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Multinationals in Brazil

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BRASIL IS A developing country with a present population of roughly 105 million and is growing at the rate of 2.9 percent per year. Perhaps 35 million should be considered as an active economic population but this is increasing continuously so that a considerable and expanding internal market already exists. The greater part of the population (more than half) is under 21 years of age, and this requires at least one million new jobs per year. For this reason, and also because of Brazil's political and economic stability, the country has been an interesting attraction to multinational corporations (MNC). Few of the 500 largest American industrials, as published by FORTUNE, and the 300 largest non-American companies, are absent from Brazil. An examination of MNCs in Brazil is nothing more than a study of foreign investment in the country. Brazil is a capital importing country and the present rules by which capital is brought into the country may be of interest to those who study MNCs outside their country of origin.

The basic legislation in regard to foreign investment in Brazil is Law No. 4131 of September 3, 1962, as amended by Law No. 4390 of August 29, 1964 and regulated by Decree No. 55.762 of February 17, 1965. It should be noted that Law No. 4131 was passed after considerable discussion not only by the interested parties but in Congress also. Times were then difficult for Brazil, for the President of the Republic had suddenly withdrawn from office and the Vice-President who took over had well-known leftist

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2 Lei de Capital Estrangeiro, 5 Coleção das Leis 117 (1962) [hereinafter cited as Coleção]. See annotated English translation, Brazilian Remittance of Profits Law, in P. GARLAND, A BUSINESSMEN'S INTRODUCTION TO BRAZILIAN LAW AND PRACTICE 153 (1966) [hereinafter cited as GARLAND].

3 5 Coleção 97 (1964). See also GARLAND, supra note 2, at 153.

inclinations which he was attempting to put into practice. Nationalistic feeling was apparently high and this had its effects on the first law. The main thrust of 4131 was that foreign capital could be accepted, but the results obtained could not be considered as an addition to the original investment. At the time, the opinion of many was that the appearance of a law attempting to set rules for foreign capital in Brazil would create impediments for other and greater investment from abroad of which the country was in need. The change that took place in 1964 eliminated the more obnoxious provisions and later years confirmed that the worries voiced at the time had no foundation in fact.

Brazil went through considerable turmoil in 1964 and a new government took over. Since then the country has seen political stability and, from an economic point of view, Brazil has been developing steadily at a great pace. From the very beginning, the new government sought to correct the excesses that had been committed and this is why Law No. 4390 was passed. The rules of the game, in all that is of interest to foreign investment in Brazil, are thus quite well-known by now. MNCs have no difficulty in recognizing the guidelines which govern their activity in the country.

All business organizations created in Brazil are, by law, Brazilian and subject to local laws. So are the branches of foreign organizations duly authorized to do business in the country. Due to the difficulties encountered in the creation of branches, their number is small and decreasing except in activities in which they are required, such as in air traffic and some shipping activities. The foreign banks operating in Brazil are also branches of their parent organizations.

No distinction should exist in Brazil between foreign and local investment. This is clearly stated in article 2 of Law No. 4131, which reads: “Foreign capital invested in the country will receive the same treatment before the law as that granted to Brazilian capital under similar conditions; any discrimination not provided for in the present law is prohibited.”

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5 Lei de Introdução ao Código Civil Brasileiro, Decree-Law No. 4657 of Sept. 4, 1942, art. 11, D.O.U. I:1, (1942) (Law of Introduction to the Brazilian Civil Code). See also Decree-Law No. 2627 of Sept. 26, 1940, art. 60 (Brazilian Commercial Code). See annotated English translation, Of the Corporation or Company Whose Operation is Dependent on Government Authorization, in GARLAND, supra note 2, at 200. Annual editions of both the Civil and Commercial Codes are published by Ediçao Saraiva.

