INVESTING IN BRAZIL:

A LEGAL AND PRACTICAL GUIDE

OECD
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PARIS

This publication presents an assessment of Brazil's foreign direct investment trends and policies. It is based on the results of an examination held in July 1997 by the Committee on International Investment and Multinational Enterprises (CIME) as part of Brazil's request to become an observer participant in the Committee and to adhere to the 1976 OECD Declaration on International Investment and Multinational Enterprises and its Related Decisions and Recommendations.

This study updates the original OECD report published in 1998. It is published by the Alexandre de Gusmão Foundation and the Brazilian law firm Noronha Advogados.

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Foreword

Since 1992, the Government of Brazil has been progressively implementing a policy aimed at strengthening its ties with the Organization of Economic Cooperation and Development (OECD). In line with this gradual approach toward the Paris-based Organization, Brazil has become a full member of the Development Center and of the Steel Committee and has more recently become an observer member of the Committee on International Investment and Multinational Enterprises (CIME) and its Working Groups, the Competition Law and Policy Committee and its subsidiary bodies, the Trade Committee and its Working Party and the Agriculture Committee and its subsidiary bodies.

This publication presents an assessment of Brazil's foreign direct investment trends and policies. It is based on the results of an examination held in July 1997 by the CIME as part of Brazil's request to become an observer participant in the Committee and to adhere to the 1976 OECD Declaration on International Investment and Multinational Enterprises and its Related Decisions and Recommendations. The 1976 Declaration promotes non-discriminatory policies toward established foreign enterprises and sets voluntary guidelines for foreign investors to follow in host countries.

In December 1997, Brazil also signed the OECD Bribery of Foreign Public Officials in International Business Transactions and became a full participant in the CIME Working Group on Bribery in International Business Transactions and has adhered to the OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, which are also prerequisites for CIME observership.

This study updates the original OECD report published in 1998. It is published by the Alexandre de Gusmão Foundation and the Brazilian law firm Noronha Advogados. I am convinced it will constitute a privileged guide for foreign government officials and investors worldwide with an interest for Brazil foreign investment policies.

Ambassador Luiz Felipe Lampreia,
Minister of Foreign Relations
of the Federative Republic of Brazil

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Summary and Conclusions

Until recently, Brazil was overshadowed by other countries as a destination for foreign direct investment. This is particularly true when one considers its size - the fifth largest country in the world - as well as its economic weight - the world's tenth largest economy. Starting in 1993, however, FDI has been on a sharp rise, boosted by a substantial improvement in macroeconomic stabilization, a policy shift towards liberalization and the opening of state-reserved activities to private and foreign operators. Inflows reached a record of US$ 17.1 billion in 1997 and may exceed US$ 20 billion in 1998. Brazil ranked fifth among non-OECD countries and eighteenth world-wide as an FDI recipient between 1990-1995.

Over 75% of the stock of inward investment has come from OECD countries. The United States is the single largest investor, but European countries are also very active (France, Germany, Italy, the Netherlands, Spain and Switzerland). At the regional level, Brazilian investments have been increasing rapidly. Manufacturing, notably in the automotive sector, attracts the largest percentage of FDI inflows but it is expected that the share of services and public utilities will grow substantially in response to the needs of 160 million Brazilian consumers. Outflows are also rising, particularly to Mercosur countries. Brazil can be regarded as a major player in the field of foreign direct investment.

Liberalization of foreign direct investment has been a strategic component of Brazil's reform process. The most far-reaching measure was the 1995 Constitutional Amendment which eliminated the distinction between Brazilian companies on the basis of their level of foreign ownership. This opened up critical areas of

economic activity - including mining, petroleum, electricity, transport and telecommunications - to foreign involvement. Statutory equity limitations were also lifted or relaxed in important sectors (notably transport and telecommunications). These measures have been amplified by the reactivation of privatization, the deregulation of monopolies, and new rules for the granting of concessions. Tax reform has reduced the tax burden on foreign direct investment.

Another salient feature of Brazil's regulatory regime is the absence of a general authorization mechanism for FDI. Registration with the Central Bank of capital invested and of profits is required for information and statistical purposes only. A number of improvements have been made to simplify the procedures and reduce delays, and others are being developed (such as the introduction of electronic registration already in place for portfolio investment and import financing).

Brazilian legislation, however, still deviates from the National Treatment principle in a number of areas. These concern the financial sector, telecommunications, radio, television and publishing, cable television, air and road transport, fishing, rural properties, health care and security services, and transport of valuables. Foreign investments in real estate and rural areas are subject to special authorization. There is a statutory requirement for the employment of nationals in Brazilian companies.

The 1995 Constitutional Amendment does not extend national treatment to non-established companies. In the case of privatization (Law 9,491 which replaced Law 8,031 and subsequent amendments) foreign investors can acquire up to 100% of privatized federal company, unless there is a legal disposition (case of the Telecommunications Sector and Financial Services) or

an expressed decision of the Executive, that determines an inferior participation. The federal government has the right to establish special share arrangements, including the retention of golden shares. Privatization of companies controlled by states and municipalities is not governed by Law 9,491, which is restricted to the federal privatizations. Their controlling authorities are constitutionally entitled to adopt specific policies regarding their privatization programs. The banking legislation provides far greater room for discretionary action by the authorities than those of OECD countries. A relatively large share of Brazilian banking activities remain in state hands. More liberal and clearer market access rules for this sector - including for the Brazilian payments system - could therefore be considered by the Brazilian authorities. There is also scope for further simplification of foreign exchange regulations. Vigilance needs to be exercised with respect to the implementation of the new Industrial Property Law.

The OECD encourages Brazil not to relax the pace of its reforms and to pursue its efforts towards a broader application of the fundamental principles of the OECD liberalization instruments. FDI relations between Brazil and member countries are expanding rapidly. Brazil is also an important player in Mercosur, a regional grouping of non-member countries that is of growing interest to member countries.

The OECD welcomes Brazil's adherence to the various components[1] of the OECD Declaration on International Investment and Multinational Enterprises, the Convention on Combating Bribery of Foreign Affairs in International Business Transactions and related to

[1] The National Treatment Instrument, the Guidelines for Multinational Enterprises, the Incentives and Disincentives Instrument and the Conflicting Requirements Instrument (a summary of these provisions is presented in Annex 4).

recommendations[2] and the fact that Brazilian authorities will participate fully in the implementation of these instruments. The Organization believes this development should contribute to the liberalization process in Brazil and provide a framework for the expansion of FDI relations between Brazil and OECD countries.

[2] Brazil has also signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in December 1997. The related instruments are the Recommendation on Combating Bribery in International Business Transactions and the Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials.

Chapter 1

Direct Investment in the Brazilian Economy

A. Foreign investment in Brazil

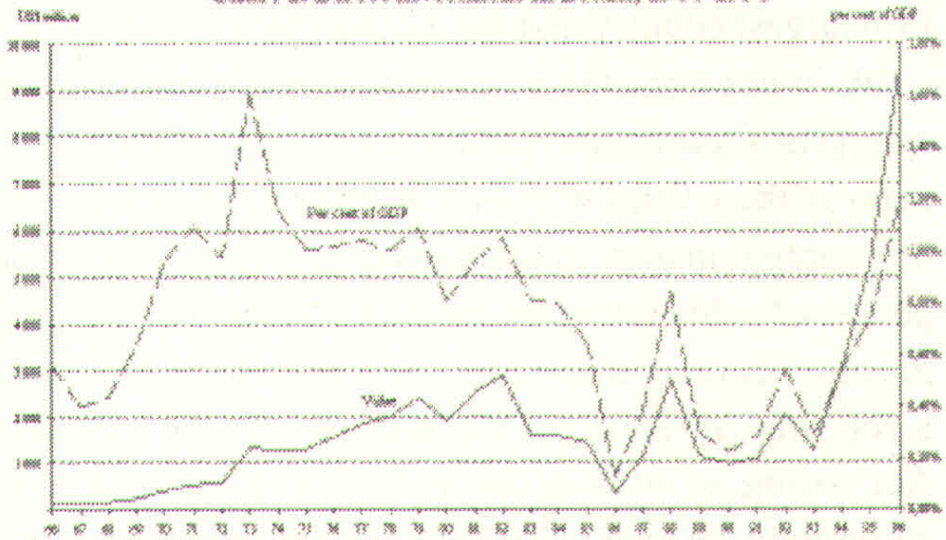
Brazil is the fourth leading recipient of direct investment inflows since 1990 among non-member countries and the fifteenth world-wide. Excluding offshore financial centers, Brazil is the principal non-member destination for firms from many OECD countries, including Canada, France, Germany, Italy, the Netherlands, Switzerland and the United States. In spite of its prominent role as a destination for global FDI flows, Brazil has nevertheless been overshadowed in recent years by other locations, principally in Asia. Its share has since recovered slightly as inflows reached almost US$ 5 billion in 1995 and over US$9 billion in 1996. Foreign investment not directly related to privatization netted US$ 4.2 billion in the first four months of 1999, an average of US$ 1.05 billion per month, which is close to the last 18 months pattern, in spite of the high observed volatility. Outflows were also at record levels, particularly to Mercosur countries, although they remain only a fraction of the level of inflows which is consistent with Brazil's current level of development.

Chart 1 shows inflows into Brazil in dollar terms and as a percentage of GDP. While growth in inflows in the past three years has represented a dramatic break

with the relatively low levels of inflows over the past decade, it is still below the levels of the early 1970's in real terms. As of 1996, inflows into Brazil had returned to the same levels (as a percentage of GDP) as in the late 1970's and early 1980's. The decline in inflows in the mid-1980's resulted partly from the unfavorable economic situation characterized by high inflation and fiscal imbalances and partly from the adoption of more restrictive rules towards foreign investors, particularly the Federal Constitution of 1988. The recovery in inflows in the first semester of 1998 owes much to the improvement in the economic situation, the privatization process and a liberalization of policies towards foreign investment. Given the sheer size of firms scheduled to be privatized and the continuing interest of foreign investors in the Brazilian market, inflows should continue at the same high levels for much of the current decade.

The Brazilian balance of payments statistics record as foreign direct investment foreign currency investment, goods incorporated as assets, reinvestment of profits, and debt-equity swaps. Although loans to domestic branches and subsidiaries of foreign corporations could also be accounted for as FDI (IMF Balance of Payments Manual – 5th Edition, 1993), they are not recorded as investment in the Brazilian statistics, as they exhibit a more volatile pattern than equity investment. Given that subsidiaries of foreign corporations in Brazil show net liabilities to their parent company, FDI flows in 1998 would have been US$ 31.9 billion, according to IMF Balance of Payments Manual, instead of the US$ 26.1 billion reported by the Central Bank of Brazil.

Chart 1. Direct investment in Brazil, 1966-1996



Source: *International Financial Statistics* - IMF

In conjunction with the dramatic improvement in macroeconomic stabilization, the liberalization of the Brazilian economy during the 1990's has served as a powerful catalyst for foreign investment. According to a Central Bank study, privatization has accounted for one third of recent FDI in Brazil. Steps towards trade liberalization and that undertaken as part of the Mercosur agreement have increased the attractiveness of the region as a whole to foreign investors. In addition, liberalization of the treatment of foreign investors has opened up many new opportunities for foreign firms. The registered stock of foreign investment in Brazil which amounted to US$ 37 billion in September 1991 stood at close to US$ 58 billion in June 1995, an expansion of some 57% in nominal terms. Although portfolio investment accounted for a large part of the flows, foreign direct investment has also been growing considerably.

With a population of 160 million, Brazil is the world's fifth largest country and the tenth largest economy. As a result, it has attracted many of the largest multinational enterprises, particularly in the automotive sector. While many of these firms were initially attracted by the promise of a captive market in the heyday of import substitution policies, the liberalization measures adopted in the 1990's in conjunction with the Mercosur agreement have led to a renewed interest on the part of foreign investors. According to official sources foreign investors are committed to over US$ 26 billion in new investment between now and the end of the decade. Over two fifths of this new investment will be in the automotive sector, principally by established American and European firms, but also new investment from Korean firms. 1998, pointed towards another record year, with 24.267 billion at the end of the year. These investments have included banking, insurance, retailing and active participation in various privatizations (US$ 6.121 billion).

It is important to recognize that many of the foreign firms which have investment projects planned in Brazil are already well-established within the Brazilian economy. Unlike many other dynamic non-member countries, Brazil has a long history of foreign-owned firms manufacturing for the domestic market. Many large multinational enterprises (MNEs) such as General Motors and Goodyear invested in the first half of the century. As recently as 1980, Brazil had the seventh largest stock of global direct investment and was the principal host to inward investment among non-OECD countries. By 1995, it had fallen to fourteenth place in terms of stocks.

Table 1. Foreign companies in Brazil , 1993

Rank 93	*Foreign-owned Brazilian Companies*	*Sector*	*Employees*	*Assets $m.*	*Exports $m.*
2	Autolatina	Automotive	48 000	3 153	638
4	General Motors	Automotive	21 622	na	2850
5	Shell	Petroleum	2 730	1 570	na
6	Souza Cruz (BAT)	Tobacco	12 500	1 472	na
9	Fiat	Automotive	16 632	1 083	604
11	Carrefour	Retailing	17 583	na	-
14	Gessy Lever	Soaps/cosmetics	9 366	590	82
15	Esso	Petroleum	1 213	317	na
16	Texaco	Petroleum	1 501	325	-
18	Atlantic	Petroleum	1 588	239	-
19	Mercedes Benz	Automotive	17 056	814	482
21	IBM	Computers	3 474	na	127
22	Nestlé	Food	12 855	781	na
35	Xerox	Electronics	4 926	na	65
42	Rhodia	Petrochemicals	8 487	877	72
47	Cargill Agricola	Food	2 752	346	191
48	Makro	Retailing	4 740	200	-
50	Robert Bosch	Auto parts	9 300	na	153
51	Hoechst	Chemicals	4 958	359	na
53	Philip Morris	Tobacco	4 591	192	128
58	Goodyear	Tyres	6 200	na	162
59	Philips	Electronics	7 632	na	95
65	Alcoa Aluminio	Metals	9 506	1279	223
68	Pirelli Pneus	Tyres	4 685	269	110
70	Ref. de Milho	Food	3 910	222	na
78	Asea Brown Boveri	Machinery	3 489	300	72
79	Sanbra	Food	3 682	418	118
82	Fleischmann Royal	Food	6 368	na	
83	Scania	Automotive	3 600	na	113
88	Bayer	Chemicals	3 211	346	na
90	Avon	Soaps/cosmetics	2 393	na	na
97	White Martins Industrials	Chemicals	3 500	382	
			264 050	15 534	6 285

Source : Latin America's largest companies 500, *America Economia*, Special Issue 1994/95.

As a result of this historical legacy of inward investment, foreign-owned firms already play a major role in the Brazilian economy. Thirty-one of the largest 100 companies in Brazil in 1993 were foreign-owned, compared with 25 in the public sector and 44 private Brazilian firms (see Table 1). These foreign firms are particularly prevalent at the top of the list, together with several State-owned firms, some of which have since been privatized. Together they employed a quarter of a million Brazilians and exported US$ 6.3 billion worth of merchandise in 1993.

The orientation of these affiliates towards the domestic Brazilian market can be gleaned from a comparison of the operations of General Motors in Mexico and Brazil in 1993. Although the Mexican affiliate employs three times more than the Brazilian one, its exports are ten times as high as those from Brazil. Furthermore, while the Mexican affiliate exported two thirds of its output, the Brazilian affiliate exported only 7% in 1993.

As a result of this long history of inward investment in Brazil, foreign investors now dominate many sectors which are not reserved to the State. The products of foreign MNEs in Brazil account for 100% of sales of large computers, 95% of automobiles, 90% of electrical and communications products, 80% of pharmaceuticals, 70% of chemicals and 60% of non-ferrous metals.[3]

Table 2 shows the stock of foreign investment in Brazil by source. The United States is the single largest investor, but European firms as a group are more active. Indeed, the Brazilian market is relatively more important for European firms than it is for American ones. French and German firms, for example, have invested almost as much in Brazil as they have in the emerging Asian economies. Japanese investment is facilitated by the presence of a large emigrant community in Brazil, but is nevertheless only a small and falling share of total Japanese investment abroad. Japanese investment in Brazil in 1996 represented only 2% of the total inflow. Among European investors in 1996, the largest investors were from France, Spain and the Netherlands. The United States was the largest single investor with almost US$ 2 billion in direct investment.

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[3] *Investing, Licensing & Trading Conditions Abroad: Brazil,* Economist Intelligence Unit, 1997, p. 10.

Table 2. Stock of foreign investment (direct and portfolio) in Brazil at 30 June 1995, by source
(US$ million)[1,2]

Source	Investments	Re-investment	Total	Share of total (%)
Total	**45.504**	**12.579**	**58.083**	**100.0**
United States	17.427	3.003	20.430	33.2
Germany	5.029	2.845	7.874	13.6
Japan	3.660	900	4.560	7.9
United Kingdom	3.612	729	4.341	7.5
France	2.036	1.150	3.186	5.5
Netherland	1.734	707	2.441	4.2
Italy	2.004	422	2.426	4.2
Switzerland	1.344	779	2.123	3.7
Canada	1.272	612	1.884	3.2
Bahamas	1.230	13	1.243	2.1
Sweden	352	273	625	1.1
Panama	458	128	586	1.0
Belgium	267	305	572	1.0
Luxembourg	498	130	628	1.1
Bermuda	803	14	817	1.4
Argentina	146	218	364	0.6
Liechtenstein	323	32	355	0.6
Portugal	319	19	338	0.6
Kuwait	268	0	268	0.5
Netherlands	270	32	302	0.5
Australia	248	9	257	0.4
Other	2.204	259	2.463	4.2

1. Conversion to US dollars at the parity of 30 June 1995. Investments in portfolio, Fixed-income Funds, Foreign Capital and Privatisation Funds are included. Distribution by holding's country.
2. Inter-company loans, bonds, commercial paper and notes are not included.

Source: Central Bank of Brazil

Although inflows into Brazil originate predominantly in OECD countries, a small but rising share of inward investment is coming from neighboring countries. This has been encouraged both by the privatization process in Brazil which has attracted investments by newly privatized firms in the region and by the Mercosur agreement which stimulates the economic integration of the signatory countries. Bilateral flows between Brazil and Argentina have been increasing recently.

Table 3 shows the stock of inward investment by sector as of mid-1995. The figure for services is overstated because it includes various portfolio flows such as fixed-income and privatization funds which are not

usually classified as direct investment. If they are excluded, the manufacturing share rises to 72%, while services fall to 22%. More recent figures show a higher share of foreign investment in public utilities, following recent privatizations in this sector. The privatization of the electricity company, Light, brought in US$ 1,384 million in foreign investments alone, through a consortium led by Electricité de France. The retail sector brought in US$ 671 million and telecommunications US$ 564 million following the sale of CRT to a consortium led by Telefonica of Spain.

