leñas Protocol of 1992. With regard to the recognition of foreign judgments, the Protocol allows a request to be served by letters rogatory, rather than by a petition filed in Brazil by the party requesting the recognition. This, in turn, makes it possible for proceedings filed in one country to be transferred to another through the respective central authorities. Ratification by Superior Court of Justice (STJ) is nonetheless required.

Although Brazilian law (article 90 of the Code of Civil Procedure) does not consider *lis pendens* in a foreign jurisdiction preclusive of jurisdiction to adjudicate of Brazilian courts, *lis pendens* is deemed an impediment for the recognition of a foreign judgment under the Lãs Leñas Protocol, if the pending action law suit brought in the State of recognition prior to the law suit in which the foreign judgment was proffered (article 22).

As a complement to the Las Leñas Protocol, MERCOSUR Member States have defined conditions for international jurisdiction in contractual matters, through the Buenos Aires Protocol on International Jurisdiction in Contractual Matters signed in 1994, and ratified by Brazil in 1996. [67]

29.5. Jurisdiction of International Arbitral Tribunals

The Brazilian Arbitration Law (Law 9.307 of 1996)[68] accepts and endorses international arbitration as an effective means of resolving disputes involving patrimonial rights and parties capable to freely dispose of such rights. It places no restriction on the use of arbitration rules of foreign or international arbitral institutions, which is left to the discretion of the parties entering into an arbitration agreement.

Though parties are fee to sign international contracts that establish the dispute resolution mechanism of their choice, a foreign arbitral award or judgment issued by a foreign court is only valid in Brazil once it has been recognized by the Superior Court of Justice (STJ). The procedures for recognition of a foreign arbitral award or a foreign court judgment are practically identical, and are

[67] For the full text of the Protocol, see http://www.mj.gov.br/mercosul/RMJ/Documenta%E7%E3o/5_Protocolo%20de%20Buenos%20Aires.pdf

[68] For full text, see http://legislacao.planalto.gov.br/legislacao.nsf/Viw_Identificacao/lei%209.307-1996?OpenDocument

governed by STJ Resolution 9, of 2005.

The United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, ratified by Brazil in 2002, also applies to recognition of foreign arbitral awards in Brazil.

Recent case law of the Federal Supreme Court (formerly the competent court for such recognition) has generally been favorable to recognition of foreign arbitral awards, especially after the enactment of the Arbitration Law of 1996, which exempted the requirement of double homologation[69]. Since STJ became competent to issue recognition of foreign arbitral awards in 2004, it has been ruling in favor of international arbitration involving parties domiciled in Brazil, consonant to the New York Convention[70].

[69] See SE 5206 AgR/EP – ESPANHA, Rapporteur Min. Sepúlveda Pertence, Tribunal Pleno,12/12/2001; SEC-5828/NO, Rapporteur Min. Ilmar Galvão, Tribunal Pleno, 06/12/2000; SEC-5847/IN, Rapporteur Min. Maurício Corrêa, Plenary, December 12, 1999

[70] See SEC 802 / EX, 2005/0032132-9, Rapporteur Min. José Delgado, CE - Corte Especial, August 17, 2005; SEC 856 / EX, 2005/0031430-2 Rapporteur Min. Carlos Alberto Menezes Direito, CE - Corte Especial, May 18, 2005