6 Lei de Capital Estrangeiro, supra note 2 (translation by the author).
Foreign investment in Brazil can be made in cash or in any kind of goods, machinery and equipment brought into the country without a disbursement of foreign exchange and intended for the production of goods and services. In some special cases it has been known that technical know-how, patents and trademarks have been registered as a foreign investment in Brazil but this becomes permissible only after a long and difficult process before the National Institute of Industrial Property (INPI), and the Central Bank of Brazil. Besides this, the total amount of the investment in know-how is also subject to a 25 percent withholding tax at the source that makes it exceedingly costly.7 It is for these reasons that there have been so few registered foreign investments through the transfer of know-how and patents.

Registration of the foreign investment is essential. This is carried out by the Central Bank of Brazil and is by now a routine matter. A request for registration should be made within 30 days after the arrival of the plant and equipment, or after the exchange contract by which funds are brought into Brazil.8 Companies established in Brazil for a long time, many years before the enactment of Law No. 4131, have had considerable problems in providing proof of the entry into Brazil of the funds which they now ask to be registered as foreign investment.

Registration of the foreign investment is made in the currency which was sent to Brazil; reinvestments derived from this initial investment are registered in the currency of the country of origin of the investor.9 The corresponding value in cruzeiros is also indicated as well as the number of shares purchased or acquired with the investment. If a premium is paid at the time of acquisition, and this is also paid in foreign currency, the registration is for the full amount. In this case some problems may occur with the Central Bank for the registration of profits obtained at a later date and corresponding to the premium paid. The investment may be made either directly into an existing corporation by a direct issue of new shares, or it may also be made by the purchase of existing shares from a shareholder in the company. In both cases there is an entry into Brazil of foreign funds and the

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7 Regulamento do Imposto sobre a Renda e Proventos de Qualquer Natureza (Brazilian Income Tax Law), art. 343, 344, approved by Decree No. 76,186 of Sept. 2, 1975, 6 Coleção 224 (1975).
8 Lei de Capital Estrangeiro, art. 5, supra note 2. See also GARLAND, supra note 2, at 154.
9 Lei de Capital Estrangeiro, art. 4, supra note 2. See also GARLAND, supra note 2, at 154.
total amount so entering the country is registered as foreign investment.

Once registration has been obtained it is possible to remit to the person or company that made the investment the result of its participation in a Brazilian concern. Profits may be remitted after payment of the applicable income tax withheld at the source, which is usually at the rate of 25 percent. When a treaty for the avoidance of double taxation exists with the country to which the remittance is to be made the tax is reduced to 15 percent, or to 10 percent in the case of Japan.\(^\text{10}\) This tax is applicable when the remittance, considered as an average over a 3 year period, does not exceed 12 percent net of the amount registered in foreign currency. It should be kept in mind that the capital of Brazilian companies is expressed in local currency, namely cruzeiros, and due to inflation, this capital is subject to indexing or "monetary correction" as it is called in Brazil. The application of "monetary correction" causes an increase in the number of shares issued but this has no effect on the registration in the foreign currency. Only when existing profits are capitalized, and bonus shares issued, do the initial and later registrations change to the extent of the reinvestment. This is computed in the foreign currency of the initial investment at the mean rate of exchange prevailing between the time the profits were ascertained in accordance with the year end balance sheet and the date of their capitalization. The distribution of profits at the end of a financial period may be the equivalent in cruzeiros of 16 percent of the foreign investment; this total is then subject to the 25 percent withholding tax, leaving a net of 12 percent to be remitted to the foreign shareholder. Remittances in excess of this percentage are also allowed but they then become subject to a supplementary tax which ranges from

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\(^\text{10}\) The general 25 percent rate is established by the Brazilian Income Tax Law, art. 344, supra note 6. Exceptions are made by special treaties for the avoidance of double taxation that Brazil has entered into with other countries. The 10 percent rate was established with Japan by Decree No. 61,899 of Dec. 14, 1967, art. 9.