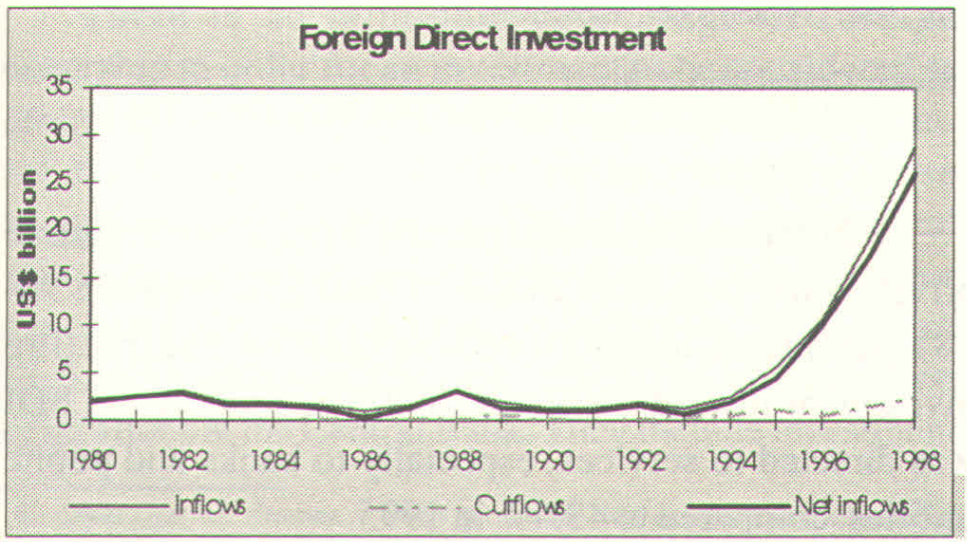
Table 3. Stock of foreign investment in Brazil at 30 June 1995, by sector
(US$ million) [1,2]

Sector	Investment	Reinvestment	Total	Share of FDI Total
Total	45,503	12,579	58,082	
Portfolio [3]	15,343		15,343	
Direct investment	30,160	12,579	42,739	100.0%
Agriculture	175	126	301	0.7%
Livestock	128	1	127	0.3%
Fishing	12	2	14	0.0%
Minerals	899	191	1,091	2.6%
Manufacturing	21,046	9,866	30,913	72.3%
Iron and steel	538	88	626	1.5%
Metals	1,947	670	2,617	6.1%
Non-electric machinery	2,540	770	3,311	7.7%
Electric machinery and comm. equipment	2,572	1,119	3,692	8.6%
Automobiles	3,181	1,279	4,461	10.4%
Auto parts	691	474	1,165	2.7%
Basic chemicals	2,747	1,298	4,046	9.5%
Petroleum products	516	337	854	2.0%
Medical and vet. products	1,416	518	1,934	4.5%
Textiles	362	326	687	1.6%
Food products	835	1,067	1,902	4.5%
Tobacco	190	68	259	0.6%
Other	3,611	1,843	5,359	12.5%
Public Utilities	60	10	71	0.2%
Transport	26	3	29	0.1%
Other	34	7	41	0.1%
Services	7,096	2,250	9,346	21.9%
Banks	1,409	548	1,957	4.6%
Property management	3,345	1,086	4,431	10.4%
Other	2,342	616	2,968	6.9%
Other	743	130	873	2.0%

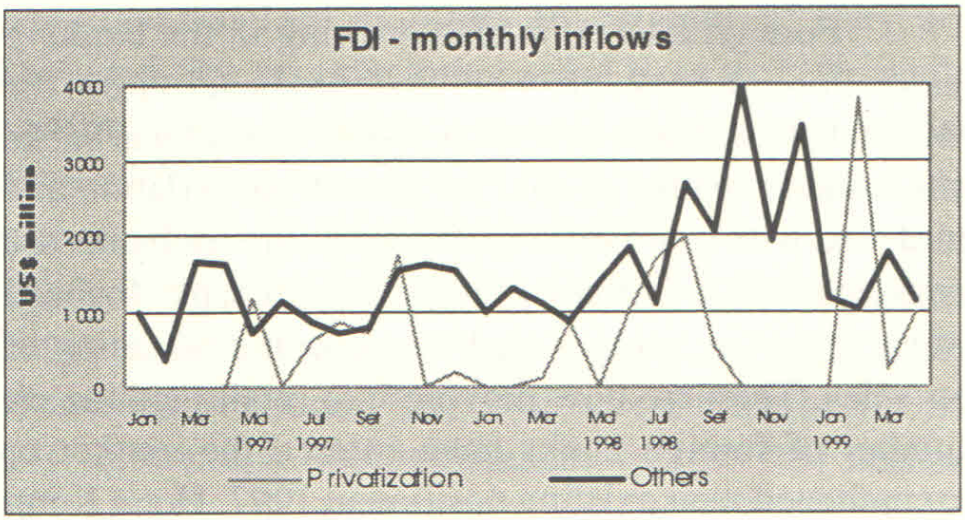
1. Conversion to US dollars at the parity of 30 June 1995.
2. Inter-company loans, bonds, commercial paper and notes are not included.
3. Includes investments in Fixed-income Funds-Foreign Capital and Privatisation Funds.
Source: Central Bank of Brazil

Foreign interest is also growing in the banking sector. Foreign banks are well-placed to benefit from the potential of the Brazilian market. Unlike many local banks which made healthy profits for years from inflation and burdened with non-performing loans, foreign banks are well-capitalized. Formerly, many foreign banks focused on niche sectors such as credit cards or the financing of car sales. They are now moving into retail banking. A number of foreign banks have entered the market or strengthened their existing position in 1997. Hong Kong and Shanghai Banking Corporation (HSBC) has acquired one of the five largest banks, Banco Bamerindus, for US$ 1 billion in March 1997. Banco Santander acquired a majority stake in Banco Geral do Comércio for US$ 220 million. Other foreign banks such as Société Générale and Lloyds TSB have also been engaged in consolidating their presence. The growing interest in Brazil by foreign banks has also been encouraged by a more liberal attitude of the Central Bank towards foreign investment in the sector. There had been a freeze on the expansion of foreign investors in banking since 1988.Chart 2 and Table 4 show more updated data.

Chart 2. Annual and monthly inflows



Source: Central Bank of Brazil



Source: Central Bank of Brazil

Table 4. Foreign direct investment by sector in Brazil

SECTOR	Stock as of Dec-95		Inflows 1996		1997		1998	
	US$ million	%	US$ million	%	US$ million	%	US$ million	%
Agriculture, Livestock and Mining	689	1.62	111	1.44	456	2.98	151	68
Industry	23,402	55.03	1,740	22.70	2,036	13.30	3,625	16.28
Services	18,439	43.36	5,815	75.86	12,819	83.72	18,496	83.05
Aggregate	42,530	100.00	7,665	100.00	15,311	100.00	22,272	100.00

This sample represented 73.6%, 81.6%, 83.5% of total FDI inflows in 1996, 1997and 1998, respectively.

Source: Central Bank of Brazil

FDI related to foreign participation in the Brazilian privatization program (24.2% of total FDI between 96-98) produced qualitative changes by redirecting investment towards services. In 1998, 83% of the FDI was directed to services, especially to banks and public utilities, compared to 43.4% in 1995.

B. Outward Brazilian investment

As with inflows, Brazilian outflows of FDI show a clear upward trend - albeit with considerable volatility (Chart 2). Outflows reached US$ 1.4 billion in 1995, or one quarter of the level of inflows. Over one third of these flows have gone to the Cayman Islands, suggesting that investors have been interested in placing funds in offshore financial affiliates. Such placements are common for countries which have had a legacy of various capital controls. Another one third has flowed to the United States. Although only 10% of the stock of outward investment as of mid-1995 had gone to the rest of South America, there has nevertheless been an increasing tendency for Brazilian firms to make acquisitions in neighboring countries, notably Argentina. Vasp, a private Brazilian airline, expressed interest in buying a controlling stake in Aerolineas of Argentina for an estimated US$ 300 million.[4]

C. Methodological issues

There is no minimum percentage of foreign ownership in order for an investment to be considered as foreign direct investment, but as a general rule the Central Bank considers as foreign subsidiaries those enterprises with more than 50% of the voting capital controlled directly or indirectly by foreign investors. For branches, voting capital must be entirely in the hands of the foreign investor. Data on FDI flows are based on registrations at the Central Bank. They include investment

[4] G. Dyer and M. Doman, "Vasp set to bid for Aerolineas", *Financial Times*, January 31, 1997.

in assets, disbursements of foreign exchange, reinvestment of profits, conversion of external credits or into investments and conversion of other assets held by residents abroad into investment. Reinvested earnings are included whether they are invested in the existing company or in another sector of the economy. Reinvested earnings are not recorded for outward investment. Short- and long-term loans between the parent and the subsidiary, as well as other related credit made available from the country of origin of the investor, are not classified as direct investment, but rather as part of the external debt of the country.[5]

[5] *World Investment Directory, Volume IV - Latin American and the Caribbean,* UNCTAD, 1994.

Chapter 2

Regulatory Framework for FDI

A. Overview of economic reforms

At the end of 1993, a combination of favorable political, economic and historical circumstances made it possible for the government to lay the groundwork for a long-term, multi-pronged attack on three decades of high inflation. This process resulted in a sharp drop in inflation and paved the way for the introduction of the **Real Plan** in 1994. Up to 15 January, 1999, the national currency had fluctuated within a range established by the Central Bank according to the monetary base and foreign reserves. Presently the national currency fluctuates freely and the range as established has been eliminated. The government has taken steps to tackle the problem of the public sector including:

- the refinancing of state government debt owed to the federal government;

- the prohibition of state bank lending to state governments;

- the introduction of measures aimed at balancing state government budgets;

- the creation of the Fund of Fiscal Stabilization in 1996 to reduce the degree of earmarked tax revenues;

-the fight by federal, state and municipal governments against tax evasion and avoidance.

With regard to fiscal stabilization policies the Brazilian government has proposed a new agenda to put the country in a safe path of fiscal solvency. It encompasses both structural and institutional reforms, which will change the quality of fiscal management and fiscal results, a new approach to the budget process, strict regulation on fiscal responsibility and a Plan of Action for 1999-2001 covering mainly the federal government budget but also action at local level and putting special emphasis on the need for a rational management of the social security accounts. The new fiscal trajectory agreed upon with the IMF encompasses primary surpluses (exclude interest payments) of 3.1% of GDP in 1999, 3.25% in 2000 and 3.35% in 2001.

The main measures of expenditure reduction and revenue increase are the following (other measures maybe adopted in order to meet the new fiscal agreement with IMF) :

- The federal government budget cuts for 1999 *vis-à-vis* the budget previously sent to Congress amounts to R$ 8.7 billion;

- State enterprises' expenditure cuts for 1999 to 2001 will amount to R$ 2.7 billion (0.29% of GDP) *vis-à-vis* actual expenditures in 1998 and projected expenditures for 1999;

- Emergency measures to combat fiscal evasion in social security will have an impact of the order of R$ 2 billion for a period of twelve months after they enter into effect;

- The present social security contribution amounting to 11% of salaries has been extended to all public officials including retirees and

pensionists. This measure affects 446,942 employees and will have a financial impact of R$ 1.7 billion;

- A 9% social security additional contribution has been imposed on salaries over R$ 1,200 for a period of five years. This measure will affect 488,989 employees and will have a financial impact of R$ 2.7 billion;

- The present CPMF (tax on financial transactions), which was projected to be extinguished at the end of 1998, has been extended. It will increase from the present 0.20% to 0.38% in 1999 and 0.30% in 2000 and 2001;

- The present contribution for social purposes (COFINS) has been increased of one percentage point. It will not affect small and medium companies, which usually choose to pay taxes based on projected profits;

- Judicial deposits made in connection with a court decision or with a dispute with the tax collection authority has been incorporated into current tax revenue;

- Increase of the tax base of COFINS, which is imposed on financial institutions. This measure will have an impact of R$ 1.2 billion per year for the next three years;

- Extension of the Fiscal Stabilization Fund (FEF) until 2006. The Fund is composed of resources originating from taxes collected by the federal government and witheld by Treasury in lieu of being transferred to states. The extension of the FEF is neutral from a fiscal point of view, but it

helps to increase resources available at the federal level. 20% of taxes to which states usually have access are retained. From 2000 to 2006 the proposal is to increase the percentage of taxes retained to 40%;

- increase of public service tariffs;

- the refund of financial contributions (PIS and COFINS) paid by exporters is postponed until the end of 1999;

- increase of the Tax on Financial Operations (IOF) on consumer's credit;

- a bill has been sent to Congress proposing the increase of social security contribution paid by the military;

- federal public official expenditure cuts of 0.15% of GNP;

Macroeconomic stabilization and fiscal reform have been accompanied by trade liberalization. The implementation of a tariff reduction program has brought import tariffs down from an average 32.2% in 1990 to 14.3% in 1994. The maximum duty is 40%, but Brazil undertook during the closing session of the Uruguay Round of GATT to cut its ceiling on import duties to 35%. Non-tariff restrictions have been also relaxed and currently only a very narrow range of products require authorization from special agencies for the issuance of an import license. The World Trade Organization has nevertheless noted that Brazil maintains high tariffs in certain sectors and has a complex tariff structure with frequent adjustments.

Liberalization of the legal framework for FDI is an integral part of the overall reform process. In 1995, constitutional amendments approved by Congress eliminated the concept of Brazilian company of national capital (Art. 171 of the 1988 Federal Constitution) and opened a number of strategic areas to private and foreign participation. Adoption of implementing regulations is now in progress. Other significant policy changes include legislative actions to allow foreign capital remittances, increase intellectual property protection and provide the legal framework for the participation of foreign companies in the privatization of State industries and public utilities.

B. The regulatory framework of FDI

i) The Constitution

Brazil is a federal republic comprising 26 states and a federal district. Each state has its own government and courts. Under the Brazilian Constitution, legislation including civil, commercial and criminal law may only be enacted by the National Congress whereas local legislatures enact procedural legislation.

According to Article 24 of the 1988 Federal Constitution, fiscal and economic law are matters of shared competence between the union and the states. In these matters, the union imposes the general guidelines and in the absence of a federal framework, states are allowed to exercise a full legislative competence. A recent law makes it clear that federal legislation overrides state laws.

Regulatory powers regarding foreign investment are the exclusive competence of the federal government; states do not have regulatory powers in this matter. This is enunciated in Article 172 of the Federal Constitution

which states that federal legislation will regulate, based on national interest, foreign investments, reinvestment incentives and profit remittances. The commercial registration of firms, the granting of investment incentives and the provision of infrastructure projects are, however, under state competence, with occasional participation from the federal government. State and local communities also have the power to grant incentives to attract domestic and foreign investments. Article 151 of the Federal Constitution allows the granting of fiscal incentives aiming at promoting regional economic and social development.

The Federal Constitution and the Law 4,131 provide the main legal framework with respect to FDI. States are bound by the Constitution in the area of national treatment for foreign investors. Amendment 6 to the Constitution modified Articles 171 and 176 by eliminating the distinction between "national companies" and "national companies of Brazilian capital" and by allowing foreign companies to participate in Brazilian companies which exploit minerals and hydroelectric power under concessions or permits. The amendment defines Brazilian companies as those established under Brazilian law, with headquarters and administration in Brazil; it seeks to provide all Brazilian companies with the same treatment independently of capital origin. National treatment is assured only to already-established foreign firms, even if in practice the same treatment is given to first establishments. Foreign investors have access to domestic legal recourse as well as to international recourse for which Brazil is a member.

The Constitution (Article 175) also provides the basis for granting public service concessions in Brazil. Implementing regulations are contained in Law 8,987 of

February 13, 1995, with an updated and consolidated version published on September 28, 1998 (the Concessions Law) which defines sector-specific criteria under which the government may authorize third parties to perform public services. The concessionaire, investing for his own account and at his own risk, will act on his own and will be compensated by collecting tariff charges from the public. The Concessions Law introduces competition into sectors that are overly protected and excessively regulated, allowing national and foreign enterprises to invest in the most dynamic and strategically important areas for national development (electric energy - generation, transmission and distribution - telecommunications, transport, highway construction, ports and airports sanitation and water supply).

ii) General requirements

Foreign companies may invest freely in Brazil in most sectors, subject to registration at the Central Bank. The registration is necessary in order to remit capital and profits for information and statistical purposes. Since the elimination of the concept of Brazilian companies of national capital in 1995, foreign investors have been guaranteed identical juridical treatment under equal conditions, and all forms of discrimination not specified in legislation have been prohibited. A number of sectors are nevertheless reserved to domestic firms although the list of restricted sectors has been reduced recently. Foreign take-overs of Brazilian companies in non-restricted sectors are permitted under the same competition rules as domestic. Foreigners are free to participate in privatizations, and a 40% limit on their share of voting stock has been eliminated. The State nevertheless has

the possibility to maintain a golden share in a few cases. Foreign companies that are established in Brazil have the same rights as Brazilian companies, concerning bid and the sales of goods and services to the government.

Foreign capital is broadly defined as goods, machinery and equipment entering Brazil without any initial outlay of exchange for use in the production of goods and services, as well as those financial or monetary resources introduced into the country for investment in economic activities provided that, in both cases, they belong to individuals or legal entities resident, domiciled or with headquarters abroad.[6]

Foreign investment registration is effected through the issue by the Central Bank of a Certificate of Registration (CR) by the Department of Foreign Capital (FIRCE) and, based on the geographic zoning system in effect, should be applied for at the Regional Office of the Central Bank that has jurisdiction over the headquarters of the company receiving the investment. According to the provisions contained in this legislation, the request for registration must be presented within a maximum of 30 days of the entry of the resources into the country or, in the case of reinvested profits, of the respective accounting entry. Registration involves no fees or other type of commission. Investments involving royalties - including franchises - and technology transfer must be registered with the National Institute of Industrial Property (INPI) as well as with the Central Bank.

The Central Bank has recently adopted measures to ease registering procedures by eliminating registration

[6] In Brazil, foreign capital is governed by Law 4,131 of September 3, 1962. This legislation was later altered by Law 4,390 of August 29, 1964 and regulated by Decree 55,762 of February 17, 1965.

delays and by obliging the FIRCE to issue the Certificate of Registration within 30 days from the entry date of the investment. There is no limit for the effective registration by the Bank. The Bank only registers investment inflows and is not responsible for granting entry authorizations. Registration is automatic for credit operations related to import financing; these operations are now done electronically. Other recent measures include more consistent criteria for registering investments in goods, registering foreign investment in the form of patents or trademarks, and the reinvestment of profits from financial revenues.

The Certificate of Registration is essential to permit remittances of profits and dividends abroad, as well as repatriation of the invested capital at any time following investment, provided there has been due compliance with corporate and tax legislation and all other relevant norms. For monitoring and control purposes, investments, redemption, earnings, capital gains, transfers and other movements of foreign portfolio investments are subject to electronic declaratory registration at the Central Bank.[7] Remittances of capital gains from FDI require specific Central Bank approval and are subject to the prior payment of income taxes over such capital gains.

Unlike subsidiaries, branches of foreign companies may not deduct for tax purposes or pay royalties for trademark and patent licenses for contracts between the Brazilian branch and the parent company overseas. This is justified by the fact that the Brazilian branch and its parent are considered to be part of the same legal entity and that very limited foreign investment occur in that form. This matter is nevertheless under

[7] Resolution 2,337, Circular 2,728 and Circular Letter 2,702 of November 28, 1996.

review by the INPI. Transfer of trademark fees are limited to 1% of turnover. Royalty deductions are limited to 5% of product sales.

As any other fund, foreign capital investment funds and privatization funds must be authorized by the Securities and Exchange Commission (CVM) irrespective of the origin of the capital. Transfers of resources from one portfolio mode to the other, among portfolios of the same mode and among investors should be notified by the managing institution through the Central Bank Information System up to the business day subsequent to that of the transaction.

Brazil still benefits from transitional status under Article XIV of the Articles of Agreement of the International Monetary Fund related to exchange restrictions, according to which qualifying IMF members may restrict international payments and current transactions. These countries are nevertheless under an obligation to ease and eliminate these restrictions as soon as their balance of payment situation allows it. Capital repatriation from Brazil has been delayed or suspended in the past and profit remittances have been prevented during balance of payments crises. Brazil is reviewing prospects for abandoning its transitional IMF status, but the authorities have not yet reached a decision.

Although international currency may freely enter and exit the country, Brazil has a dual exchange rate regime regulated by the Central Bank. One rate (known as the commercial or financial rate) is applied to international transfers related to imports, exports, loans and financing transactions in general, and FDI and profit flows. The other rate (known as tourism or floating rate) was initially applied to tourism transactions but has been extended to other transactions (such as health and education expenses,

real estate acquisition abroad, etc.).[8] These transactions in general are not subject to an authorization from the Central Bank but must be performed by a banking institution authorized to operate on the exchange market. Moreover, any transaction above US$10,000 must be reported to the Central Bank by the operating commercial bank. The two exchange rates have been kept very close to each other.

iii) Mercosul

Another important aspect of the liberalization process in Brazil has been the Mercosul Agreement. Brazil has signed the Protocol for the Promotion and Protection of Investment for non-members of Mercosul (Buenos Aires Protocol signed on August 5, 1994) and the Protocol for the Promotion and Protection of Investment for Mercosul members (Colonia Protocol signed on January 17, 1994) which covers FDI originating in Mercosul countries. Both agreements, which contain arbitration settlement procedures relatively new under Brazilian law[9], are still under careful consideration. The Extra-Zone Protocol provides, *inter alia,* the following benefits for non-signatory countries:

> - Each member party undertakes to assure that just and equitable treatment will be accorded to investments of third parties and will in no way hamper their management, their continuance, their

[8] Due to exchange crisis in Brazil in January and February of 1999, the Central Bank decided to unify the previously dual exchange rate (financial rate and tourism or floating rate) into one sole exchange rate which, until January 1999, fluctuates freely, withoutintervention of the Central Bank. See Central Bank's Resolution 2,588 and Nacional Monetary Council Circular 2,857 and 2,858.

[9] A Recent step has already been made in this respect with Congress recent approval of the so-called Marcos Maciel Law Which accords to international arbritation awards the same status of court decision.

utilization, their privileges or their realization, by any unjustified or discriminatory measures;

- Each of the member parties will provide full protection to third party investments and will not grant to those a less favorable treatment that is accorded to its own national investors or investors from other States;

- Free transfer of funds which includes, *inter alia:* capital and additional amounts invested for maintenance and development purposes; profits, revenues, interest, dividends and other current income; loan reimbursements; royalties and professional fees; funds resulting from asset liquidation or sale; compensation and indemnification; and salaries paid to authorized foreign workers connected to a investment, and the guarantee that the transfer is done in convertible money;

- Dispute settlement between a foreign investor and a party through domestic court intervention or international arbitration at the investor's preference. Arbitration decisions enforced by the parties under their respective legislation.

In the Intra-Zone Protocol Brazil has reserved the right to establish transitory exceptions to national treatment including: mining, hydroelectricity production, health care, radio and television and other telecommunication services, acquisition or rent of rural areas, participation in the financial intermediary system, insurance, building, and ownership and international navigation services. These exceptions do not, however, involve any preferential treatment for Mercosul partners. More recently, there was a significant loosening of the

rules concerning the following sectors: telecommunication services, mining, hydroelectricity, financial intermediary system and insurance.

Finally, according to the Protocol of Commercial Arbitration of Mercosul, signed by Brazil in July 23, 1998 (which is subject to confirmation by the National Congress), the arbitration system can also be adopted by the parties in order to solve disputes related to contracts celebrated between them).

C. Legal forms of operation

Brazil has a functional commercial legal system, consisting of the commercial code and other current commercial legislation, which governs most aspects of commercial association, except for corporations formed for the provision of professional services, which are governed by the civil code. Bankruptcy laws provide for creditors' rights. There is in general no capital minimum required except in banking institutions or insurance companies.

Foreign companies may engage in business in Brazil by acquiring an existing company or by forming a local subsidiary in Brazil. Many foreign companies choosing the latter form prefer to establish a limited-liability company (*Sociedade por quotas de responsabilidade limitada*) which entails fewer formalities and less public disclosure than the form of a *Sociedade Anônima* (equivalent to a US corporation or UK public company). These two forms of company structure are widespread as they allow limited liability for partners. It is only on very rare occasions (sometimes to fulfill specific purposes) that company structures without limited liability are adopted.

Company Law 6,404 of 1976 and the Securities Exchange (CVM - *Comissão de Valores Mobiliários*) are designed to provide protection for minority shareholders, strengthen stock markets and facilitate the formation of conglomerates. The law introduced new corporate concepts to Brazil, including those of a controlling shareholder and the mandatory distribution of dividends.

A foreign company may also set up a branch in Brazil. However, unless there is a substantial tax advantage in the investor's home country (*e.g.*, through deduction of the branch's losses from the parent's taxable income), the disadvantages of this form probably more than outweigh the benefits. The establishment of a branch, which requires a prior authorization from the president of the Republic, takes six months and the costs are greater than for other business forms. In addition, the regime for royalty payments is more stringent.

D. The tax regime

In Brazil, the origin of foreign direct investments (real estate acquisition, paid-ups, individual buyout of shares of national enterprises) is generally irrelevant for fiscal matters. Taxes applied to foreign direct investments are identical to those applied to national firms. They are charged on profits, gross income, value added, financial operations, real estate and payroll.

As the total tax charge over dividends paid to residents abroad was considered too high, the following

measures were taken in order to stimulate FDI in the country:

- end of the supplementary income tax on dividends which are higher than 12% of the registered capital (Law 8,383/91);

- reduction of the withholding tax from 25% to 15% on remittances of royalties or payments resulting from technical assistance between parent company and Brazilian subsidiaries as of January 1, 1996 (Law 9,249/95);

- dividend and profit remittances are exempt from withholding tax since January 1, 1996 (Law 9,249/95). Prior rate was 15% from January 1, 1993 through December 31, 1995 (Law 8,383/91);

- corporate income tax is levied on company's revenue on a world-wide basis with the availability of a tax credit for taxes paid abroad.

It can also be noted that Brazil has contracted a number of bilateral investment protection and double taxation agreements. (See Chapter 5).

E. Investment incentives

Investment incentives in Brazil are offered to specific industries, for investments in less developed regions, and for investments in tax-exempt export processing zones.

Market-based credits by BNDES are available for certain sectors and geographical regions. Non-established firms may have access to such public financing

if the Ministry of Planning and Budget considers the investment of national interest.

Investment incentives in less developed regions are channelled through three *superintendências* (a kind of federal agency): SUDAM (for the Amazon), SUDENE (for the North-East) and SUFRAMA (Manaus). The north-eastern region of Brazil receives the majority of investment incentives. State development banks also provide funding (medium and long term) to manufacturing, agriculture and infrastructure projects. State and governmental authorities give tax incentives to companies willing to invest in priority sectors (steel, agriculture, construction material). The tax incentives include temporary exemptions or reduction of state value-added taxes and municipal service taxes. In addition, states may offer long term financing using state funds for investors, donations and grants of land, and the provision of specific infrastructure such as telephony, energy and water, rail and road transport.[10]

Decree Law 2,452 of July 1988 elaborated a set of policy instruments to aid the establishment of export processing zones (EPZs) to promote the development of less advanced regions in Brazil. The development of this program was reportedly slow for a number of reasons. According to the association in charge of these zones (ABRAZPE-Brazilian Association of Export Processing Zones), since 1988, when they were created, 17 zones have been established by the government and only four of them have been presenting considerable progress and

[10] Veiga Pedro da Motta, "Brazil", presentad at an OECD Development Center Workshop of Policy Competition and Foreign Direct Investment, November 18, 1996.

a reasonable infrastructure for industrial projects to be implemented, namely the zones of Rio Grande (RS), Ibituba (SC), Teofilo Otone (MG) and Araguaia (TO). Moreover, three industry projects have been approved by the federal government: at Ibituba and two projects are waiting for approval in MG.

In addition to EPZs, Manaus has free trade zone status (FTZ) and has become the largest free trade zone in South America. Foreign imports entering the FTZ of Manaus are exempt from custom duties as well as from state sales tax and industrial taxes if they are used for local consumption, industry, agriculture or fishing. No taxes are levied on goods produced in the FTZ if these are processed or re-exported. Imports are exempted from state taxes up to a maximum of 80%.

In general terms, the above mentioned incentives must receive previous approval from SUDENE, SUDAM and SUFRAMA (all subordinated to the Ministry of Planning) Councils. Factors and criteria taken into account include the industrial sector, the location of the investment, the extent of export-import substitution, the use of local raw materials, and the number of jobs created. Candidates do not submit a formal application but rather an outline of the project and an explanatory letter (reasons for the project, relevant developments for the region or the sector). After a first selection, candidates present a detailed description of the project including production costs, financing, machinery and technology imports, and job creation.

The government has adopted a special regime for the automotive sector which includes a mixture of

incentives and performance requirements.[11] Beginning in March 1995, following a deterioration in the balance of payments, the government raised tariffs on consumer durables, including automobiles. These tariffs were subsequently lowered for all but the automotive sector. In June 1995, the government imposed quotas on automobiles which were subsequently removed following a ruling in the WTO. Brazil announced at the end of 1995 that foreign carmakers with operations in Brazil would be able to cut tariffs on finished vehicle imports if they achieved a local content of 60% or more and balanced their exports of vehicles with imports of parts. Companies qualifying for the tariff cuts could see tariffs fall from 70% to 35%. This policy affects both companies exporting to Brazil and those wishing to invest since tariff reductions depend on the level of local content which rises only slowly for new investors. The benefits accrue mainly to foreign carmakers already established or which establish in Brazil. The government has indicated its intention to hold consultations about the matter in the WTO.

F. Protection of intellectual property

Brazil is a member of the World Intellectual Property Organization (WIPO) and a signatory of the Bern Convention on Artistic Property, the Washington Patent Cooperation Treaty and the Paris Convention on Protection of Intellectual Property. In August 1992, Brazil removed its reservations and accepted fully the Stockholm revision of the Paris Convention.

[11] The Brasilian Regulatory Regime for the automotive sector is defined by Laws 9,440 (Regional regime) and 9,449 (general regime) of March 14, 1997, Decree 20,725 regional regime of November 14, 1997, Decree 2,179 (regional regime) of March 18, 1997, Imterministerial Measure 1 (general regime) of January 5, 1996 and Interministerial Measure 3 (regional regime) of March 31, 1997. The directives resulting thereof are general and do not distinguish between the origin of the capital.

Brazilian legislation for intellectual property comprises both industrial property (patents, trademarks, technology supply and technical and scientific assistance service) and copyright.

The government agency that rules matters pertaining to the protection of industrial rights and the registration of technology transfer contracts is the INPI (*Instituto Nacional de Propriedade Industrial*).

The Industrial Property Bill which came into effect on May 14, 1997, intends to bring Brazil's patent and trademark regime up to the international standards specified in the Uruguay Round Trade Related Aspects of Intellectual Property (TRIPS) Agreement. The main innovations of this law are the following:

- chemical/pharmaceutical substances, chemical compound and processed food products can now be patented. This is also true for genetically altered micro-organisms;

- the term for product patents has been extended from 15 to 20 years; the term of model patents has been extended from 10 to 15 years;

- the patent owner may now ask the INPI (to launch a public tender for the exploitation of the patent;

- protection of trademarks is improved by the inclusion of internationally famous brand names;

- the law provides for pipeline protection, effective immediately, as well as for pharmaceutical, chemical and processed food products which have been patented in other countries but not yet placed on the market;

- compulsory licensing may be granted if a patent owner exercises his rights in an abusive manner (economic abuses) or when the patent is not exploited in Brazil within three years of its issuance;

- trademarks will be canceled five years after issuance if they have not been used in Brazil; if their use was interrupted or if the main characteristics were changed during this period of time;

- this law guarantees and improves the legal protection of industrial property owners against violation of their rights;

- the INPI shall register transfer of technology contracts at the latest 30 days after their submission. Evidence of legitimate use of a trademark or a patent is no longer demanded.

Concerning copyright, a new legislation (Law 9,610), came into effect on June 1998 with a few innovations on reproduction manners. According to this law, its is necessary to obtain prior authorization from the author of a product when re-transmitting it by satellite signs, optical ways, cable, waves or other electromagnetic process. This law also determines that the copyright protection will last for 70 years starting on January 1 of the first year following the death of the author.

As for software protection, a new Software Law (Law 9,609) was passed on February 19, 1998. This law is a result of the TRIPS Agreement of the Uruguay Round, which Brazil has signed. According to this law, the period of software protection was increased from 25 to 50 years.

G. Government procurement

Government procurement matters are ruled by Law 8,666 of June 21, 1993 (Public Bids and Contracts) and its amendments, Law 8,883, of June 8, 1994. According to Law 8,666, every contract between the government, whether at federal, state or municipal levels as well as public agencies, and a third party is preceded by a bid. The bid may be in the form of competition, price inquiry, invitation, contest or auction. The announcement of a bid is made through the bid document named *Edital*.

In general, the law forbids the granting of preferences based on the domicile of bidders or differential treatment between Brazilian and foreign firms. However, when all other factors are equal, suppliers may be selected according to whether a service or good is, in descending order of priority, domestically produced, and produced or supplied by Brazilian firms as defined by the 1995 Constitutional Amendment.

Interested parties must provide evidence of their technical and financial positions, fiscal standing as well as legal status: for foreign firms, the latter involves official registration or authorization to operate in Brazil. Foreign firms without operation in Brazil and involved in an international tender must have legal representation here. It is important to point out that in a joint venture association of Brazilian and foreign companies, the leadership shall always be vested in the Brazilian company.

International tenders must comply with guidelines on monetary and foreign trade policy. Domestic charges and taxes paid by domestic firms are added to bids made by foreign companies in order to decide on awards. There is no central procurement agency in Brazil. Procurement

is the responsibility of each individual government body, including State enterprises, although some control is exercised through their budgets.

H. Access to local finance

The access of foreign companies to the national financial system may be restricted by the Central Bank in case of imbalance of payments (Law 4,728/65 of July 14, 1965) There are no restrictions when funds for investments are collected abroad.

Law 4,131, Articles 37,38 and 39, restricts public financial institutions to finance enterprises whose central control belongs to individuals who are not residents in Brazil, except in the following cases:

- the funds were collected abroad;

- a special authorization from the Ministry of Planning and Budget can be requested based on national interest (in the case of companies which are not yet established in Brazil);

- the enterprises that operate in sectors and geographical regions which were considered a priority to presidential decree (in the case of companies already established in Brazil).

I. Competition Law

Brazil's current antitrust legislation is composed basically by Law 8,884/94 of June 13, 1994 and Law 9,069 of June 29, 1995.

According to Law 8,884/94, there are four acts which may violate the economic order as follows: to limit,

defraud, or harm any kind of free competition; to control or dominate a relevant market of services or goods; to arbitrarily increase profits, and to exercise in an abusive manner a dominant position.

Any act that somehow limits or adversely affects open competition and that results in the control of a relevant market must be submitted to Brazil's antitrust enforcement agency, the CADE (Administrative Council for Economic Defense), for its analysis and approval. Theses acts include transactions such as mergers, acquisitions or joint ventures which exceed certain market share or gross annual sales criteria.

CADE will only authorize a merger, acquisition or joint venture if it can be shown that the transaction will increase productivity, improve the quality of goods and services, provide technological or economic development or that competition will not be substantially reduced in a relevant market.

In accordance with the antitrust law, a company or a group of companies with a market share that exceeds 20% or with gross annual sales equivalent to R$ 400,000,000.00 must present to the CADE a notification of the transaction to verify whether it violates the economic order. Such companies should present this notification within 15 days of the execution of the first binding document. Should the company fail to comply with this rule, a fine will be applied.

The notification procedure is ruled by Resolution 15 of the CADE. This resolution lists the 50 required documents and data to be presented and includes a sample of the application form. Furthermore, Resolution 15 has also increased the speed of the analysis of simple transactions permitting that such operations be approved

in a period of a little over 60 days, when the normal analysis process takes around seven months.

CADE also has jurisdiction to question acts which although practiced abroad may have effects in Brazil. Under the terms of Article 2 of Law 8,884/94 branches, agencies, subsidiaries, offices, establishments and agents of representatives located in Brazil of foreign companies shall be deemed to be situated in the Brazilian territory.

CADE is assisted by two other federal agencies, the SDE (Secretary of Economic Law) and SEAE (Secretary of Economic Accompaniment).

Chapter 3

Sectoral Measures

In spite of the general principle of national treatment, foreign investment restrictions exist in the following sectors or activities in the private sector domain: banking, insurance, telecommunications, fishing, radio, television and publishing, cable television, air transport, rural properties and security services. There is also scope for discrimination in the field of government procurement for a limited number of products and access to local finance (see Chapter 2). A number of activities remain subject to a monopoly or concessionary regime (see Chapter 4).

A. Banking

The 1988 Constitution regulates foreign investment in the financial sector. Article 192 of the Constitution indicates that a complementary legislation (still to be enacted) shall establish conditions for the foreign participation in the financial system. In the absence of such legislation, foreign participation has been regulated by Transitional Constitutional Provisions (Article 52) which condition the establishment of new branches and subsidiaries of foreign financial institutions and participation of foreign investors in the capital stock of existing Brazilian financial institutions to the issuance of a presidential decree. These provisions allow foreign banks to establish subsidiaries or to acquire Brazilian banks (including state-owned banks) under certain conditions

(*i.e.*, obligations under international agreements, reciprocity or national interest).[12]

The dramatic reduction in inflation under the Real Plan has undermined the profitability of many Brazilian banks and has encouraged a greater openness towards foreign investment. An Executive Decree issued in August 1995 (Exposé of Motives 311) established the basic guidelines for renewed foreign participation in the sector, justified on the basis of the country's own economic interest to allow foreign banks to invest. Potential investors in federal or state banks must submit a proposal to the Central Bank which, in turn, forwards it to the National Monetary Council (CMN). Following CMN approval, the president signs a decree officially authorizing the investment. A separate decree signed in the same year deals with foreign participation in federal and state owned banks.

Since the end of 1996, the CMN has allowed foreign branches in Brazil to operate as multi-banks and to expand their activities. These privileges had formerly been restricted to subsidiaries of foreign banks. In addition, foreign investment funds may now hold preferred shares in Brazilian banks. Supplementary legislation concerning foreign investment in banking is expected to be approved by the Congress this year.[13]

In practice, these decrees are automatically granted when the foreign bank seeks and obtains previous approval from the CVM (Brazilian SEC) and the CMN. Full foreign control of a Brazilian bank has already been

[12] *National Treatment Study*, US Treasury Department, Washington, 1994.

[13] *Investing, Licensing & Trading Conditions Abroad: Brazil*, Economist Intelligence Unit, 1997.

permitted, as well as the establishment of a new foreign subsidiary[14],and there is an administrative understanding that foreign participation shall also be allowed in the state banking privatization program. There is no legal restriction to the participation of foreign investors in the privatization of federal and state banks. Nearly a substantial part of the banking system is still in state hands, at either the federal or state level.[15]

B. Insurance

There is no restriction for foreign direct investment in the sector according to a rule by the Legal Federal Adviser (*Parecer 104* of June 5, 1996), The **health** insurance sector falls under the legislation concerning the insurance sector in general. Examples of foreign involvement include the 100% ownership of Companhia Paulista de Seguros by the US Liberty Company, HSBC's 100% acquisition of Bamerindus, the fifth largest Brazilian insurer, and UK equity interest in Unibanco Seguros.

Constitutional Amendment 131[16], of August 21, 1996, eliminated a monopoly of more than 55 years in the Brazilian reinsurance market. However, in practice, liberalization still depends on the adoption of a

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[14] Banco Santander is to acquire 50% of ordinary shares and 49.9% of preferential shares in Banco Geral do Comércio which owns 42% of the operating branches in Brazil. Société Générale has acquired the remaining shares in Banco Sogeral which it did not already hold. HSBC has taken control of Banco Bamerindus in which it already held a 6% stake. HSBC is the first foreign bank to enter into Brazilian retail banking. Lastly, the largest bank in Korea, the Korea Exchange Bank has established a subsidiary in Brazil.

[15] Geoff Dyer, "Foreign banks vie for pole position", *Financial Times,* April 11, 1997.

[16] Constitutional Amendment 13, of August 21, 1996, modified paragraph 2nd of Article 192, of the Brazilian Federal Constitution.

complementary law, which is expected to be passed by the end of 1999. For the time being, re-insurance is still under the exclusive umbrella of the Brazilian Re-Insurance Institute (IRB) with 50% of total shares and 100% of the voting shares held by the federal government. The government participation in IRB's capital is expected to be sold to the private sector in 1999.

C. Telecommunications

In 1997 the Brazilian Congress approved a new Telecommunications Code, and created a competitive telecommunications model. The new code updated existing legislation and established rules to create an independent regulatory agency ANATEL.

The government planned privatization of the public service sector estimated the need for approximately US$ 75 billion in investments (public and private resources) over the next seven years: US$ 37.4 billion for the first five years (1995-1999) and US$ 37.6 from 2000 to 2003. At least half must come from outside sources. On April 7, 1997 B Band mobile cellular phone service concessions were auctioned to contending foreign operators and local Brazilian partners for licensing fees totaling more than US$ 8 billion. Foreign operators however could not hold more than 49% of the voting capital.

Recently Decree 2,617 of June 5, 1998, stipulates that public telecommunications concessions, permissions and authorizations may be granted to companies established and having domicile and administration in Brazil. Moreover, that, the majority of the voting shares may be held by foreign legal persons. Therefore, no limitations were placed on foreign capital participation on the companies established and having their domicile and

administration in Brazil. Moreover, the participation of telecommunication operators will not be required in these partnerships, with the single exception involving the fixed telephone operating sector where such participation is considered necessary. As a result the government's 20% share in the Telebrás system was auctioned to the private sector on July 29, 1998 for an unprecedented amount of approximately US$ 22 billion with a premium of 63.74%. The auction for the Telebrás system divided its regional local carriers, regional cellular operators and a long distance company (formerly Embratel) to facilitate privatization, resulted as follows:

Table 5. Fixed telephony

	TELE NORTE-LESTE	TELE CENTRO-SUL
Minimum Price (R$)	3.4 billion	1.95 billion
Premium	1%	6.15%
Price of Sale (R$)	3.434 billion	2.07 billion
Buyer	Andrade Gutierrez	Telecom Italia/ Opportunity
	TELESP	EMBRATEL
Minimum Price (R$)	3.52 billion	1.8 billion
Premium	64.28%	47.22%
Price of Sale (R$)	5.783 billion	2.650 billion
Buyer	Telefonia SA/RBS Iberbola/ PortugalTelecom/BBV	MCI

Table 6. Cellular telephony

	TELESP CELULAR	TELE SUDESTE CELULAR
Minimum Price (R$)	1.1 billion	570 million
Premium	226.18%	138.59%
Price of Sale (R$)	3.588 billion	1.36 billion
Buyer	Portugal Telecom	Telefonia de España
	TELE CENTRO-OESTE CELULAR	TELE NORTE CELULAR
Minimum Price (R$)	230 million	90 million
Premium	1.20%	108.88%
Price of Sale (R$)	442 million	188 million
Buyer	BID/Splice	Telpart
	TELEMIG CELULAR S.A.	TELE CELULAR SUL
Minimum Price (R$)	230 million	230 million
Premium	228.69%	204.34%
Price of Sale (R$)	756 million	442 million
Buyer	Telesystem/Opportunity	BID/Splice
	TELE LESTE CELULAR	TELE NORDESTE CELULAR
Minimum Price (R$)	125 million	225 million
Premium	242.40%	163.33%
Price of Sale (R$)	428 million	660 million
Buyer	Iberdrola	Globopar

The competitive model adopted by ANATEL envisages several stages prior to achieving a truly competitive sector by the year 2003. Until such time, a duopoly shall exist between B Band and A Band cellular operators, whilst the recently privatized local carriers shall compete within their respective concession areas with

so called mirror companies. Tender offers for such mirror companies were held in the beginning of 1999 and much expectation has been created in this regard since these companies shall not have obligations deriving from universal access and services that were imposed on the newly privatized local carriers. Moreover, after the year 2003, ANATEL shall be responsible for arbitrating conflicts between the private sector service providers and consumers.

D. Radio, television and publishing

In accordance with Article 222 of the Constitution and Decree Law 236/67, foreign participation is limited to native-born Brazilians or persons who have been naturalized citizens for at least ten years. The purchase of technical assistance from foreign enterprises or entities is also forbidden. A constitutional amendment before the Congress would allow a foreign minority participation of 30% in the capital of communication companies (broadcasting and publishing, including newspaper).

None of these activities are reserved to the state or constitute a monopoly. These services are exploited on a concession/permission regime, mostly by private enterprises (Law 2,593 of May 15, 1998).

E. Cable television

Concessions to exploit cable television services are only granted to Brazilian firms (Law 8,977 of January 6, 1995). At least 51% of the voting capital must be in the hands of native-born Brazilians or persons who have been naturalized citizens for at least ten years or must belong to firms whose headquarters are in Brazil and whose

control is under native born Brazilians or persons who are naturalized citizens for at least ten years. This policy is currently under review.

F. Transport

i) Air transport

In accordance with Article 21 of Federal Constitution and the Brazilian Air Code (Law 7,565 of December 19, 1986)[17], direct participation of foreign capital in air transport is restricted. Some foreign companies not established in the territory have been authorized to hold up to a 20% stake in some national air companies. Authorization is granted by the Air Ministry under Law 7,565/86 and Administrative Rule 146 of March 30, 1993.