The following countries have treaties with Brazil establishing a 15 percent rate: Portugal, Decree No. 69,393 of Oct. 21, 1971, art. 10, 8 Coleção 78 (1971); France, Decree No. 70,506 of May 12, 1972, art. 10, 4 Coleção 88 (1972); Belgium, Decree No. 72,542 of July 30, 1973, art. 10, 6 Coleção 244 (1973); Austria, Decree No. 78,107 of July 22, 1976, D.O.U. I.1, at 9768 (July 23, 1976); Spain, Decree No. 76,975 of Jan. 2, 1976, art. 10, D.O.U. I.1, at 79 (Jan. 5, 1976); Germany, Decree No. 76,988 of Jan. 6, 1976, art. 11, D.O.U. I.1, at 149 (Jan. 7, 1976).
40 to 60 percent of such excess taken as an average over 3 years.\(^{11}\) It is a penalty and, in accordance with figures published by the Government, very few companies make these high remittances. The Brazilian Minister for Planning has indicated that for the last 3 years, 1971-1974, the average remittances have not exceeded 5.5 percent of registered capital.\(^{12}\)

There are reasons for these low remittances. In the first place, the reinvestment procedure is very interesting to locally established companies as it can be accomplished without any tax implication. The capitalization of profits increases the registered foreign investment without any tax, and allows for an increased remittance to be made, if so desired, in future years. Another cause for this reinvestment is the continuous need for funds in Brazil to comply with the demands of the growing market and with the expansion of existing facilities. While the development of Brazil continues at the amazing pace which it has held during the last 10 years, MNCs do not find it expedient to make remittances of dividends and profits as these remittances would deprive them of funds required locally.

But it is also possible to comment differently on these low remittances of dividends, and this the more radical voices against foreign capital do quite often.\(^{13}\) It has been stated that no MNC would possibly consider itself satisfied with such a low rate of profit from its investments in Brazil were it not for the fact that MNCs are obtaining other remittances which are not officially made known. The accusation of price manipulation is then made, in an attempt to show that the MNC has the possibility of remitting profits from Brazil by an adjustment in the price of its exports to Brazil, or on the exports of its Brazilian subsidiaries to the parent company.

Loans to Brazilian companies, including the subsidiaries of MNCs, also have to be registered with the Central Bank. These loans have to be for a term periodically established by the Central Bank, and at rates of interest also acceptable to it and in accordance with prevailing rates in the international market.

\(^{11}\) Lei de Capital Estrangeiro, art. 43 § 1, supra note 2. See also GARLAND, supra note 2, at 162.

\(^{12}\) Brasil Social, a statement made by the Minister for Planning, João Paulo dos Reis Velloso, before the Parliamentary Commission for the Examination of Salary Policies of the House of Representatives, Sept. 24, 1975. See Três TEMAS (1975), a collection of three statements made by the Minister for Planning and published by the Secretariat of Planning.

At the moment, the minimum period for a foreign loan to a Brazilian company is 5 years, and remittances of principal can only be made proportionately to the term of the loan. One of the accusations made against MNCs is that they are in a better position than native Brazilian companies because they can avail themselves of foreign loans, as they have access to the international and Eurodollar markets. A loan so contracted has the advantage that the local Brazilian company has to consider only the difference in the exchange rate at the time payments of interest and principal become due, and consideration has to be given to the fluctuation of the interest rate as against the fluctuation of the local currency due to inflation. In the past, it has been more advantageous to accept foreign loans and to be subject to a different rate of exchange, as this rate has been consistently below the inflation rate prevailing in Brazil. In any case, to make it possible for Brazilian companies, especially those of medium and smaller size, to avail themselves of foreign loans, the Central Bank has authorized local investment banks to make use of foreign credit lines to lend the equivalent in cruzeiros to local companies. The local company then accepts the fluctuation of the exchange rate but the cost to it of the loan does not quite compare with the loan taken by the subsidiary of an MNC as the Brazilian company has to pay a fee to the bank for its guarantee of the foreign loan. In any case, new sources of capital have been made available to local companies and wise use has been made of them to enable Brazilian concerns to expand at the rate required by the development of the country and of the local and export market.