In addition, according to the Brazilian Air Code, foreign enterprises may not administer or operate airports nor provide navigation and air traffic services.

ii) Maritime and inland waterways transport

Constitutional Amendment 7/95 eliminated restrictions and reduced former requirements in maritime navigation established by the Article 178 of the 1998 Federal Constitution. The implementing regulations change the requirements for granting authorizations to navigation firms and for the registry of Brazilian flag vessels: it allows foreign freight vessels to provide services between Brazilian ports under certain circumstances[18]

[17] The Brazilian Air Code is the Law 7,565 of December 19, 1986.

[18] According to Administrative Rule 412 of September 6, 1997, foreign vessels are allowed to operate in internal navigation only through freightment by Brazilian companies, including the foreign companies already established in the territory.

and to open internal navigation to foreign ships when reciprocity is granted. The liberalization of cabotage does not extend, however, to tourism transport according to Article 1, III of Law 9,432/97 (January 8, 1997).

The new law also applies to inland waterways and all maritime transport other than cabotage (Articles 1 and 2). Exceptions under Article 1 relate to war vessels or state vessels not engaging in commercial activities, sport and leisure vessels, tourism vessels, fishing vessels and scientific research vessels.

Foreign controlled firms created and constituted according to Brazilian law are considered as Brazilian companies and have access to Brazilian flag advantages (Article 3, II, Law 9,432/97). Authorization is granted by the Transport Ministry (Administrative Rule 6 of January 5, 1998 for maritime transport and Administrative Rule 412 of September 16, 1997 for internal navigation transport).[19]

Passenger transport follows the same rules of cargo transport.[20] Several foreign firms operate in that sector.

iii) Road and rail transport

The road infrastructure and the rail sector have been opened to the private sector through the privatization and concessionary programs.

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[19] Administrative Rule 671 of December 15, 1994, was revoked by Administrative Rule 6 of January 5, 1998.

[20] Law 9,432/97 does not apply to tourism vessels (Article 1, paragraph I, III).

Foreign participation in rail transport is allowed unless contrary to Law 9,491 of September 9, 1997.[21] Foreign companies have actually invested in four out of seven[22] of the railway companies (100% of Ferrovia Noroeste S.A., 25% of Ferrovia Centro-Atlântica S.A. e 32.5% of Ferrovia Sul-Atlântica, 20% of Ferrovia Paulista) created from the dismantling of the federal railway monopoly (RFFSA). Intra-state rail transport falls under the competence of Brazilian states in accordance with Article 21 of Brazilian Federal Constitution.

Foreign participation in road transport companies is no longer restricted. Law 6,813 of July 10, 1980 which limited foreign participation to 20% of the voting capital and the direction and administration of road transport firms only to Brazilian people, was not received by Federal Constitution of 1988.

Furthermore, this new law has brought an important innovation: cargo multimodal transport which is ruled by a single contract although it utilizes two or more modes of transport (maritime and road, for example) from origin to destination. Therefore, the present law facilitates cargo transport as well as simplifies the transport of merchandise.

G. Fishing

In accordance with Executive Decree 2,840 of November 10, 1998, which rules fishing activities in Brazilian jurisdiction, the operation in the national territory

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[21] Provisional Measure 1,481 was converted in Law 9,491 of September 9, 1997, which alters the procedures related to the National Privatization Program.

[22] In fact, dismantling of the Federal Railway Company (RFFSA) resulted in seven companies: Noroeste, Centro-Atlântica, MRS Logística, Tereza Cristina, Sul Atlântica, Paulista and Nordeste.

- comprising the continental waters, the internal waters and the territorial sea - is restricted to Brazilian fishing vessels. Nevertheless, in the continental shelf zone and the private economic zone, foreign vessels may be authorized to exploit fishing activities through leasing contracts with Brazilian companies. Authorization is granted by the Ministry of Agriculture and may be awarded for a period of three years.

In any case, Brazilian fishing policy is under review: a bill related to the regulation and organization of the fishing sector is presently being appreciated by the National Congress.[23]

H. Restrictions to foreign capital in border and rural areas

In accordance with Article 20 of the 1988 Federal Constitution, "border areas within 150 kilometers of international frontiers, coastal land and national security areas" such as the Amazon basin are subject to restrictions on foreign ownership for national security reasons. Certain activities within 150 kilometers of land frontiers are subject to approval by the National Defence Council (*Conselho de Defesa Nacional* - CDN), pursuant to the Brazilian Constitution, article 91, paragraph I, III.[24] These activities concern the transfer or concession of public property, the opening of roads or waterways, broadcasting, bridges, international roads, runways and aircraft landing strips, national security industries, mining (except for civil engineering programs), transactions

[23] Bill 687/95 (PL 687/95), which remains at Agriculture Comission since April 1998, waiting for report.

[24] Law 6,634 (May 2, 1979) to Decree Law 1,135 (December 3, 1970) and to Decree 85,604 (August 26, 1980).

involving rural property, the transfer of rural property to foreigners, possession of rural lands by foreigners. To be allowed to operate, companies engaging in the above mentioned activities must meet the following requirements: 51% of the capital must be in the hands of Brazilian individuals; two thirds of the labor force must be Brazilian; the actual management must be exercised by Brazilians who must be in a majority position. In the event such activities are undertaken by an individual, only Brazilians may be granted a special permit by the CDN.

There are also some limitations with regard to rural property. A foreign company or individual must be headquarters and/or resident in Brazilian territory in order to purchase or rent any rural property Moreover, this property must be no greater than a quarter of the total area of the municipality (*município*) to which it belongs. Specific authorization is needed according to the size of the property to be purchased or rented by foreigners: a) up to 50 exploitation units or MEI (*Módulo de Exploração Indefinida*) from INCRA/Ministry of Agriculture; b) from 50 to 100 from the president; c) above 100 MEI from the Brazilian Congress. Purchase of real properties up to 20 MEI require the presentation of a specific project of exploration for the land.

I. Security services and transport of valuables

Foreign participation in security services and the transport of valuables, consisted on the property or administration of companies specialized on these services, is forbidden.[25]

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[25] In accordance with Law 7,102/83 and Administrative Measure 91/92.

J. Computers

The market reserve policy in the computer sector was terminated in October 1992. As a result, import controls and the requirement for prior authorization for the domestic production of computer products were eliminated for all firms. The operation of maximum prices and performance differentials was also terminated in October 1992 (Law 8,248/91). Performance requirements remain with respect to government procurement according to Law 8,666 of June 21, 1993.

The new Software Law (Law 9,609), passed in February 19, 1998, eliminated restrictive measures for the free trade of computer programs. Among the revoked measures is the requirement for prior registration for sale of both national and foreign computer programs, and the necessity of formalizing a distribution agreement with foreign software suppliers and a similarity analysis between local and foreign products.

K. Brazilian investments abroad

On December 17, 1997, the Central Bank of Brazil, through Circular 2,794, eliminated one of the previously existing barriers for Brazilian employees to invest in Employee Share Ownership Schemes (known as ESOPs), which schemes are widely used internationally.

Only in exceptional cases, such as an employee leaving the company or in other circumstances provided by the scheme, will it be possible to prematurely dispose of the shares granted under the scheme.

The referred Circular 2,794, has granted an

exception in the case of the participation of Brazilian employees in international ESOPs. Such investments must however be submitted for registration with the Department of Foreign Capital (FIRCE) of the Central Bank, which will monitor and control the same. Remittances abroad and the return of funds to Brazil, whether the capital itself or income arising from the same, must be effected through the floating rates foreign exchange market.

The Brazilian subsidiary which participates in the ESOP is responsible for the presentation of all the necessary information prescribed in Circular 2,794. Additionally the Brazilian company must provide proof of the collection of or exemption from any taxes due and must also present, within 90 days of the remittance of funds, proof of the application of such resources in the foreign company's capital. Annual financial statements must be provided which indicate the status of the investments of each of the employees, the value of dividends paid in cash and/or shares, and other relevant data that might influence the value of the investment.

The shares can be disposed of at any time, provided this occurs outside Brazil and the disposal proceeds are immediately repatriated to Brazil. Where an employee leaves the Brazilian company the investment must be immediately disposed of and the proceeds returned to Brazil. Compliance with these requirements can present an obstacle in the implementation in Brazil of ESOPs where the parent offers subsidies and/or where the scheme permits employees to retain their interest in the shares even after their employee relationship is terminated. Solutions to these potential problems will need to be found on a case by case basis.

Chapter 4

Privatization, Monopolies and Concessions

A. Privatization

Privatization in Brazil began officially in 1981, when a presidential decree created the Special Privatization Commission. In the first phase (1981-1989), without establishing a guiding plan on the matter, the government sold 38 companies, transferred 18 to state governments, merged ten into other federal institutions, closed four and rented one. Most of the sales were of small companies and produced revenues of US$ 723 million. At the time, the government had no intention of implementing a large-scale privatization program.

In 1990, the National Privatization Program (*Programa Nacional de Desestatização* - PND), was created through Law 8,031, introducing a new and large scale privatization program in the framework of a broad program of market-oriented reforms. The PND's initial objectives were to: a) redefine the role of the Brazilian State through the transfer to the private sector of all economic activities unnecessarily managed by the public sector; b) reduce the public sector deficits and debts; c) promote the modernization and competitiveness of the domestic industry; d) strengthen domestic capital markets through wider share ownership; e) free federal government management capacity and re-direct it towards health, education, housing, social security and high technology research and development.

The PND included among its priorities, for the very first time, the sale of State companies considered strategic in the 1970s - *e.g.*, State oligopolies in petrochemicals, fertilizers and steel. Usiminas, a modern and well managed steel company, was the first to be put up for sale in October 1991. This sale alone produced twice the proceeds of the first phase of privatization.

Beginning in 1990, the National Economic and Social Development Bank (BNDES) has been the government agency responsible for implementing the directives established by the Privatization Committee. Since January 1995, the National Privatization Council (CND) has coordinated the activities of the PND. The CND comprises cabinet levels officers, is chaired by the minister of Planning and Budget and is directly accountable to the president of the Republic.

Privatization in Brazil does not usually involve sales at fixed prices. The companies are sold at a public auction, open to foreign investors, with the final price being determined competitively by the market itself. The government sets only a minimum auction price, based on appraisals made by two independent consulting firms selected by BNDES via public tender. Equal access has been guaranteed to both domestic and foreign firms since the beginning of the PND. Two consulting firms conduct appraisals of the company, with one including a recommendation of a minimum price and the other pointing out obstacles to privatization, proposing solutions, identifying potential investors and suggesting the sale model to be adopted.

During the privatization process there is no direct waiver of debts or any tax holiday. Thus there is no legal or administrative measure leading to cancellation of any type of debt which the State company controlled by the

federal government may have with any public institutions. In addition, with privatization, the State also transfers the company's remaining debts, in this way reducing the public sector's liabilities. This transfer has amounted to more than US$ 16 billion up to October 1998.

The PND allows investors to use two types of payment, in addition to the real. The first is medium and long term debt of State enterprises, their parent companies and the federal public sector at large. The second is foreign-held securities and credits corresponding to obligations of federal public sector entities. In 1993-1994 the law was changed to allow the wider use of federal Treasury debts as privatization currencies. The government also established a floor for the use of the cash payment for the companies which is set on an *ad hoc* basis. In 1995, the government, the National Monetary Council and the Central Bank eliminated the 25% discount applicable to the face value of several classes of foreign debt bonds under the responsibility of the federal government, thus ensuring equal conditions for use of both Brazilian and foreign bonds in the PND.

With the PND, the participation of foreign investors, forbidden in the 1980's, was allowed, though initially in a restricted form. Law 8,031 (August 16, 1990) determined that a foreign investor could acquire no more than 40% of the voting capital, unless authorization had been voted by Congress. In 1992 this limit was abolished, so that currently foreigners may acquire up to 100% of a privatized company. The State nevertheless reserves the right to retain a golden share in specific instances which confers a right of veto on certain matters.

The biggest privatization in 1996 occurred in the electricity sector. A majority control in Light, the electricity utility for Rio de Janeiro, was sold to private investors for

over US$ 2 billion. A foreign consortium led by Electricité de France now holds a 34.2% stake (which includes a 7.25% participation by CSN), while the Federal electricity holding company, Eletrobras, holds 28.8%. Another 7.25% is held by CSN, a local steel company. The Brazilian government sold its remaining stake in Light in the first semester of 1999. This privatization has been followed by the sale of a 70.3% stake in the electricity distribution company for Rio, CERJ, to a consortium of foreign investors. The authorities of Rio de Janeiro sold their last shares in December 1996; Eletrobras' remaining shares account for 13.3% of the CERJ's capital.

Other prominent sectors in which privatization has occurred include telecommunications, rail transport and mining.

The first privatization to grant full ownership to a foreign investor occurred in the rail transport sector. A 30 year concession was sold to a US consortium to operate the 1,600 kilometer Western Rail Network. Since then, other rail lines have also been sold to foreigners.

The largest privatization to date - and the largest in Latin America -occurred with the sale of a 41.7% stake of voting shares in the Companhia Vale do Rio Doce (CVRD), a mining conglomerate. CVRD is the world's largest iron ore producer and exporter, Latin America's largest gold producer and the largest foreign exchange earner in Brazil. In addition, it has investments in many other activities both in mining and other sectors, including rails (the largest rail freight carrier in Brazil) and ship transport, steel, paper and fertilizers. Its privatization has proved unpopular in Brazil: indeed, the privatization succeeded despite opposition from several political groups. All injunctions were eventually nullified and the transfer

of the control of CVRD to private hands was effected with a premium of 20% above the minimum price established by the government. The purchaser was a consortium led by CSN, the steel producer which also bought a share in Light. Other members included Nationsbank from the United States and several foreign and Brazilian investment funds. The government plans to sell its remaining stake in the company through a public offering to foreign and domestic investors in a near future.

The participation of foreign capital in the Brazilian privatization process should continue to increase due to the development of a regulatory framework that facilitates the privatization of public services and the extension of the privatization process to states and municipalities. These states own a large number of public enterprises in water, sewage, piped gas and electricity, besides controlling a large share of Brazil's highway and railway networks. At the State level, the sales will include also the local state banks. BNDES has signed agreements with several states to give support to their privatization processes, although privatization of companies controlled by states and municipalities is not included in the PND. In 1996, three state companies were privatized - CERJ (electricity), CRT (telecommunication) and Ferroeste (railway network), totalling US$ 1.27 billion in revenues.

The major privatizations that occurred in 1997 and in 1998 were of the telecommunications system. The total amount obtained by the government with the privatization of the telecommunications system in Brazil was US$ 28.68 billion, US$ 21.07 billion for state owned companies (which includes fixed and long distance services and Band A) and US$ 7.61 billion for the Band B.

Sixty federal enterprises were privatized from 1991 to 1998. From 1991 to this date, around US$ 28.49 billion has been collected with the PND for federal privatization, another US$ 28.68 billion with the telecommunication sectors and US$ 27.52 billion with state privatizations (values considering the liabilities transferred to the new owners).

Adding these results to the PND's proceeds, the total revenues with privatization in Brazil from 1991 to 1998 reached approximately US$ 68 billion or US$ 85 billion considering the liabilities transferred to the new owners.

For the following years, sectors involved in the privatization will include telecommunications, electricity, energy and water sewage companies, roads, ports, railways and banks. As in the past, however, delays may be likely. There are no plans presently to privatize Petrobras, a federally controlled oil company and the largest Brazilian industrial company.

Table 7. What has already been privatized

TELECOMMUNICATIONS SECTOR	
SERVICES	COMPANIES
• Fixed • Mobile Cellular System	• CRT (Telefonia do Rio Grande do Sul) • B Band -Area 1 - SP Area 7 - DF, MS, TO, AC, RO Area 9 - BA and SE Area 10 - PI, CE, RN, PB, AL
ELECTRIC SECTOR	
SERVICES	COMPANIES
• Distributor • Distributor • -- • Distributor • Distributor • Distributor • Distributor • Distributor • Distributor • Distributor	• Escelsa (Espírito Santo Centrais Elétricas) • Light Serviços de Eletricidade S.A. • CERJ (Cia. de Eletricidade do Rio de Janeiro) • Coelba (Cia. de Eletricidade da Bahia) • Cemat (Centrais Elétricas Matogrossenses) • CEEE (Cia. Estadual de Energia Elétrica) • CPFL (Cia. Paulista de Força e Luz) • Enersul (Centrais Elétricas do Mato Grosso do Sul) • Cosern (Cia. Energética do Rio Grande do Norte) • Energipe (Empresa de Eletricidade do Sergipe)

Table 8. Plans for the future

TELECOMMUNICATION SECTOR	
SERVICES	COMPANIES
• Fixed	• TELESP (Telecomunicações de São Paulo S.A.)
• Fixed	• Tele Norte/ Nordeste/ Leste
• Fixed	• Tele Centro/Sul
• Mobile cellular system	• A Band (9 areas)
• Mobile cellular system	• B Band (Area 8 - AM)
ELECTRIC SECTOR	
SERVICES	COMPANIES
• Generator, Distributor and Transmitter	• Eletronorte (Centrais Elétricas do Norte)
• Generator, Transmitter	• Eletrosul (Centrais Elétricas do Sul do Brasil S.A.)
• Distributor, Generator	• Furnas (Furnas Centrais Elétricas)
• Distributor	• Light Serviços de Eletricidade S.A. (the remaining parts)
--	• Cesp (Cia. Energética de São Paulo)
• 2 Generators, 1 Distributor	• Cemig (Cia. de Eletricidade de Minas Gerais)
• Distributor, Generator and Transmitter	• Celpa (Centrais Elétricas do Pará)
• Distributor	• Coelce (Cia. Energética do Ceará)
• Distributor	• Eletropaulo (Eletricidade de São Paulo)
• 2 Distributors	• Chesf (Cia. Hidrelétrica do Rio São Francisco)
• Generator and Transmitter	• Cepisa (Cia. Energética do Piauí)
• Distributor	• Ceal (Cia. Energética de Alagoas)
• Distributor	• Ceron (Centrais Elétricas de Rondônia)
• Distributor	• Eletroacre
• Distributor, Generator and Transmitter	

B. Monopolies and concessions

i) Postal services

General postal services (*e.g.* letter, telegrams, etc.) is a federal monopoly provided by a State company which can grant franchises to any individual or legal entity established in Brazil. Other mail services (*e.g.*, special delivery) may be provided by private companies, operating in Brazil, under a national treatment regime.

ii) Concessions

The Law on Concessions (Law 8,987 of February 13, 1995 as amended by Law 9,074, of July 7, 1995), which regulates the implementation of Article 175 of the Constitution, establishes the general rules by which the government authorizes third parties to perform public services and public contracts. The Law on Concessions is designed to inject competition and private funds into traditionally overly protected and regulated sectors, allowing national and foreign enterprises to invest in strategically important areas for national development. The concessionaire will invest at his own risk and will be compensated by collecting tariff charges from the public.

This Law applies, among others, to concession for the operation of:

- federal highways;

- federal dams, locks, reservoirs and irrigation works;

- customs stations and terminals for public use (except for those located in ports or airports);

- telecommunications;

- electricity services;

- air and space navigation and airport infrastructure;

- interstate railways and waterways;

- transportation of passengers by highways across state or national boundaries;

- ports;

- local distribution of piped natural gas within states;

- mining;

- sanitation services, garbage removal and related activities.

Under the Concessions Law:

- the authority granting a concession must be a public sector legal entity (federal government, states, the federal district or municipalities);

- any partnership or legal entity can be a concessionaire, including State owned companies. It is possible to create a partnership for the purpose of an auction, especially since that is a way for foreign capital to participate immediately in those public service sectors where such capital is still restricted;

- all concessions will last for a specific period and be offered through public bidding;

- there are no government subsidies; the concessionaire bears the risk of the concession;

- users participate officially in monitoring the services rendered;

- the concessionaire will no longer be guaranteed a fixed return based on total costs - a system that promoted inefficiency. Prices fixed through the tendering process are an element in the factors used in choosing the winning bid; prices may be adjusted only in accordance with rules established in the call for bids and in the contract.

Private companies may also provide public services through permits. The conditions are similar to those of a concession, with some exceptions:

- a permit is granted for an undefined period, but may be revoked by the granting authority at any time;

- the granting of a permit does not require a public bidding process;

- private individuals may be granted a permit, but not a concession.

The Concessions Law establishes the rights and obligations of granting authorities, concessionaires or permit holders and users, as well as fines and penalties.

In addition, 1995 Constitutional Amendments opened up new sectors to foreign participation via the concessionary regime:

- By eliminating the distinction between national companies and national companies of Brazilian capital, Constitutional Amendment 6 opened up the possibility of foreign companies exploiting minerals and hydroelectric power under concessions or permits, according to the National Treatment Principle;

- By modifying Article 177 of the Constitution, Amendment 9 has opened up the petroleum sector to increased private participation. The amendment makes it possible, under a regulation to be enacted by the Congress, to private companies, including foreign ones, to undertake research, exploration and extraction of petroleum and natural gas, petroleum refining, import and export of refined petroleum products, and the transport via pipelines and ships of hydrocarbons. It is also possible for the private companies to establish joint-ventures with Petrobras (the State owned company). Constitutional Amendment 8, approved by Parliament on August 15, 1995, allows private companies to provide telecommunication services. The amendment will be ruled by ordinary law and the government sent the corresponding bill to the Brazilian Congress in 1996.

The Constitutional Amendment 5 of August 16, 1996 opened the distribution of natural gas through pipelines to national or foreign private firms through public concessions, ending the monopoly on local distribution enjoyed by individual states.

Chapter 5

Investment Protection and Double Taxation

A. Bilateral investment protection treaties

Brazil has signed bilateral investment protection treaties (see Table 9) with ten European OECD countries as well as with Latin American countries (Mercosur, Chile and Venezuela). It has also signed a BIT with Korea. None of these BITs have been ratified. Other treaties with three European OECD countries are agreed upon and should be signed in the following months. Besides that, Brazil is currently negotiating, in preliminary stage, BITs with South Africa, Canada and the People's of Republic of China.

The BITs already signed, which are based on the OECD model in Europe since 1959, have in Article 2 a safeguard provision that allows for the necessary flexibility in implementing changes in the Brazilian direct investment regime. Article 2 of those agreements states that "each contracting party shall promote as far as possible the investment of investors of the other contracting party and admit such investments in accordance with its law and regulations". No national and most favored nation (MFN) is granted prior to the entry and establishment of an investment according to the appropriate laws and regulations. A second degree of flexibility is provided by denying MFN treatment in relation to benefits granted in the context of sub-regional agreements, such as Mercosur, and also in connection to Conventions to Avoid Double Taxation.

Table 9. Brazilian bilateral investment protection treaties

Under congressional review for ratification[26]

Belgium-Luxembourg Union	06.01.99
Chile	22.03.94
Cuba	26.06.97
Denmark	04.05.94
Finland	17.03.95
France	21.03.95
Germany	21.09.95
Italy	03.04.95
Korea	01.09.95
Mercosul (intra-zone)	17.01.94
Mercosul (extra-zone)	05.08.94
Netherlands	25.11.98
Portugal	09.02.94
Switzerland	11.11.94
United Kingdom	19.07.94
Venezuela	04.07.95
Finalized, awaiting signature	
Norway	
Spain	
Sweden	
Currently under negotiation (preliminary stage)	
Canada	
People's of Republic of China	
South Africa	

[26] In alphabetical order.

After three unsuccessful attempts in 1981, 1986 and 1988, Brazil adopted a new law on arbitration on September 1996, which entered into force in November 1996. Under this new legal framework, "persons capable of entering into contracts may recourse to arbitration to solve their disputes over transferable patrimonial rights" (Article 1 of the law). Parties are free to choose the material legal rules applicable to the arbitration (national laws and regulations; equity; general principles of law; international transitions customary patterns; *lex mercatoria*; etc.) as well as the procedural rules (*ad hoc* institutional rules, national rules or any set rules freely agreed upon).

This new law also admits general rules of arbitration (such as the autonomy of arbitration clause, the independence, competence and discretion of the arbitrators, transparency of the proceedings, right of defense).

One of the most significant aspects of the new law in comparison with the previous regime, is that it now provides legal grounds for the party who wants to start arbitration proceedings to obtain judicial specific performance of the arbitration clause included in the commercial contract against the will of the other party.

International arbitrage awards, however, must be ratified by the Supreme Court before they come into force. The Supreme Court examines formal aspects but not the substance of the award.

Brazil has ratified only a few international arbitration treaties: the Geneva Protocol of 1923; the 1975 Inter-American Convention on Commercial International

Arbitration (known as the Panama Convention) and the 1979 Inter-American Convention on the Recognition of Foreign Arbitration Awards (known as the Montevideo Convention). It is not currently a party to the 1958 New York Convention on Recognition of Foreign Arbitration Awards (although the 1996 Law offers an alternative avenue which follows UNCITRAL directives) nor to the ICSID.

It may also be noted that although historically Brazil has been reluctant to accept binding arbitration between foreign economic agents and State entities on the grounds that this would affect the sovereign rights of the State, Brazil has accepted an arbitration clause in its foreign external debt restructuring agreements (1988 Agreement and 1992 Brady Agreement).

B. Double taxation treaties

Brazil has also signed bilateral agreements (see Table 10) to avoid double taxation, with the following countries: Austria, Belgium, Canada, Denmark, Finland, France, Germany, Hungary, Italy, Japan, Korea, Luxembourg, Netherlands, Portugal, Spain, Argentina, People's Republic of China, the Czech Republic, India, Norway, the Slovak Republic, Ecuador, Philippines and Sweden.

Brazil has been renegotiating existing taxation agreements with the following countries: Portugal, Norway and Sweden. Brazil has also been negotiating the signature of new agreements with the UK and Mexico.

Table 10. Brazilian bilateral agreements on double taxation

Countries	*Decree*	*Date*	*Date of entry into force*
Argentina	87,976	22.12.1982	23.12.1982
Austria	78,107	22.07.1972	23.07.1976
Belgium	72,547	30.07.1973	02.08.1973
Canada	92,318	23.01.1986	27.01.1986
China	762	19.02.1993	20.02.1993
Czech Republic	43	25.02.1991	26.02.1991
Denmark	75,106	20.12.1974	26.12.1974
Ecuador	95,717	11.02.1988	12.02.1988
Spain	76,975	02.01.1976	05.01.1976
Finland	73,496	17.01.1974	21.01.1974
France	70,506	12.05.1972	16.05.1972
Germany	76,988	06.01.1976	07.10.1976
Hungary	53	08.03.1991	11.03.1991
India	510	27.04.1992	28.04.1992
Italy	85,985	06.05.1981	08.05.1981
Japan	61,899	14.12.1967	18.12.1967
Korea	354	02.12.1991	03.12.1991
Luxembourg	85,051	18.08.1980	20.08.1980
Netherlands	355	02.12.1991	03.12.1981
Norway	86,710	09.12.1981	10.12.1981
Philippines	241	25.10.1991	28.10.1991
Portugal *	69,393	21.10.1971	26.10.1971
Slovak Republic	43	25.02.1991	26.02.1991
Sweden	77,053	19.01.1976	20.01.1976

* Present agreement has been terminated and is due to expire on December 31, 1999. A new bilateral instrument is already being negotiated.

Annex 1

Brazil's Exceptions Notified in Pursuance of the National Treatment Instrument

A. Exceptions at the national level - investment by established foreign controlled enterprises

i) Banking

Article 52 of the Transitional Constitutional Provisions of 1988 allows the federal government to issue an authorization for the establishment of foreign financial institutions or to allow any increase in foreign participation in the capital of Brazilian institutions, as well as the participation in privatization of state owned financial institutions. (Authority: Article 192 of the Federal Constitution (to be regulated by congress), Article 52 of the Transitional Constitutional Provisions of 1988.)

ii) Telecommunications

A license is required to operate all telecommunication services. Criteria used to grant licenses include the applicant's technical and financial capacity and, in certain cases, pricing policies and the amount offered for the license. in cellular telephone (B Band frequency), satellite and value-added services, foreign interests are allowed to own all of a firm's non-voting shares (up to two thirds of the total capital) and to

control up to 49% of the voting capital. In the latter case, restriction on foreign ownership remain for three years after the legislation came into force in 1997. (Authority: Law 9,472 of July 16, 1997.)

iii) Radio, television and publishing

Foreign participation is limited to native born Brazilians or persons who have been naturalized citizens for at least ten years. The purchase of technical assistance from foreign enterprises or entities is also forbidden. (Authority: Article 222 of the Federal Constitution and Decree Law 236/67.)

iv) Cable television

The concession to exploit this service is only granted to Brazilian firms. At least 51% of the voting capital must be in the hands of native born Brazilians or persons who have been naturalized citizens for at least ten years or must belong to firms whose headquarters are in Brazil and whose control is under native born Brazilians or persons who have naturalized citizens for at least ten years.
(Authority: Law 8,977 of January 6, 1995.)

v) Air transport

Direct participation of foreign capital in air transport is restricted. Some foreign companies not established in the territory have been authorized to detain a minority stake, up to 20% in some air national companies. (Authority: Article 21 of the Federal Constitution, Brazilian Air Code and Law 7,565 of December 19, 1986.)

vi) Airports and air traffic services

Foreign enterprises may not administer or operate airports nor provide navigation and air traffic services. (Authority: Brazilian Air Code.)

vii) Road transport

Foreign participation is limited to 20% of the voting capital with respect to companies established in Brazil after November 7, 1980. Restrictions also apply to all foreign controlled companies with respect to the raise of capital subscriptions. (Authority: Law 6,813 of July 10, 1980 updated by Law 7,092 of April 19, 1983 and regulated by Law 99,471 of August 24, 1980.)

viii) Fishing

Exploitation of internal waters, areas within the territorial sea and some other activities are reserved to native born Brazilians or persons who have naturalized citizens or must be undertake by firms registered in Brazil. Foreign vessels need authorization from the Ministry of Agriculture to develop fishing activities. (Authority: Decree 68,459 of April 19, 1971.)

ix) Rural properties

The foreign company or individual must be headquartered/resident in the territory and the purchase or renting of the rural property must be no greater than a quarter of the total area of the municipality (*município*) to which the property belongs. Specific authorizations are needed according to the size of the property to be purchased or rented by foreigners. (Authority: Law 5,709 of October 7, 1971, regulated by the Decree 74,965 of November 26, 1974.)

x) Health care

Direct and indirect participation of foreign capital or enterprises in the sector is forbidden, except in those cases established in law. (Authority: Article 199 of the Federal Constitution.)

xi) Security services and transport of valuables

Foreign participation is forbidden. (Authority: Law 7,102/83 and Administrative Measure 91/92).

B. Access to local finance

The access of foreign companies to the national financial system may be restricted by the Central Bank in case of balance of payments disequilibrium. The purchase of public financial institutions is restricted to finance enterprises whose central control belongs to individuals who are residents in Brazil, except in the following cases:

- the funds were collected abroad;

- a special authorization from the Ministry of Planning and Budget can be requested based on national interest (in the case of companies which are not yet established in Brazil);

- the enterprises that operate in sectors and geographical regions which were considered a priority by a president's decree (in the case of companies already established in Brazil). (Authority: Law 4,728/65 of July 14, 1965; Law 4,131, Articles 37, 38 and 39.)

Annex 2

Brazil's List of Measures Reported for Transparency Purposes

A. Transparency measures at the level of national government

i) Transparency measures based on public order and essential security considerations

Real estate

Border areas within 150 kilometers of international frontiers, coastal land and national security areas such as the Amazon Basin are subject to restrictions on foreign ownership for national security reasons. (Authority: Article 20 of the Federal Constitution.)

ii) Other measures reported for transparency

Trans-sectoral measures

In a firm employing more than three persons, two thirds of all employees must be Brazilian nationals, receiving two thirds of the total payroll. Foreign specialists not available locally are excluded from the calculations, as

are directors who are not employees. In addition, under Brazilian company law, the foreign managers must be permanent residents in Brazil, essentially for liability reasons in cases of fraudulent actions or fraudulent bankruptcy. (Authority: Labor Code, Chapter II.)

B. Measures reported for transparency at the level of territorial subdivisions

Ten São Paulo municipalities restrict the purchase of land by foreigners to 750 hectares and require compliance with detailed regulations.

Annex 3

Monopolies and Concessions

A. Public monopolies

i) Mail services

General posting services (*e.g.* letter, telegrams, etc.) is a federal monopoly, provided by a State company which can grant franchises to any individual or legal entity established in Brazil. Other mail services (*e.g.,* special delivery) may be provided by private companies, operating in Brazil, under a national treatment regime.

ii) Reinsurance

The opening up of the sector for FDI is under examination by the government.

B. Private monopolies

None.

C. Concessions

Under the Concessions Law:

- the authority granting a concession must be a public sector legal entity (federal government, state, the federal district or municipalities);

- any partnership or legal entity can be a concessionaire, including state owned companies. It is possible to create a partnership for the

purpose of an auction, especially since that is a way for foreign capital to participate immediately in those public service sectors where such capital is still restricted (telecommunications until 1999);

- all concessions will last for a specific period and be offered through public bidding;

- there are no government subsidies; the concessionaire bears the risk of the concession;

- users participate officially in monitoring the services rendered;

- the concessionaire will no longer be guaranteed a fixed return based on total costs - a system that promoted inefficiency. Prices fixed through the tendering process are an element in the factors used in choosing the winning bid; prices may be adjusted only in accordance with rules established in the call for bids and in the contract.

Private companies may also provide public services through permits. The conditions are similar to those of a concession, with some exceptions:

- a permit is granted for an undefined period, but may be revoked by the granting authority at any time;

- the granting of a permit does not require a public bidding process;

- private individuals may be granted a permit, but not a concession.

The Concessions Law establishes the rights and obligations of granting authorities, concessionaires or permit holders, and users, as well as fines and penalties.

i) Federal level

Energy and natural resources *- Gas, ore, nuclear ore and by-products, nuclear energy*

Constitutional Amendment 6 modified Articles 171 and 176 by eliminating the distinction between national companies and national companies of Brazilian capital and allowing foreign companies to exploit minerals and hydroelectric power under concessions or permits, according to the National Treatment Principle. In the case of mining, an authorization is needed from the Mining and Energy minister. In the case of energy, an authorization is needed from the Departamento Nacional de Águas e Energia Elétrica (DNAEE). (Authority: Law 73 of November 21, 1966. Law 507, Art. 11 of April 23, 1992.)

Oil research, exploration, extraction, refining and transportation

By modifying Article 177 of the 1988 Constitution, the Constitutional Amendment 9 has opened up the petroleum sector to increased private participation. The amendment makes it possible, under a regulation to be enacted by the Congress, to private companies, including foreign ones, to undertake research, exploration and extraction of petroleum and natural gas, petroleum refining, import and export of refined petroleum products, and the transport via pipelines and ships of hydrocarbons. It is also possible for the private companies to establish joint-ventures with Petrobras (the State owned company).

Subsequent to Constitutional Amendment 9 of November 10, 1995, which allowed the activities of petroleum and natural gas to be commercially developed

through concessions granted to private companies, Law 9,478/97 was published, regulating these activities.

Brazilian Petroleum Agency (ANP) has launched the bidding proceedings, with a view to granting private companies the right to commercially exploit and produce both petroleum and natural gas in Brazilian territory.

Pursuant to Article 45 of Law 9,478/97, fees payable by those companies involved in these commercial development activities in Brazil are as follows:

- signature bonus;
- royalties;
- special participation; and
- payment for land occupation or retention.

Please note that only royalties and payment for land occupation or retention will necessarily be charged to companies that may sign concession contracts with ANP for commercial development of petroleum and natural gas. The other fees can be waived by ANP, pursuant to the criteria set out in Decree 2,705/98, published on August 4, 1998. Pursuant to Article 31 of this decree, Petrobras is subject to payment of the same governmental participation fees as any private company.

ii) State level

Distribution of natural gas through pipelines

The Constitutional Amendment 5 of August 16, 1996 opened the distribution of natural gas through pipelines to national or foreign private firms through public concessions, ending the monopoly on local distribution enjoyed by individual states.

Annex 4

The OECD Declaration and Decisions on International Investment and Multinational Enterprises

(Summary of main provisions)

A. Nature of the commitments

Adherence to the 1976 Declaration on International Investment and Enterprises implies acceptance of all its components as well as the related decisions and recommendations.

The OECD Declaration on International Investment and Multinational Enterprises is a political agreement among member countries for cooperation on a wide range of investment issues. The declaration contains four related elements: the National Treatment Instrument, the Guidelines for Multinational Enterprises, an instrument on incentives and disincentives to international investment, and an instrument on conflicting requirements. It is supplemented by legally binding council decisions on implementation procedures, and by recommendations to member countries to encourage pursuit of its objectives, notably with regard to National Treatment.

i) National Treatment

The National Treatment Instrument provides that member countries should, consistent with their needs to maintain public order, to protect their essential security interests and to fulfill commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled by nationals of another

member country treatment under their laws, regulations and administrative practices consistent with international law and no less favorable than that accorded in like situations to domestic enterprises.

Under the Third Revised Decision of the Council on National Treatment, adherents to the declaration must notify the Organization of all measures constituting exceptions to the National Treatment principle within 60 days of their adoption and of any other measures which have a bearing on this principle (the so-called transparency measures). These measures are periodically reviewed by the CIME, the goal being the gradual removal of measures that do not conform to this principle.

The 1991 Review confirmed the understanding reached in 1988 by the Committee on International Investment and Multinational Enterprises on a standstill on National Treatment measures. This understanding provides that member countries should avoid the introduction of new measures and practices which constitute exceptions to the present National Treatment instrument. Particular attention is to be given to this question in the Committee's work.

A number of recommendations of the Council have also been addressed to member countries in the context of earlier horizontal examinations. Most of these recommendations were made to individual countries, but a number of them were of a general character. Concerning investment by established foreign controlled enterprises, member countries should give priority in removing exceptions where most member countries do not find it necessary to maintain restrictions.

In introducing new regulations in the services sectors, member countries should ensure that these measures do not result in the introduction of new

exceptions to National Treatment. Member countries should also give particular attention to ensuring that moves towards privatization result in increasing the investment opportunities of both domestic and foreign controlled enterprises so as to extend the application of the National Treatment Instrument.

In the area of official aids and subsidies, member countries should give priority attention to limiting the scope and application of measures which may have important distorting effects or which may significantly jeopardize the ability of foreign controlled enterprises to compete on an equal footing with their domestic counterparts. Finally, with regard to measures motivated by and based on public order and essential security interests, member countries are encouraged to practice restraint and to circumscribe them to the areas where public order and essential considerations are predominant. Where motivations are mixed (*e.g.* partly commercial, partly national security), the measures concerned should be covered by exceptions rather than merely recorded for transparency purposes.

ii) Guidelines for Multinational Enterprises

The Guidelines for Multinational Enterprises are recommendations jointly addressed by OECD governments to multinational enterprises operating in their territories. While their observance is voluntary and not legally enforceable, they represent the collective expectations of these governments concerning the behavior and activities of multinational enterprises.

They also provide standards by which multinational enterprises can ensure that their operations are in harmony with the national policies of their host

countries. The areas covered include disclosure of information, competition, financing, taxation, employment and industrial relations, environmental protection, and science and technology.

Member governments must establish within their administration national contact points (NCPs) to deal with the implementation of the Guidelines. The purpose of NCPs is to engage in promotional activities, gather information on experience with the Guidelines, handle enquiries, discuss all matters related to the Guidelines, and assist in solving problems which may arise between business and labor in matters covered by the Guidelines.

One of the NCPs most important functions is to act as a forum for discussion on matters relating to the Guidelines. Business and trade unions should be able to discuss problems which may arise from the Guidelines application, and should use the NCPs as a first step to try and resolve issues at the national level. Effective and timely communication and cooperation with the NCPs of other countries is an important element of this work.

The Committee on Investment and Multinational Enterprises is responsible for activities promoting application of the Guidelines among member countries. These include providing clarifications of provisions in the Guidelines; proposing changes or amendments of the Guidelines and recommending to the Council procedural decisions; regularly reviewing the Guidelines; exchanging views periodically on the role and functioning of the Guidelines; responding to requests from members on specific or general aspects of the Guidelines; responding to requests from the social partners on various aspects of the Guidelines; and organizing promotional activities such as symposiums, seminars and other activities.

iii) Incentives and disincentives

The instrument on Investment Incentives and Disincentives recognizes that member countries may be affected by this type of measure and stresses the need to strengthen international cooperation in this area. It first encourages them to make such measures as transparent as possible so that their scale and purpose can be easily determined. The instrument also provides for consultations and review procedures to make cooperation between member countries more effective. A considerable part of the work undertaken in this area is analytical, two studies being undertaken in the 1980's. Member countries may therefore be called upon to participate in studies on trends in and effects of incentives and disincentives on FDI and to provide information on their policies.

iv) Conflicting requirements

The instrument on conflicting requirements provides that member countries should cooperate with a view to avoiding or minimizing the imposition of conflicting requirements on multinational enterprises. In doing so, they shall take into account the general considerations and practical approaches recently annexed to the Declaration. This cooperative approach includes consultations on potential problems and giving due consideration to other country's interests in regulating their own economic affairs.

B. Listing of exceptions and transparency measures

In accordance with the Third Revised Decision of the Council on National Treatment, any new signatory to the Declaration and related decisions is entitled to list its exceptions to National Treatment to reflect the state of its laws and regulations upon adherence to the Declaration. This list of exceptions is submitted to the

Council for approval. In addition, it needs to notify, for transparency purposes, all other measures having a bearing on National Treatment.

Exceptions to National Treatment fall into five categories: investments by established foreign controlled companies, official aids and subsidies, tax obligations, access to local bank credit and the capital market, and government procurement.

Transparency measures include measures based on public order and national security interests, restrictions on activities in areas covered by monopolies, public aids and subsidies granted to government owned enterprises by the state as a shareholder in the enterprises concerned, and corporate organization requirements concerning the nationality of management or director positions in the host countries.

The National Treatment instrument is solely concerned with discriminatory measures that apply to established foreign controlled enterprises. This includes established branches, except for the category of "investment by established foreign controlled enterprises".

Areas of existing public, private or mixed monopolies are to be recorded for the purpose of transparency since foreign controlled and domestic private enterprises are subject to the same restrictions. The undertaking to apply National Treatment comes into force as and when areas previously under monopoly are opened up. In such cases, access to these areas should be provided on a non-discriminatory basis. If restrictions prohibit or impede in any way the participation of foreign controlled enterprises *vis-à-vis* their domestic counterparts, then these restrictions are to be reported as exceptions to National Treatment. The objective is to ensure access to formerly closed sectors on an equal basis.