The entry of an MNC into the Brazilian market can be accomplished either by the creation of a new company and the setting up of its required physical facilities, or by the acquisition of an existing concern. It can be an outright purchase or a joint venture, with the MNC in a majority or minority position. Some years ago, a joint venture was looked upon with disdain, as it was thought that the natives were not in a position to join an MNC in a business venture. Another reason for the reluctance to effect a joint venture was the different policies of the Brazilians and the MNC in regard to the destination of the profits derived from the business. In the case of the MNC, the profits could all be used in the expansion of the business if so required, their distribution in the form of dividends being dependent on the demands of the local company. If Brazilians were participating in the venture, they might demand the distribution of some, if not all, of the profits obtained, thereby curtailing the advancement of the business. The
different mentalities of management were also causes for the reluctance to enter into a joint venture. Today the position has changed and many joint ventures have been established. For the MNC, this also has the advantage that local knowledge and habits may become more readily available thus allowing for increased progress of the new or expanded venture.

There have been signs that the government is somewhat concerned with this kind of take-over of Brazilian companies by MNCs. Some years ago, a decree-law was issued making it mandatory for any such acquisition to have the prior approval of the government. But this decree-law was never officially published so it has not come into effect. Nevertheless, some members of the government, especially the Minister for Industry and Commerce, have expressed the view that any major acquisition by an MNC of an existing Brazilian concern should be approved by the government before it becomes final. Some cases have been known in which the government stepped in and prevented the consummation of deals already in their final stages. One of them, the Philips-Consul case, was widely reported in the press and denials had to be issued that, by its disapproval of the deal, the government had changed its mind in regard to foreign capital in the country. The government's contention is that when a Brazilian company obtains financial or tax benefits it expressly agrees to submit any major change in its shareholding to the prior approval of the department concerned. It is certainly correct that this condition is standard as far as the Council for Industrial Development (CDI) is concerned, but it is no less correct to say that the law provides for a penalty if there is an infringement, and that penalty is the payment of all exempted taxes and other benefits. If the foreign company taking over a Brazilian firm, in this situation, accepts the penalty, there should be no valid reason to prevent the deal.

It is an accepted fact that the government has not changed its mind in regard to foreign capital and has no intention of changing the present rules of the game. The latest statements on the part of the more important Ministers are to that effect. Speaking before the Subcommittee organized by Congress to examine the activities of MNCs in Brazil, the Minister for Planning confirmed the views expressed in the Second Development Plan of Brazil (1974-1979) and indicated quite clearly that Brazil welcomes

14 For a report, see the Brazilian newspaper Folha de São Paulo, May 29, 1973, at 17.

15 Stalled Acquisition in Brazil Raises Key Questions about Government Policy, BUSINESS LATIN AMERICA, Aug. 27, 1975, at 273.
foreign capital but expects that the MNCs will abide by local laws and accept the policies of the government in regard not only to their activities but also to the development of their Brazilian subsidiaries.\textsuperscript{16} The rules of the game, such as they are known and contained mainly in Law No. 4131 as it presently stands, will not be changed, and the only step that the government is considering taking is that of indicating to MNCs the activities and the locations which are favored by the government. This is a very reasonable attitude and confirms the value of providing MNCs and local interests with guidelines clearly spelled out and maintained over long periods.

In spite of this, there is a definite attempt to support and help develop the Brazilian company, the company in which the majority of voting stock, or control, rests in the hands of nationals. This is provided by special financing conditions given to these companies which, in many ways, place them in a more advantageous position in regard to the MNCs established in the country. But this has been so for some years and it is not expected that any change will occur. It is not a change of the policy already established in regard to foreign capital, nor is it a reduction of the welcome afforded to MNCs, but only the expression of the feeling that to compete with MNCs the local purely Brazilian company must be given financial support and other facilities. The cheaper credit being extended to Brazilian companies may take different forms. In the first instance, one should refer again to Law No. 4131, which already in 1962 stated very clearly that credits and financing provided by official banking and credit institutions normally could only be given to Brazilian companies and only exceptionally to companies under foreign control. The principal finance organization of Brazil, the BNDE (National Bank for Economic Development), a wholly owned government bank, has made it a rule to provide credit facilities only to those companies which have control in Brazilian hands. Even the rule that the majority of voting stock should be in the hands of Brazilians is now not enough — the requirement being that actual control should be in their hands.\textsuperscript{17} The BNDE has created three subsidiaries