Annex 5

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on November 21, 1997

Preamble

The parties,

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organization of Economic Cooperation and Development (OECD) on May 23, 1997, C(97)123/FINAL, which, *inter alia*, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalization of such bribery in an effective and coordinated manner and in conformity with the agreed common elements set out in that Recommendation and

with the jurisdictional and other basic legal principles of each country;

Welcoming other recent developments which further advance international understanding and cooperation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organization, the Organization of American States, the Council of Europe and the European Union;

Welcoming the efforts of companies, business organizations and trade unions as well as other non-governmental organizations to combat bribery;

Recognizing the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

Recognizing that achieving progress in this field requires not only efforts on a national level but also multilateral cooperation, monitoring and follow-up;

Recognizing that achieving equitable treatment among the measures to be taken by the parties is an essential object and purpose of the convention, which requires that the convention be ratified without derogations affecting this equivalence;

Have agreed as follows:

Article 1 - The Offense of Bribery of Foreign Public Officials

1. Each party shall take such measures as may be necessary to establish that it is a criminal offense under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public

official; for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

2. Each party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official shall be a criminal offense. Attempt and conspiracy to bribe a foreign public official shall be criminal offenses to the same extent as attempt and conspiracy to bribe a public official of that party.

3. The offenses set out in paragraphs 1 and 2 above are hereinafter referred to as bribery of a foreign public official.

4. For the purpose of this convention:

a. foreign public official means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization;

b. foreign country includes all levels and subdivisions of government, from national to local;

c. act or refrain from acting in relation to the performance of official duties includes any use of the public official's position, whether or not within the official's authorized competence.

Article 2 - Responsibility of Legal Persons

Each party shall take such measures as may be necessary, in accordance with its legal principles, to

establish the liability of legal persons for the bribery of a foreign public official.

Article 3 - Sanctions

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

2. In the event that, under the legal system of a party, criminal responsibility is not applicable to legal persons, that party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.

3. Each party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.

4. Each party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Article 4 - Jurisdiction

1. Each party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offense is committed in whole or in part in its territory.

2. Each party which has jurisdiction to prosecute its nationals for offenses committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

3. When more than one party has jurisdiction over an alleged offense described in this convention, the parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

4. Each party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

Article 5 - Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

Article 6 - Statute of Limitations

Any statute of limitations applicable to the offense of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offense.

Article 7 - Money Laundering

Each party which has made bribery of its own public official a predicate offense for the purpose of the

application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

Article 8 - Accounting

1. In order to combat bribery of foreign public officials effectively, each party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

2. Each party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

Article 9 - Mutual Legal Assistance

1. Each party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another party for the purpose of criminal investigations and proceedings brought by a party concerning offenses within the scope of this convention and for non-criminal proceedings within the scope of this convention brought

by a party against a legal person. The requested party shall inform the requesting party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.

2. Where a party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offense for which the assistance is sought is within the scope of this convention.

3. A party shall not decline to render mutual legal assistance for criminal matters within the scope of this convention on the ground of bank secrecy.

Article 10 - Extradition

1. Bribery of a foreign public official shall be deemed to be included as an extraditable offense under the laws of the parties and the extradition treaties between them.

2. If a party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another party with which it has no extradition treaty, it may consider this convention to be the legal basis for extradition in respect of the offense of bribery of a foreign public official.

3. Each party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offense of bribery of a foreign public official. A party which declines a request to extradite a person for bribery of a foreign public official

solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each party. Where a party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offense for which extradition is sought is within the scope of Article 1 of this convention.

Article 11 - Responsible Authorities

For the purposes of Article 4, paragraph 3, on consultation, Article 9, on mutual legal assistance and Article 10, on extradition, each party shall notify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for these matters for that party, without prejudice to other arrangements between parties.

Article 12 - Monitoring and Follow-up

The parties shall cooperate in carrying out a program of systematic follow-up to monitor and promote the full implementation of this convention. Unless otherwise decided by consensus of the parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and parties shall bear the costs of the program in accordance with the rules applicable to that body.

Article 13 - Signature and Accession

1. Until its entry into force, this convention shall be open for signature by OECD members and by non-members which have been invited to become full participants in its Working Group on Bribery in International Business Transactions.

2. Subsequent to its entry into force, this convention shall be open to accession by any non-signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions or any successor to its functions. For each such non-signatory, the convention shall enter into force on the sixtieth day following the date of deposit of its instrument of accession.

Article 14 - Ratification and Depositary

1. This convention is subject to acceptance, approval or ratification by the signatories, in accordance with their respective laws.

2. Instruments of acceptance, approval, ratification or accession shall be deposited with the Secretary-General of the OECD, who shall serve as depositary of this convention.

Article 15 - Entry into Force

1. This convention shall enter into force on the sixtieth day following the date upon which five of the ten countries which have the ten largest export shares set out in DAFFE/IME/BR(97)18/FINAL (annexed), and which represent by themselves at least 60% of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification. For each signatory depositing its instrument after such entry into force, the convention shall enter

into force on the sixtieth day after deposit of its instrument.

2. If, after December 31, 1998, the convention has not entered into force under paragraph 1 above, any signatory which has deposited its instrument of acceptance, approval or ratification may declare in writing to the depositary its readiness to accept entry into force of this convention under this paragraph 2. The convention shall enter into force for such a signatory on the sixtieth day following the date upon which such declarations have been deposited by at least two signatories. For each signatory depositing its declaration after such entry into force, the convention shall enter into force on the sixtieth day following the date of deposit.

Article 16 - Amendment

Any party may propose the amendment of this convention. A proposed amendment shall be submitted to the depositary which shall communicate it to the other parties at least sixty days before convening a meeting of the parties to consider the proposed amendment. An amendment adopted by consensus of the parties, or by such other means as the parties may determine by consensus, shall enter into force sixty days after the deposit of an instrument of ratification, acceptance or approval by all of the parties, or in such other circumstances as may be specified by the parties at the time of adoption of the amendment.

Article 17 - Withdrawal

A party may withdraw from this convention by submitting written notification to the depositary. Such withdrawal shall be effective one year after the date of

the receipt of the notification. After withdrawal, cooperation shall continue between the parties and the party which has withdrawn on all requests for assistance or extradition made before the effective date of withdrawal which remain pending.

Annex

Statistics on OECD exports

OECD EXPORTS			
	1990-1996	1990-1996	1990-1996
	US$ million	%	%
		of Total OECD	of 10 largest
United States	287,118	15.9%	19.7%
Germany	254,746	14.1%	17.5%
Japan	212,665	11.8%	14.6%
France	138,471	7.7%	9.5%
United Kingdom	121,258	6.7%	8.3%
Italy	112,449	6.2%	7.7%
Canada	91,215	5.1%	6.3%
Korea (1)	81,364	4.5%	5.6%
Netherlands	81,264	4.5%	5.6%
Belgium-Luxembourg	78,598	4.4%	5.4%
Total 10 largest	**1,459,148**	**81.0%**	**100%**
Spain	42,469	2.4%	
Switzerland	40,395	2.2%	
Sweden	36,710	2.0%	
Mexico (1)	34,233	1.9%	
Australia	27,194	1.5%	
Denmark	24,145	1.3%	
Austria*	22,432	1.2%	
Norway	21,666	1.2%	
Ireland	19,217	1.1%	
Finland	17,296	1.0%	
Poland (1) **	12,652	0.7%	
Hungary **	6,795	0.6%	
New Zealand	6,663	0.4%	
Czech Republic ***	6,263	0.3%	
Greece	4,606	0.3%	
Iceland	949	0.1%	
Total OECD	**1,801,661**	**100%**	

*1990-1995;
** 1991-1996;
*** 1993-1996

Concerning Belgium-Luxembourg: Trade statistics for Belgium and Luxembourg are available only on a combined basis for the two countries. For purposes of Article 15, paragraph 1 of the convention, if either Belgium or Luxembourg deposits its instrument of acceptance, approval or ratification, or if both Belgium and Luxembourg deposit their instruments of acceptance, approval or ratification, it shall be considered that one of the countries which have the ten largest exports shares has deposited its instrument and the joint exports of both countries will be counted towards the 60 percent of combined total exports of those ten countries, which is required for entry into force under this provision.

Source:OECD, (1) IMP

Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on November 21, 1997

General

This convention deals with what, in the law of some countries, is called **active corruption** or **active bribery**, meaning the offense committed by the person who promises or gives the bribe, as contrasted with **passive bribery**, the offense committed by the official who receives the bribe. The convention does not utilize the term **active bribery** simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.

This convention seeks to assure a functional equivalence among the measures taken by the parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a party's legal system.

Article 1 - The Offense of Bribery of Foreign Public Officials

Re paragraph 1

Article 1 establishes a standard to be met by parties, but does not require them to utilize its precise

terms in defining the offense under their domestic laws. A party may use various approaches to fulfill its obligations, provided that conviction of a person for the offense does not require proof of elements beyond those which would be required to be proved if the offense were defined as in this paragraph. For example, a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this article. Similarly, a statute which defined the offense in terms of payments "to induce a breach of the official's duty" could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an autonomous definition not requiring proof of the law of the particular official's country.

It is an offense within the meaning of paragraph 1 to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business.

"Other improper advantage" refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements.

The conduct described in paragraph 1 is an offense whether the offer or promise is made or the pecuniary or other advantage is given on that person's own behalf or on behalf of any other natural person or legal entity.

It is also an offense irrespective of, *inter alia*, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in

order to obtain or retain business or other improper advantage.

It is not an offense, however; if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law.

Small facilitation payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offense. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programs of good governance. However, criminalization by other countries does not seem a practical or effective complementary action.

Under the legal system of some countries, an advantage promised or given to any person, in anticipation of his or her becoming a foreign public official, falls within the scope of the offenses described in Article 1, paragraph 1 or 2. Under the legal system of many countries, it is considered technically distinct from the offenses covered by the present convention. However, there is a commonly shared concern and intent to address this phenomenon through further work.

Re paragraph 2

The offenses set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorization, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a party's legal system, then the party would not be required to make it punishable with respect to bribery of a foreign public official.

Re paragraph 4

Public function includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.

A public agency is an entity constituted under public law to carry out specific tasks in the public interest.

A public enterprise is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.

An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, *i.e.*, on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.

In special circumstances, public authority may in fact be held by persons (*e.g.*, political party officials in single party States) not formally designated as public officials. Such persons, through their *de facto* performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.

Public international organization includes any international organization formed by States, governments, or other public international organizations, whatever the

form of organization and scope of competence, including, for example, a regional economic integration organization such as the European Communities

Foreign country is not limited to states, but includes any organized foreign area or entity, such as an autonomous territory or a separate customs territory.

One case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office - though acting outside his competence - to make another official award a contract to that company.

Article 2 - Responsibility of Legal Persons

In the event that, under the legal system of a party, criminal responsibility is not applicable to legal persons, that party shall not be required to establish such criminal responsibility.

Article 3 - Sanctions

Re paragraph 3

The proceeds of bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.

The term confiscation includes forfeiture where applicable and means the permanent deprivation of property by order of a court or other competent authority. This paragraph is without prejudice to rights of victims.

Paragraph 3 does not preclude setting appropriate limits to monetary sanctions.

Re paragraph 4

Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

Article 4 - Jurisdiction

Re paragraph 1

The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

Re paragraph 2

Nationality jurisdiction is to be established according to the general principles and conditions in the legal system of each party. These principles deal with such matters as dual criminality. However, the requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute. For countries which apply nationality jurisdiction only to certain types of offenses, the reference to principles includes the principles upon which such selection is based.

Article 5 - Enforcement

Article 5 recognizes the fundamental nature of national regimes of prosecutorial discretion. It recognizes as well that, in order to protect the independence of

prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature. Article 5 is complemented by paragraph 6 of the Annex to the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, C(97)123/FINAL (hereinafter, 1997 OECD Recommendation), which recommends, *inter alia*, that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery. Parties will have accepted this recommendation, including its monitoring and follow-up arrangements.

Article 7 - Money Laundering

In Article 7, "bribery of its own public official" is intended broadly, so that bribery of a foreign public official is to be made a predicate offense for money laundering legislation on the same terms, when a party has made either active or passive bribery of its own public official such an offense. When a party has made only passive bribery of its own public officials a predicate offense for money laundering purposes, this article requires that the laundering of the bribe payment be subject to money laundering legislation.

Article 8 - Accounting

Article 8 is related to section V of the 1997 OECD Recommendation, which all parties will have accepted and which is subject to follow-up in the OECD Working Group on Bribery in International Business Transactions. This paragraph contains a series of recommendations

concerning accounting requirements, independent external audit and internal company controls the implementation of which will be important to the overall effectiveness of the fight against bribery in international business. However, one immediate consequence of the implementation of this convention by the parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this convention, in particular its Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery. This also has implications for the execution of professional responsibilities of auditors regarding indications of bribery of foreign public officials. In addition, the accounting offenses referred to in Article 8 will generally occur in the company's home country, when the bribery offense itself may have been committed in another country, and this can fill gaps in the effective reach of the convention.

Article 9 - Mutual Legal Assistance

Parties will have also accepted, through paragraph 8 of the Agreed Common Elements annexed to the 1997 OECD Recommendation, to explore and undertake means to improve the efficiency of mutual legal assistance.

Re paragraph 1

Within the framework of paragraph 1 of Article 9, parties should, upon request, facilitate or encourage the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings. Parties should take measures

to be able, in appropriate cases, to transfer temporarily such a person in custody to a party requesting it and to credit time in custody in the requesting party to the transferred person's sentence in the requested party. The parties wishing to use this mechanism should also take measures to be able, as a requesting party, to keep a transferred person in custody and return this person without necessity of extradition proceedings.

Re paragraph 2

Paragraph 2 addresses the issue of identity of norms in the concept of dual criminality. Parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign public officials should be able to cooperate fully regarding cases whose facts fall within the scope of the offenses described in this convention

Article 10 - Extradition

Re paragraph 2

A party may consider this convention to be a legal basis for extradition if, for one or more categories of cases falling within this convention, it requires an extradition treaty. For example, a country may consider it a basis for extradition of its nationals if it requires an extradition treaty for that category but does not require one for extradition of non-nationals

Article 12 - Monitoring and Follow-up

The current terms of reference of the OECD Working Group on Bribery which are relevant to monitoring and follow-up are set out in Section VIII of

the 1997 OECD Recommendation. They provide for:

i) receipt of notifications and other information submitted to it by the [participating] countries;

ii) regular reviews of steps taken by [participating] countries to implement the recommendation and to make proposals, as appropriate, to assist [participating] countries in its implementation; these reviews will be based on the following complementary systems:

- a system of self evaluation, where [participating] countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the recommendation;

- a system of mutual evaluation, where each [participating] country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the [participating] country in implementing the recommendation.

iii) examination of specific issues relating to bribery in international business transactions;

iv) provision of regular information to the public on its work and activities and on implementation of the recommendation.

The costs of monitoring and follow-up will, for OECD members, be handled through the normal OECD budget process. For non-members of the OECD, the current rules create an equivalent system of cost sharing, which is described in the Resolution of the Council Concerning Fees for Regular Observer Countries and Non-Member Full Participants in OECD Subsidiary Bodies, C(96)223/FINAL.

The follow-up of any aspect of the convention which is not also follow-up of the 1997 OECD Recommendation or any other instrument accepted by all the participants in the OECD Working Group on Bribery will be carried out by the parties to the convention and, as appropriate, the participants party to another, corresponding instrument.

Article 13 - Signature and Accession

The convention will be open to non-members which become full participants in the OECD Working Group on Bribery in International Business Transactions. Full participation by non-members in this working group is encouraged and arranged under simple procedures. Accordingly, the requirement of full participation in the working group, which follows from the relationship of the convention to other aspects of the fight against bribery in international business, should not be seen as an obstacle by countries wishing to participate in that fight. The Council of the OECD has appealed to non-members to adhere to the 1997 OECD Recommendation and to participate in any institutional follow-up or implementation mechanism, *i.e.*, in the working group. The current procedures regarding full participation by non-members in the working group may be found in the Resolution of the Council concerning the Participation of Non-Member Economies in the Work of Subsidiary Bodies of the Organization, C(96)64/REV1/FINAL. In addition to accepting the Revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, adopted on April 11, 1996, C(96)27/FINAL.

Revised Recommendation of the Council on Combating Bribery in International Business Transactions

Adopted by the Council on May 23, 1997

The Council,

Having regard to Articles 3, 5.a and 5.b of the Convention on the Organization for Economic Cooperation and Development of December 14, 1960;

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Considering that enterprises should refrain from bribery of public servants and holders of public office, as stated in the OECD Guidelines for Multinational Enterprises;

Considering the progress which has been made in the implementation of the initial Recommendation of the Council on Bribery in International Business Transactions adopted on May 27, 1994, C(94)75/FINAL and the related Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials adopted on April 11, 1996, C(96)27/FINAL; as well as the Recommendation

concerning Anti-corruption Proposals for Bilateral Aid Procurement, endorsed by the High Level Meeting of the Development Assistance Committee on May 7, 1996;

Welcoming other recent developments which further advance international understanding and cooperation regarding bribery in business transactions, including actions of the United Nations, the Council of Europe, the European Union and the Organization of American States;

Having regard to the commitment made at the meeting of the Council at Ministerial level in May 1996, to criminalize the bribery of foreign public officials in an effective and coordinated manner;

Noting that an international convention in conformity with the agreed common elements set forth in the Annex, is an appropriate instrument to attain such criminalization rapidly;

Considering the consensus which has developed on the measures which should be taken to implement the 1994 Recommendation, in particular, with respect to the modalities and international instruments to facilitate criminalization of bribery of foreign public officials; tax deductibility of bribes to foreign public officials; accounting requirements, external audit and internal company controls; and rules and regulations on public procurement:

Recognizing that achieving progress in this field requires not only efforts by individual countries but multilateral cooperation, monitoring and follow-up;

General

I. Recommends that member countries take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.

II. Recommends that each member country examine the following areas and, in conformity with its jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal:

i) criminal laws and their application, in accordance with section III and the Annex to this recommendation:

ii) tax legislation, regulations and practice, to eliminate any indirect support of bribery, in accordance with section IV;

iii) company and business accounting, external audit and internal control requirements and practices in accordance with section V;

iv) banking, financial and other relevant provisions, to ensure that adequate records would be kept and made available for inspection and investigation;

v) public subsidies, licenses, government procurement contracts or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases, and in accordance with section VI for procurement contracts and aid procurement;

vi) civil, commercial, and administrative laws and regulations, so that such bribery would be illegal;

vii) international cooperation in investigations and

other legal proceedings, in accordance with section VII.

Criminalization of Bribery of Foreign Public Officials

III. Recommends that member countries should criminalize the bribery of foreign public officials in an effective and coordinated manner by submitting proposals to their legislative bodies by April 1, 1998, in conformity with the agreed common elements set forth in the Annex, and seeking their enactment by the end of 1998.

Decides, to this end, to open negotiations promptly on an international convention to criminalize bribery in conformity with the agreed common elements, the treaty to be open for signature by the end of 1997, with a view to its entry into force 12 months thereafter.

Tax Deductibility

IV. Urges the prompt implementation by member countries of the 1996 Recommendation which reads as follows: "that those member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign officials as illegal."

Accounting Requirements, External Audit and Internal Company Controls

V. Recommends that member countries take the steps necessary so that laws, rules and practices

with respect to accounting requirements, external audit and internal company controls are in line with the following principles and are fully used in order to prevent and detect bribery of foreign public officials in international business.

A. Adequate accounting requirements

i) Member countries should require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and expenditure takes place. Companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts.

ii) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities.

iii) Member countries should adequately sanction accounting omissions, falsifications and fraud.

B. Independent external audit

i) Member countries should consider whether requirements to submit to external audit are adequate.

ii) Member countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls.

iii) Member countries should require the auditor who discovers indications of a possible illegal act of bribery to report this discovery to management

and, as appropriate, to corporate monitoring bodies.

iv) Member countries should consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities.

C. Internal company controls

i) Member countries should encourage the development and adoption of adequate internal company controls, including standards of conduct.

ii) Member countries should encourage company management to make statements in their annual reports about their internal control mechanisms, including those which contribute to preventing bribery.

iii) Member countries should encourage the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards.

iv) Member countries should encourage companies to provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors.

Public Procurement

VI. Recommends:

i) Member countries should support the efforts in the World Trade Organization to pursue an agreement on transparency in government procurement;

ii) Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that member's national laws and, to the extent a member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials.

iii) In accordance with the Recommendation of the Development Assistance Committee, member countries should require anti-corruption provisions in bilateral aid-funded, procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development cooperation efforts.

International Cooperation

VII. Recommends that member countries, in order to combat bribery in international business transactions, in conformity with their jurisdictional and other basic legal principles, take the following actions:

i) consult and otherwise cooperate with appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as sharing of information (spontaneously or upon request), provision of evidence and extradition;

ii) make full use of existing agreements and

arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;

iii) ensure that their national laws afford an adequate basis for this cooperation and, in particular, in accordance with paragraph 8 of the Annex.

Follow-up and Institutional Arrangements

VIII. Instructs the Committee on International Investment and Multinational Enterprises, through its Working Group on Bribery in International Business Transactions, to carry out a program of systematic follow-up to monitor and promote the full implementation of this recommendation, in cooperation with the Committee for Fiscal Affairs, the Development Assistance Committee and other OECD bodies, as appropriate. This follow-up will include, in particular:

i) receipt of notifications and other information submitted to it by the member countries;

ii) regular reviews of steps taken by member countries to implement the recommendation and to make proposals, as appropriate, to assist member countries in its implementation; these reviews will be based on the following complementary systems:

-a system of self-evaluation, where member countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the recommendation;

- a system of mutual evaluation, where each member country will be examined in turn by the Working Group on Bribery, on the basis

of a report which will provide an objective assessment of the progress of the member country in implementing the recommendation.

iii) examination of specific issues relating to bribery in international business transactions;

iv) examination of the feasibility of broadening the scope of the work of the OECD to combat international bribery to include private sector bribery and bribery of foreign officials for reasons other than to obtain or retain business;

v) provision of regular information to the public on its work and activities and on implementation of the recommendation.

IX. Notes the obligation of member countries to cooperate closely in this follow-up program, pursuant to Article 3 of the OECD Convention.

X. Instructs the Committee on International Investment and Multinational Enterprises to review the implementation of Sections III and, in cooperation with the Committee on Fiscal Affairs, Section IV of this recommendation and report to ministers in Spring 1998, to report to the Council after the first regular review and as appropriate there after, and to review this revised recommendation within three years after its adoption.

Cooperation with Non-Members

XI. Appeals to non-member countries to adhere to the recommendation and participate in any institutional follow-up or implementation mechanism.

XII. Instructs the Committee on International Investment and Multinational Enterprises through its

Working Group on Bribery, to provide a forum for consultations with countries which have not yet adhered, in order to promote wider participation in the recommendation and its follow-up.

Relations with International Governmental and Non-Governmental Organizations

XIII. Invites the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to consult and cooperate with the international organizations and international financial institutions active in the combat against bribery in international business transactions and consult regularly with the non-governmental organizations and representatives of the business community active in this field.

Annex - Agreed Common Elements of Criminal Legislation and Related Action

1) Elements of the Offense of ActiveBribery

i) Bribery is understood as the promise or giving of any undue payment or other advantages, whether directly or through intermediaries to a public official, for himself or for a third party, to influence the official to act or refrain from acting in the performance of his or her official duties in order to obtain or retain business;

ii) Foreign public official means any person holding a legislative, administrative or judicial office of a foreign country or in an international organization, whether appointed or elected or, any person exercising a public function or task in a foreign country;

iii) The offeror is any person, on his own behalf or on the behalf of any other natural person or legal entity.

2) Ancillary Elements or Offenses

The general criminal law concepts of attempt, complicity and/or conspiracy of the law of the prosecuting State are recognized as applicable to the offense of bribery of a foreign public official.

3) Excuses and Defenses

Bribery of foreign public officials in order to obtain or retain business is an offense irrespective of the value or the outcome of the bribe, of perceptions of local custom or of the tolerance of bribery by local authorities.

4) Jurisdiction

Jurisdiction over the offense of bribery of foreign public officials should in any case be established when the offense is committed in whole or in part in the prosecuting State's territory. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

States which prosecute their nationals for offenses committed abroad should do so in respect of the bribery of foreign public officials according to the same principles. States which do not prosecute on the basis of the nationality principle should be prepared to extradite their nationals in respect of the bribery of foreign public officials.

All countries should review whether their current basis for jurisdiction is effective in the fight against bribery of foreign public officials and, if not, should take appropriate remedial steps.

5) Sanctions

The offense of bribery of foreign public officials should be sanctioned/punishable by effective, proportionate and dissuasive criminal penalties, sufficient to secure effective mutual legal assistance and extradition, comparable to those applicable to the bribers in cases of corruption of domestic public officials.

Monetary or other civil, administrative or criminal penalties on any legal person involved, should be provided, taking into account the amounts of the bribe and of the profits derived from the transaction obtained through the bribe.

Forfeiture or confiscation of instrumentalities and of the bribe benefits and the profits derived from the transactions obtained through the bribe should be provided, or comparable fines or damages imposed.

6) Enforcement

In view of the seriousness of the offense of bribery of foreign public officials, public prosecutors should exercise their discretion independently, based on professional motives. They should not be influenced by considerations of national economic interest, fostering good political relations or the identity of the victim.

Complaints of victims should be seriously investigated by the competent authorities.

The statute of limitations should allow adequate time to address this complex offense.

National governments should provide adequate resources to prosecuting authorities so as to permit effective prosecution of bribery of foreign public officials.

7) Connected Provisions (criminal and non-criminal)

Accounting, record keeping and disclosure requirements

In order to combat bribery of foreign public officials effectively, States should adequately sanction accounting omissions, falsifications and fraud.

Money laundering

The bribery of foreign public officials should be made a predicate offense for purposes of money

laundering legislation where bribery of a domestic public official is a money laundering predicate offense, without regard to the place where the bribery occurs.

8) International cooperation

Effective mutual legal assistance is critical to be able to investigate and obtain evidence in order to prosecute cases of bribery of foreign public officials.

Adoption of laws criminalizing the bribery of foreign public officials would remove obstacles to mutual legal assistance created by dual criminality requirements.

Countries should tailor their laws on mutual legal assistance to permit cooperation with countries investigating cases of bribery of foreign public officials even including third countries (country of the offeror; country where the act occurred) and countries applying different types of criminalization legislation to reach such cases.

Means should be explored and undertaken to improve the efficiency of mutual legal assistance.

Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials

Adopted by the Council on April 11, 1996

The Council,

Having regard to Article 5.b of the convention on the Organization for Economic Cooperation and Development of December 14, 1960;

Having regard to the OECD Council Recommendation on Bribery in International Business Transactions [C(94)75 / FINAL];

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that the Council Recommendation on Bribery called on member countries to take concrete and meaningful steps to combat bribery in international business transactions, including examining tax measures which may indirectly favor bribery;

On the proposal of the Committee on Fiscal Affairs and the Committee on International Investment and Multinational Enterprises:

I. Recommends that those member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign public officials as illegal.

II. Instructs the Committee on Fiscal Affairs, in cooperation with the Committee on International Investment and Multinational Enterprises, to monitor the implementation of this recommendation, to promote the recommendation in the context of contacts with non-member countries and to report to the Council as appropriate.

Annex 6 - Money Laundering

Law 9,613 of March 3, 1998 Official Gazette (DOU) of March 4, 1998*

Pertains to the crimes of laundering or concealment of assets, rights, and valuables[1] ; (sets forth) rneasures designed to prevent the misuse of the financial system for illicit actions as described in the law; creates the Financial Activities Control Council – COAF[2] and deals with other matters.

The president of the Republic:

I hereby state that the National Congress has decreed and I signed the following Law:

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* Translated by Sergio Sardenberg.

[1] T. N.: The original, Portuguese language text is somewhat redundant. In the expression: *bens direitos e valores* the word *bens* corresponds to **assets** in English and *valores* may also be translated as assets - though it is not commonly indicative of financial assets, such as cash and papers (securities, bonds, etc.) It also encompasses the notion of precious metals (gold) and gems. We adopted the word **valuables**, because it is sufficiently broad to fit the case.

[2] T. N.: A better translation, and one more attuned to American usage, might have been Financial Activities Control Board, in which case the members of such body would be called board members. On the other hand, the use of the word Council is more in line with Brazilian custom and more literal, thus closer to the Portuguese language original. Moreover, it goes better with the abbreviation for the new entity, which is COAF in the original language.

Chapter 1 - Crimes of Laundering or Concealment of Assets, Rights and Valuables

Section 1 - To hide or disguise the true nature, origin, site, disposition, movement, or ownership of assets, rights or valuables which are known to be directly or indirectly the result of the (following types of) crimes:

i) of illicit trafficking in narcotic substances or similar drugs;

ii) at terrorism;

iii) of smuggling or trafficking in weapons, munitions or materials used for their production;

iv) of extorsion, through kidnapping;

v) against the public administration, including by direct or indirect demands for payment, for the benefit of the demanding party or of any other party, in exchange for the performance of any administrative act, or the omission of any act;

vi) against the national financial system;

vii) committed by a criminal organization,

Sentence: (strict imprisonment) jail term[3] of three to ten years and a fine.

Paragraph 1 - The same punishment applies to any party who, in order to hide or conceal the use of the

[3] T. N.: The original text refers to a sentence of *reclusão* (reclusion) which under the Brazilian Penal Code, (Decree-Law 2,048 of December 7, 1940) corresponds to a harsher form of imprisonment, involving some form of solitary confinement for a minimum period of time and limitation of the right of parole, it's distinguished from the sentence of *detenção*, which designates a less rigorous form of incarceration, which involves no solitary confinement.

assets, rights or valuables resulting from the crimes set forth in this section:

i) converts them into licit assets;

ii) acquires, receives, exchanges, trades in, gives or receives them as guarantee, keeps, stores, moves, or transfers any (such assets, rights, or valuables);

iii) imports or exports goods at prices which do not correspond to their actual values.

Paragraph 2 - The same penalty applies also to anyone who:

i) knowingly takes part in (any) group, association, or office set up for the purpose of hiding or concealing assets, rights, or valuables derived from (any of) the crimes dealt with in this Law.

Paragraph 3 - The attempts at committing (any of the above) crimes are punishable in the manner prescribed in section 14, sole paragraph, of the Criminal Code.

Paragraph 4 - The sentence shall be increased by one to two thirds, in any of the instances contemplated in items i) to vi) of this section when the crime follows a constant pattern or is committed by a criminal organization.

Paragraph 5 - In the event that the accused or his accomplice, freely agree to cooperate with the authorities by providing information leading to the uncovering of a crime and the determination of those responsible therefor or to the finding of assets, rights, or valuables which were the object of the crime, the sentence may be reduced by one or two thirds and (the accused)

may be allowed to start serving it in an open system of imprisonment[4].

Chapter 2 - Special Procedural Provisions

Section 2 - (The following provisions apply with regard to Judicial) Proceedings and sentencing in the case of the criminal offenses encompassed by this law:

i) the (procedural) rules that apply are those that apply to felonies punishable by extended jail term (*reclusão*), under the jurisdiction of a singular judge;

ii) the proceedings pertaining to the crimes (contemplated hereunder) are in no way dependent on the proceedings applicable to any of the criminal offenses mentioned in the preceding section, which give origin to the crimes dealt with in this law, even when such offenses originate in another country;

iii) the federal courts shall have jurisdiction over such crimes in the following instances:

a) in the event of crimes included in international treaties and conventions;

b) in the event of crimes against the financial system and the economic-financial order or

[4] T. N.: An open system type of imprisonment is one that, under certain conditions, may be converted info a restriction of rights, which may involve features of US systems such as work release and community service.

detrimental to assets, services or interests of the Federal Union[5] or any of its autarchical entities and government companies;[6]

c) in the event the originating crime is subject to the jurisdiction of the federal courts.

Paragraph 1 - The indictment shall include sufficient indications of the existence of the previous (or originating) crime. The (criminal) acts described in this law are punishable even when the offender in the originating crime is unknown or exempt from punishment.

Paragraph 2 - The provision contained in section 366 of the Code of Criminal Procedure will not apply to the judicial process pertaining to the crimes contemplated in this law.

Section 3 - In the event that the judge deems it appropriate to deny defendants the right to post bond, or to obtain release during the appeal and provides justification for preventive detention, defendants will be

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[5] T. N.: Union, as in The State of the Union Address. Henceforth, it shall be used solely in that sense and, as such, without the need of the adjective **federal**.

[6] T. N.: Under Brazilian law, in addition to agencies and government instrumentalities, there are three distinct types of entities controlled by the State, which enjoy a greater or lesser degree of administrative autonomy, as follows: autarchical entities, public companies, and mixed-economy companies. **Autarchical** entities are those which have the power of raising revenues through fees charged to the public. As such, they are not exclusively dependent on fund allocations in the federal budget for funding their operations. There are federal, state, and municipal *autarquias*. A typical example is the social security entity. **Public companies** are those which operate in the private sector, just as any private concern, but whose shares are wholly owned by the State. A good example is INFRAERO, the company that operates the country's major airports. **Mixed-economy** companies differ from public companies in that they have private shareholders, in addition to the government. Petrobras, the national oil company, is a prime example of a federal mixed-economy company.

denied such benefits, even in the case of first offenders with a clean record.

Section 4 - In the course of the police investigation or of the court proceedings, the judge, upon the request of the police authorities or the prosecutor, may order the seizure or freezing of assets, rights, or valuables, which constitute the object of the crimes dealt with under this law, and belong to the accused or are registered under his name, in accordance with the procedure set forth in Sections 125 to 144 of Decree-Law 3,689 of October 3, 1941 - Code of Criminal Procedure.

Paragraph 1 - The preventive measures contemplated in this section will be suspended, in the event that the criminal lawsuit is not initiated within a period of 120 days, counted from the date the judicial proceedings are concluded.

Paragraph 2 - Once the legality of the origin of seized or frozen assets, rights or valuables is established, the judge will order their liberation.

Paragraph 3 - No request for the liberation of any assets, rights or valuables shall be granted without the presence of the accused. The judge may order that actions be taken in order to preserve any assets, rights or valuables in the instances contemplated under Section 366 of the Code of Criminal Procedure.

Paragraph 4 - In the event that the immediate implementation of the preventive measures (contemplated herein) may compromise the investigations, the judge, acting upon a request from the police authorities, and after hearing the prosecutor, may issue an order suspending an arrest warrant or the seizure of assets rights or valuables.

Paragraph 5 - Whenever the circumstances warrant it, the judge, acting on a recommendation of the public prosecutor, may appoint a qualified person to manage the assets, rights or valuables seized or attached and (this manager) shall execute a deed of undertaking.[7]

Section 6 - The manager of the assets:

i) will be entitled to receive compensation (for his services), which shall be paid from the proceeds of the assets under management;

ii) acting in response to a court order, will provide periodic information about the status of the assets under his rnanagement as well as explanations and details about investment and reinvestment operations (that may have been) made by him;

iii) may dispose of, or encumber (assets) if he is authorized by the judge to do so.

Sole paragraph - The actions pertaining to the management of the assets seized or attached shall be communicated to the prosecutor, who may file any request before (the court) that he deems appropriate.

Chapter 3 - The Effects of a Guilty Sentence

Section 7 - In addition to the results set forth in the Criminal Code, a guilty sentence entails the following:

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[7] T. N.: The original expression translated here as deed of undertaking is *termo de responsabilidade*, which is a signed document whereby someone entrusted with the performance of a job or a task formally accepts such obligation, promises to perform it in accordance with a predetermined set of prescriptions or instructions, and agrees to be penalized or held accountable for failure to conduct himself in the manner set forth in that document. It is the equivalent of an oath of office.

i) The forfeiture, in favor of the Union, of any assets, rights, and valuables resulting from any of the crimes described in this law, due provision being made for safeguarding the rights of a victim or those of a third party in good faith;

ii) The suspension of the right to hold positions of director, member of the management council[8] or manager of any of the entities set forth in Section 9, for a period equal to double the jail term stipulated by the (court's) sentence;

Sole paragraph - The provisions of Law 7,560 of December 19, 1986 shall apply whenever the forfeited assets, rights or valuables are, directly or indirectly, the result of illegal trafficking in drugs.

Chapter 4 - Assets, Rights, or Valuables Resulting from Crimes Committed Abroad

Section 8 - In the event that there is an international treaty or convention (dealing with the matters encompassed by this law), the judge will order the seizure or freezing of assets, rights, and valuables resulting from crimes committed abroad, provided they pertain to (any of the) crimes listed in Section 1 hereof, and that the foreign authorities (in question) have requested such seizure.

Paragraph 1 - The above provision will be applied also in situations where there is no international treaty or convention, provided the government of the foreign

[8] T. N.: Management Council is used as a translation of the Portuguese original term *Conselho de Administração*, which, pursuant to the corporation law, is the highest management board in a Brazilian corporation. The expression Management (or Managing) Board was avoided because many local companies have both a Management Board (called *Diretoria Executiva*, or simply *Diretoria*) and a higher board, known as *Conselho de Administração*, which is the term used here.

country in question undertakes to grant reciprocity of treatment to Brazil.

Paragraph 2 - In the absence of an international treaty or convention, the assets, rights, or valuables seized or frozen by request of a foreign official or the funds resulting from their disposal shall be evenly divided between the requesting state and Brazil, due protection being given to the rights of a victim or of a third-party in good faith.

Chapter 5 - Legal Entities

Section 9 - the requirements contained in Sections 10 to 12 hereof are applicable to any legal entities which engage, either on a permanent or a temporary basis, and whether or not in a cumulative manner in any of the following activities as their main or secondary activity:

i)receiving, acting as brokers and investing third parties' funds, in national or foreign currency;

ii) purchasing and selling foreign currency as a financial asset;

iii) acting as securities custodian, issuer, distributor, negotiator, broker, or manager;

Sole paragraph - The same requirements apply (to the following):

i) stock, commodities, and futures exchanges;

ii) insurance companies, insurance brokers, institutions involved with private or official social security (business);

iii) credit card managers and managers of consumers' consortia for the acquisition of goods and services;

iv) managers of companies that use magnetic cards for the transfer of funds;

v) companies that engage in leasing and factoring;

vi) companies that give out discounts for the acquisition of goods or which hand out or provide cash or chattels, real estate, goods or services by means of drawings or by other similar methods;

vii) branches or proxies of foreign entities which engage in any of the above-mentioned activities;

viii) all other legal entities engaged in the performance of activities which are dependent upon an authorization from the agencies that regulate the stock, exchange, financial, and insurance markets;

ix) any and all national or foreign individuals or entities, who operate in Brazil and act in the capacity of agents, managers, representatives or proxies, commission agents, or who, in any other manner, represent the interests of foreign legal entities that engage in the performance of any of the activities set forth in this section;

x) legal entities which engage in the performance of activities pertaining to real estate, including the promotion, purchase and sale (of such properties);

xi) individuals or legal entities engaged in the commerce of jewelry, precious stones and metals, objects of art, and antiques.

Chapter 6 - Client Identification and Registry Keeping

Section 10 - The parties mentioned in Section 9 hereof shall:

i) identify their clients and maintain an updated registry, in a manner such as will be determined in instructions to be issued by the appropriate authorities;

ii) keep an up-to-date registry, setting forth, in a specific and itemized manner, all transactions in national and foreign currency, or involving securities and bonds, credit instruments, metals, or any asset that may be converted into cash and which exceeds an amount set forth by the competent authority, as prescribed in the provided instructions to be issued by the latter;

iii) comply with notices sent by the Council established under Section 14 hereof, within the time period set by the appropriate judicial authority. The judicial proceedings pertaining (to such matters) shall be conducted in a confidential manner.

Paragraph 1 - In the event that the (above mentioned) client is a legal entity, the identification mentioned in item i) of this section must comprise the individuals who are their authorized representatives, as well as their owners.

Paragraph 2 - The reference files and registries mentioned in items i) and ii) of this section must be kept during a minimum period of five years, counted from the (date of the) closing of the account or of the date of conclusion of a transaction. This period of time may be extended by a (decision of the) officials having jurisdiction over the matter.

Paragraph 3 - The registration required under item ii) of this section shall be likewise required

whenever an individual or legal entity, and any (individuals or legal entities) connected with them, enter into more than one financial transaction with the same individual, legal entity, conglomerate or group, the aggregate amount of which exceeds the limit (or ceiling) set (for such cases) by the authority having jurisdiction over such matters.

Chapter 7 - Reports about Financial Operations

Section 11 - The parties mentioned in Section 9 hereof:

i) must pay special attention to any transactions which, pursuant to instructions issued by the appropriate officials may be meaningful indications of occurrence of (any of) the crimes defined hereunder, or which may have a relationship therewith;

ii) must give notice to the appropriate officials, within a period of 24 hours, and abstain from informing their clients of this action, in connection with any of the following:

a) any and all transactions listed in item ii) of Section 10 which entail an amount which exceeds a ceiling established by the same officials in accordance with terms and conditions (likewise) set by those officials;

b) a transaction which fits the description contained in item i) of this section, or a proposal regarding the (entering into such) transaction.

Paragraph 1 - The officials having jurisdiction over the above matters will include in the instructions mentioned in item i) hereof a list of transactions which

could characterize the kind of operation contemplated in that item, by reason either of (the nature of) the parties, or the assets, or due to the type of instruments used to implement (the transaction), or because of the lack of economic or legal justification (for carrying out such a transaction).

Paragraph 2 - Information imparted in good faith, in the manner prescribed in this section, shall not generate any civil or administrative liability.

Paragraph 3 - If any parties are not subject to a specific control or oversight agency they will be required to send the reports contemplated in this section to the Financial Activities Control Council - COAF, in the manner prescribed by the Council.

Chapter 8 - Administrative Liability

Section 11 - The parties mentioned in Section 9, as well as the managers of legal entities which fail to comply with the determinations set forth in sections 10 and 11, shall be subject to the following sanctions which will be applied singly or cumulatively, by the appropriate authorities:

i) warning;

ii) monetary fine of variable amount, ranging from 1% to double the amount at the transaction, or up to 200% of the profits derived therefrom or which would have been presumably obtained, as a result of the transaction, or a fine of up to R$ 200,000;

iii) temporary prohibition against holding any position in the management of (any of the) legal entities set forth in the sole paragraph to Section 9;

iv) cancellation of the authorization to operate.

Paragraph 1 - The sanction of warning will be applied in the event of failure to adequately comply with the instructions contained in items i) and ii) of Section 10.

Paragraph 2 - A fine shall be applied whenever any of the parties mentioned in Section 9, acting negligently or maliciously:

i) failure to cure the irregularities which gave cause to the issuance of the warning, within the required time period, (as ordered) by the appropriate officials;

ii) fail to carry out the identification or registration contemplated in items i) and ii) of Section 10;

iii) fails to comply, within the prescribed time period, with the requirement contained in item iii) of Section 10;

iv) disregards the prohibition set forth in Section 2, or fails to make the communication contemplated therein.

Paragraph 3 - The (penalty of) temporary suspension of activities shall be applied whenever it is found that serious breaches of this law, have occurred or whenever there is a specific, duly ascertained, recurrence of a previous transgression which was punished with the application of a fine.

Paragraph 4 - The penalty of cancellation of the authorization to operate shall be applied in instances of specific recurrence of transgressions which were previously punished with the application of the penalty set forth in item iii) of the initial portion of this section.

Section 13 - The procedure for the application of

the sanctions contemplated in this chapter will be regulated by a decree which will ensure the right of rebuttal and ample rights of defense to the (interested) parties.

Chapter 9 - Financial Activities Control Council

Section 14 - The Financial Activities Control Council - COAF - is hereby instituted, under the jurisdiction of the Treasury Ministry, for the purpose of disciplining, examining, identifying, and investigating any activities that raise suspicion of occurrence of any of the illegal acts contemplated in this law, and receiving all pertinent information. The actions of COAF will not conflict with the regulatory powers of other agencies.

Paragraph 1 - COAF shall be the agency responsible for issuing the instructions mentioned in Section 9, to the parties which do not come under any specific regulatory agency, as well as for applying the sanction set forth in Section 12.

Paragraph 2 - COAF shall also be responsible for coordinating and advancing suggestions for (the adoption of) systems of cooporation and exchange of information designed to bring about a rapid and efficient response in the struggle against the (practice of) hiding or concealment of assets, rights, and valuables.

Section 15 - COAF shall notify the appropriate officials whenever it finds evidence of the existence of any of the crimes defined in this law, or of the existence of clear indications of the occurrence of any such crimes or of any other illicit activity, so as to enable such officials to take appropriate measures.

Section 16 - The members of COAF shall be civil servants of outstanding reputation and capability,

appointed by act of the minister of the Treasury and (chosen) from the ranks of career personnel of the Central Bank of Brazil, the Securities Commission, the Superintendency of Private Insurance, the Office of the Public Attorney for the National Treasury, the Internal Revenue Secretariat, an intelligence agency of the Executive branch, the Federal Police Department, and the Ministry of Foreign Affairs. In the latter three cases, the members shall be nominated by the ministers (having jurisdiction over each such entity).

Paragraph 1 - The president of the Council shall be appointed by the president of the Republic, acting on a recommendation of the Treasury minister.

Paragraph 2 - The decisions of COAF regarding the application of administrative sanctions may be appealed to the minister of the Treasury.

Section 17 - The (internal) organization and manner of operation of COAF will be set forth in by-laws, which will be approved by a decree of the Executive branch.

Section 19 - This law shall come into effect on the date of its publication.

Brasília, March 3, 1998; the 177th year of Independence and the 110th year of the Republic.

Fernando Henrique Cardoso
Iris Rezende
Luiz Felipe Lampreia
Pedro Malan

Commentaries on Brazil´s Law 9,613 of March 3, 1998 on Money Laundering

On March 3, 1998, the federal government approved law 9,613, which regulates money laundering crimes and creates, under the Ministry of Finance, the Council for the Control of Financial Activities - COAF - a body whose function is to accept, examine and identify suspected occurrences of illicit activities and to discipline and effect administrative penalties.

The purpose of this law is to combat crimes related to money laundering (as the hiding or camouflaging of the nature, origin, disposition, movement or ownership of assets, rights or amounts) and to detect and punish all and any attempts to legalize the assets generated by such crimes. The law makes it possible to have greater control over these kinds of operations and to enable the Central Bank to maintain a closer view of financial transactions and not have the identities of the parties lost in a paper trail.

The groups subject to the law are those companies or other legal entities whose main or secondary activity is the acquisition, intermediation or administration of financial resources of third parties in Brazilian or foreign currency; the buying or selling of foreign currency or gold as a financial activity or exchange instrument; and real estate activities.

Also included under the legislation are insurance companies and brokers, banks, stock exchanges and futures markets; users of magnetic cards, or their equivalent, which permit the transfer of funds; companies that deal with foreign exchange, leasing, and

factoring; individuals or companies dealing in commercial jewels, gemstones and precious metals, objects of art and antiquities.

All of the above groups are required to identify their clients, keeping an up-to-date list, and, for a minimum of five years, maintain records of all transactions in Brazilian or foreign currency as well as to document all operations having a value which exceeds a level as determined by a qualified authority.

In addition to the loss of their illegally acquired assets to the State, with exception to the rights of *bona fide* third parties or others who may have suffered injury, various levels of penalties have been established for offenders:

- warnings for irregularities concerning the identification of the clients and the maintenance of the registry of financial transactions;

- fines ranging from 1% to 200% of the value of the operation or the derived profit, or a fine of up to US$ 200,000. Fines are levied for negligence in correcting cited deficiencies within a designated period or failure to fulfill the requirement to identify the clients and maintain proper registers.

- suspension, to a maximum of ten years, in the exercise of corporate administrative responsibilities. Suspension results from cases of severe, verified infractions of the law, or specific and recurring transgressions previously penalized by fines.

- cancellation of enfranchisement for activities

repeated incidence of infractions related to the above suspension penalty.

In the event that the money laundering crime is practiced abroad and there is a treaty or convention enacted by the competent foreign authority, any assets resulting from its contravention will be seized and apportioned between the country and Brazil, again with exception to the rights of *bona fide* third parties similar to the above.

Annex 7

Statistics on Direct Investment Flows in OECD Countries and in Brazil

Table 1. Direct investment from abroad in OECD countries and in Brazil: *inflows* 1971-1997

US$ million

Annual average	*Flows of foreign direct investment*													
	1971-1980	1981-1990	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997 (p)
in December 1997	19111	86889	70193	117289	138689	171873	177699	123396	121051	150748	156408	230670	214947	256574
Australia	1130	3982	3457	3873	7936	7887	6513	4042	5036	3007	3951	13202	5456	9346
Austria	146	327	181	402	437	578	647	359	940	982	1314	636	3842	1739
Belgium-Luxembourg	922	2754	631	2338	4990	6731	7966	9292	11326	10751	8313	10558	14117	12525
Canada	553	3370	2781	8038	6456	5018	7562	2870	4717	4748	8431	10780	6416	8217
Czech Republic	..	..	..	..	..	..	..	..	1004	654	869	2562	972	1252
Denmark	156	339	161	88	504	1084	1212	1453	1015	1681	4890	4179	776	2970
Finland	38	284	340	265	530	489	787	-247	406	864	1578	1063	1109	1542
France [1]	1691	5468	2749	4621	8519	13062	15609	15157	17855	16439	15580	23681	21960	23178
Germany	1397	1765	1139	1818	1115	7068	2492	4090	2662	1915	1790	13449	-2720	-188
Greece [2]	..	615	471	683	907	752	1005	1135	1144	2583	3081	4272	5928	3585
Hungary	..	51	..	..	14	187	311	1462	1479	2350	1144	4453	1983	2085
Iceland	..	7	8	2	-14	19	22	18	-11	..	..	14	61	126 (e)

Ireland [3]	166	137	-43	89	91	85	258	1168	1244	850	420	621	1888	1676
Italy	570	2489	-21	4144	6882	2181	6344	2481	3210	3746	2236	4817	3535	3779
Japan	142	328	242	1178	-484	-1060	1806	1286	2755	210	888	41	228	3224
Korea	..	403	436	686	847	737	789	1180	728	588	809	1176	2325	2341
Mexico	..	2442	2401	2635	2880	3176	2633	4762	4393	4389	10973	9526	9185	12478
Netherlands	1082	3786	3085	3031	4830	8460	12165	6552	7824	8561	7586	11611	7766	8678
New Zealand [4]	260	394	390	238	156	434	1681	1695	1089	2212	2690	2690	3687	1339
Norway	307	563	1023	184	285	1511	1807	655	-426	2244	1359	1644	3437	3692
Poland	..	9	..	..	..	..	88	359	678	1715	1875	3659	4498	3077
Portugal	54	692	241	465	925	1740	2608	2451	1914	1550	1265	695	708	1728
Spain	706	4616	3442	4548	7016	8433	13839	12445	13352	8073	9425	6217	6468	5540
Sweden	90	862	1079	646	1661	1810	1971	6351	-41	3843	6346	14455	5074	9665
Switzerland [5]	..	1407	1173	2180	1925	1449	5485	2644	411	-83	3368	2224	2797	4408
Turkey	23	244	125	106	354	663	788	910	911	746	636	935	913	852
United Kingdom	4050	13047	8557	15450	21356	30369	32889	16027	16214	15468	10497	22738	26084	36972
United States	5628	36508	36145	59581	58571	69010	48422	22799	19222	50663	45095	58772	76453	90748
Brazil	1474	1651	345	1169	2804	1131	989	1103	2061	1292	3072	4859	11200	19652

Note: Data are converted using the yearly average exchange rates.

p. Most data for 1997 are provisional.

1. Break in series. As from 1988, reinvested earnings are included in the total flows.

2. Up to 1992, data are on an approval basis. As from 1993, change in the coverage: the amounts include enterpreneurial capital net and real estate investment inflows.

e. Country estimates for 1997.

3. Break in series. As from 1990, the results shown are for net (inward and outward) direct investment capital flows.

4. Data are based on fiscal years ending March 31.

5. Data for 1996 are also provisional.

Source: OECD *International Direct Investment Statistics Yearbook* - 1998; IMF *Balance of Payments Statistics Yearbook* - 1998.

Table 2. Direct investment from abroad in OECD countries and in Brazil: *inflows* 1971-1997

As a percentage of GDP

	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997 (p)
OECD countries												
Australia	2.06	1.96	3.19	2.80	2.21	1.36	1.73	1.06	1.22	3.76	1.40	2.37
Austria	0.19	0.34	0.34	0.46	0.41	0.22	0.50	0.54	0.67	0.27	1.68	0.84
Belgium-Luxembourg	0.53	1.57	3.07	4.09	3.86	4.38	4.77	4.74	3.37	3.63	4.95	4.85
Canada	0.77	1.95	1.32	0.92	1.33	0.49	0.83	0.87	1.56	1.92	1.10	1.37
Czech Republic	..	..	..	..	..	..	3.36	1.90	2.19	5.08	1.73	2.34
Denmark	0.20	0.09	0.46	1.03	0.94	1.12	0.72	1.25	3.36	2.42	0.44	1.82
Finland	0.49	0.30	0.51	0.43	0.58	-0.20	0.38	1.02	1.61	0.84	0.89	1.31
France[1]	0.38	0.52	0.88	1.35	1.31	1.26	1.35	1.32	1.17	1.54	1.43	1.66
Germany	0.11	0.15	0.08	0.54	0.15	0.24	0.14	0.10	0.09	0.56	-0.12	-0.01
Greece[2]	0.99	1.22	1.40	1.12	1.21	1.27	1.17	2.81	3.15	3.74	4.84	3.01
Hungary	..	..	..	..	0.87	4.37	3.97	6.09	2.76	10.19	4.51	4.74
Iceland	0.20	0.04	-0.23	0.36	0.35	0.27	-0.16	-	-	0.20	0.84	1.70 (e)
Ireland[3]	-0.16	0.28	0.26	0.23	0.57	2.53	2.39	1.74	0.78	0.96	2.67	2.30
Italy	0.00	0.55	0.82	0.25	0.58	0.22	0.26	0.38	0.22	0.44	0.29	0.33
Japan	0.01	0.05	-0.02	-0.04	0.06	0.04	0.07	0.00	0.02	0.00	0.00	0.08
Korea	0.40	0.50	0.47	0.33	0.31	0.40	0.24	0.18	0.21	0.26	0.48	0.50
Mexico	1.74	1.76	1.57	1.42	1.00	1.51	1.21	1.09	2.61	3.33	2.79	3.09
Netherlands	1.73	1.39	2.09	3.70	4.29	2.26	2.43	2.73	2.25	2.92	1.96	2.39
New Zealand[4]	1.36	0.65	0.36	1.03	3.90	4.07	2.72	5.07	5.24	4.47	5.60	2.03

Norway	1.35	0.20	0.29	1.53	1.57	0.56	-0.34	1.93	1.11	1.12	2.18	2.38
Poland	..	..	..	..	0.15	0.47	0.80	1.99	2.02	3.10	3.35	2.25
Portugal	0.71	1.11	1.91	3.35	3.86	3.21	2.08	1.89	1.49	0.70	0.68	1.77
Spain	1.48	1.54	2.02	2.20	2.80	2.34	2.30	1.67	1.93	1.10	1.11	1.04
Sweden	0.81	0.40	0.91	0.95	0.86	2.65	-0.02	2.07	3.20	6.25	2.02	4.21
Switzerland [b]	0.85	1.26	1.03	0.81	2.40	1.14	0.17	-0.04	1.29	0.72	0.95	1.75
Turkey	0.17	0.12	0.39	0.62	0.52	0.60	0.57	0.41	0.49	0.55	0.50	0.44
United Kingdom	1.52	2.24	2.56	3.61	3.37	1.58	1.55	1.64	1.03	2.05	2.26	2.89
United States	0.85	1.32	1.20	1.31	0.87	0.40	0.32	0.80	0.67	0.84	1.03	1.16
Brazil	0.13	0.4	0.85	0.29	0.23	0.28	0.55	0.29	0.54	0.69	1.45	2.44

Note: Data are converted using the yearly average exchange rates.

p. Most data for 1997 are provisional.

1. Break in series. As from 1988, reinvested earnings are included in the total flows.

2. Up to 1992, data are on an approval basis. As from 1993, change in the coverage: the amounts include enterpreneurial capital net and real estate investment inflows.

e. Country estimates for 1997.

3. Break in series. As from 1990, the results shown are for net (inward and outward) direct investment capital flows.

4. Data are based on fiscal years ending March 31.

5. Data for 1996 are also provisional.

Source: OECD International Direct Investment Statistics Yearbook - 1998; IMF Balance of Payments Statistics Yearbook - 1998.

Table 3. Direct investment abroad from OECD countries and from Brazil: *outflows* 1971-1997

US$ million

	Annual average		*Flows of direct investment abroad*												
	1971-1980	1981-1990	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997 [p]	
OECD countries	30429	105468	89792	137212	167158	213517	231018	191430	178589	202830	237418	307366	288573	382022	
Australia	251	2227	3419	5096	4985	3267	265	3001	951	1779	5291	3728	6306	6219	
Austria	58	413	313	312	309	855	1663	1288	1871	1467	1201	1043	1405	1450	
Belgium-Luxembourg	321	2098	1627	2680	3609	6114	6130	6493	10389	4693	1205	11786	8365	6709	
Canada	1134	4234	3501	8538	3848	4583	5222	5813	3586	5868	9090	11165	8524	12896	
Czech Republic	..	..	..	..	..	..	..	..	21	101	120	37	25	25	
Denmark	106	629	646	618	719	2027	1509	1844	2225	1373	4041	3018	2484	4045	
Finland	61	1158	810	1141	2608	3108	2708	-124	-753	1409	4297	1498	3598	4405	
France [1]	1384	10137	5230	8704	16636	20704	36220	25115	30416	19732	24381	15760	30419	35591	
Germany	2485	9038	10076	9681	12087	15181	23964	23623	19526	15320	17179	38791	29546	33166	
Greece	..	..	..	..	..	..	..	..	..	..	..	..	..	..	
Hungary	..	..	..	..	..	..	..	..	..	11	49	43	-3	431	
Iceland	..	3	2	7	1	6	10	27	3	11	23	24	65	26 [e]	
Ireland	..	..	..	..	..	..	..	..	..	..	..	..	..	..	
Italy	360	2871	2652	2339	5554	2135	7612	7326	5948	7221	5109	5732	6465	12164	

Japan	1805	19241	14403	20103	35433	46248	50774	31688	17301	13916	18117	22629	23420	25992
Korea	..	241	161	321	164	392	1052	1489	1162	1340	2461	3552	4670	4287
Mexico	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Netherlands	2783	6577	4036	8576	7164	14808	15288	13577	14366	12343	17405	19629	23214	20157
New Zealand [2]	38	456	87	562	615	135	2358	1472	391	-1386	2015	1747	-1257	-756
Norway	108	900	1605	890	968	1352	1478	1840	-80	791	2145	2844	5341	4114
Poland	..	..	..	..	..	..	..	..	13	18	29	42	53	36
Portugal	2	37	-2	-16	77	85	165	474	687	141	283	689	785	1856
Spain	127	879	377	754	1227	1470	3442	4424	2171	2648	3900	3608	5222	10142
Sweden	460	4807	3947	4789	7468	10288	14743	7053	409	1357	6698	11221	4662	11382
Switzerland [3]	..	3355	2124	1823	8711	7983	6709	6212	6050	8765	10798	12214	15981	14516
Turkey	..	10	..	9	-	-	88	127	133	175	78	163	325	319
United Kingdom	5511	18558	17077	31308	37110	35172	18636	15972	19156	25573	28251	44329	34125	58313
Unites States	13435	17599	17701	28977	17865	37604	30982	32696	42647	78164	73252	92074	74833	114537
Brazil	125	254	143	138	175	523	665	1014	137	491	1037	1384	-467	1042

Note: Data are converted using the yearly average exchange rates.

p. Most data for 1997 are provisional.

Greece, Ireland and Mexico do not report figures for outflows.

1. Break in series. As from 1988, reinvested earnings are included in the total flows.

e. Country estimates for 1997.

2. Data are based on fiscal years ending March 31.

3. Data for 1996 are also provisional.

Source: OECD *International Direct Investment Statistics Yearbook* - 1998; IMF *Balance of Payments Statistics Yearbook* - 1998.

Table 4. Direct investment abroad from OECD countries and from Brazil: *outflows* 1971-1997

As a percentage of GDP

	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997 (p)
OECD countries												
Australia	2.04	2.57	2.00	1.16	0.09	1.01	0.33	0.63	1.63	1.06	1.61	1.58
Austria	0.33	0.26	0.24	0.67	1.04	0.77	1.00	0.80	0.61	0.45	0.61	0.70
Belgium-Luxembourg	1.36	1.79	2.22	3.71	2.97	3.06	4.38	2.07	0.49	4.06	2.93	2.60
Canada	0.97	2.07	0.79	0.84	0.92	1.00	0.63	1.07	1.68	1.99	1.47	2.15
Czech Republic	..	..	..	..	..	..	0.07	0.29	0.30	0.07	0.04	0.05
Denmark	0.78	0.60	0.66	1.93	1.17	1.42	1.57	1.02	2.78	1.74	1.42	2.48
Finland	1.16	1.30	2.51	2.74	2.01	-0.10	-0.71	1.67	4.39	1.19	2.88	3.75
France [1]	0.71	0.98	1.73	2.14	3.03	2.09	2.30	1.57	1.83	1.03	1.98	2.55
Germany	1.01	0.78	0.90	1.15	1.46	1.37	0.99	0.80	0.84	1.61	1.26	1.57
Greece	..	..	..	..	..	..	..	..	..	..	..	..
Hungary	..	..	..	..	..	..	..	0.03	0.12	0.10	-0.01	0.98
Iceland	0.05	0.13	0.02	0.11	0.16	0.40	0.04	0.18	0.37	0.34	0.89	0.35 (e)
Ireland	..	..	..	..	..	..	..	..	..	..	..	..
Italy	0.44	0.31	0.66	0.25	0.70	0.64	0.49	0.73	0.50	0.53	0.53	1.06
Japan	0.72	0.83	1.21	1.60	1.71	0.93	0.47	0.33	0.39	0.44	0.51	0.62

Korea	0.15	0.24	0.09	0.18	0.41	0.51	0.38	0.40	0.65	0.78	0.96	0.92
Mexico	..	..	..	..	..	..	..	..	..	..	..	..
Netherlands	2.26	3.94	3.09	6.48	5.39	4.68	4.46	3.94	5.16	4.94	5.86	5.55
New Zeland [2]	0.30	1.54	1.41	0.32	5.47	3.53	0.98	-3.17	3.93	2.90	-1.91	-1.15
Norway	2.12	0.98	0.99	1.37	1.28	1.56	-0.06	0.68	1.74	1.94	3.38	2.65
Poland	..	..	..	..	..	..	0.02	0.02	0.03	0.04	0.04	0.03
Portugal	-0.01	-0.04	0.16	0.16	0.24	0.62	0.75	0.17	0.33	0.69	0.76	1.90
Spain	0.16	0.26	0.35	0.38	0.70	0.83	0.37	0.55	0.80	0.64	0.89	1.90
Sweden	2.97	2.97	4.11	5.38	6.42	2.95	0.17	0.73	3.38	4.85	1.85	4.96
Switzerland [3]	1.54	1.06	4.67	4.45	2.94	2.67	2.48	3.70	4.13	3.96	5.43	5.76
Turkey	..	0.01	-	-	0.06	0.08	0.08	0.10	0.06	0.10	0.18	0.16
United Kingdom	3.04	4.54	4.44	4.18	1.91	1.58	1.83	2.71	2.77	4.00	2.96	4.56
United States	0.41	0.64	0.37	0.71	0.56	0.57	0.71	1.23	1.09	1.31	1.01	1.46
Brazil	0.05	0.05	0.05	0.13	0.15	0.26	0.04	0.11	0.18	0.19	-0.06	0.13

Note: Data are converted using the yearly average exchange rates.

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Greece, Ireland and Mexico do not report figures for outflows.

1. Break in series. As from 1988, reinvested earnings are included in the total flows.

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