\textsuperscript{16} As Multinacionais e a Estratégia de Desenvolvimento, a statement made by the Minister for Planning, João Paulo dos Reis Velloso, before the Parliamentary Commission for the Examination of Multinational Corporations of the House of Representatives, Oct. 14, 1975. See Três Temas, supra note 12.

\textsuperscript{17} Normas Reguladoras do Programa de Operações Conjuntas, art. 2, attached to BNDE Resolution 451/74.

Resolution 451/74 is an internal regulation of the BNDE, enacted in accordance
which have been authorized to take part as stockholders in Brazilian companies and also to provide them with financing, not only for development projects, but also for projects deemed to be of special interest to the Brazilian economy. These subsidiaries are designed especially for basic and development industries, and for the mechanical or capital goods market. The fear has been justly expressed that by accepting this kind of financial help, the Brazilian companies may be changing from private to government hands, thereby increasing the participation of the State in the economy of the country. There is no doubt that there has been considerable growth of State control in private business.

With the exception of some well known areas and activities in which foreign participation is not allowed, all the rest is free for investment on the part of MNCs. The way the government proceeds to obtain the kind of investment it thinks advisable to the country is to give incentives of a tax and fiscal nature for those it approves. These incentives range from an exemption from an import duty on goods and equipment brought into the country to a tax holiday for those new businesses established in the more under-developed parts of the country. There are a number of worthwhile incentives for the transfer to Brazil of operating factories if their activity in Brazil will help expand the export market for their products. One of the main concerns of the government at the present time is for a great expansion of Brazilian exports and for this purpose a number of tax and fiscal incentives have been granted. The transfer of operating industrial units can be made without any import duty if approved by the government, and the profits derived from the sale abroad of its production are not included in the taxable income of the local company. This is also applicable to the exports of any other industry or activity so that exports have become paramount in a number of concerns. All goods produced for export are not locally taxed; in other words, they are exempt from the local value added taxes known as IPI and ICM. The profit made on their sale abroad is not added to the taxable income of the company. The result of this policy has been that Brazil has freed itself from its dependence on exports of primary products and raw materials, and is now a country to be contended with in the world. During the first half of this century, Brazil relied exclusively on the ex-

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with the Statutes of the BNDE art. 14, item I(b), approved by Decree No. 73,713 of March 1, 1974, D.O.U. 1,1, at 2337 (March 4, 1974), as amended by Decree No. 74,011 of May 6, 1974, D.O.U. 1,1, at 5189 (May 7, 1974).
ports of coffee. Today, besides minerals, agricultural products exported from Brazil include soy beans, sugar, cotton and others; coffee still representing a valuable part but no longer the dominant factor that it used to be. The export of manufactured products has increased year by year and every attempt is being made to have exports grow still more. There is no question that if any MNC is interested in establishing itself in Brazil, it should carefully consider the possibilities of utilizing Brazil not only as a center to supply a growing internal market but also as the basis for exports to other countries, principally those with which Brazil enjoys a favorable tax treatment, as with the countries of LAFTA.  

Something should be said in regard to the transfer of technology to Brazil. From Brazil's point of view, this is certainly one of the main advantages of having MNCs in the country, as they bring with them a much greater knowledge of advanced technical means and ways of utilizing them in an expanding economy. In the very old days, when the industrial revolution started in Brazil, this was one of the best ways to extract high returns from an investment. Royalties for the use of patents and trademarks were just business expenses as was technical assistance. Even the first attempts to tax companies in Brazil did not have the desired result of reducing the high profits some MNCs were already extracting from their investments in Brazil. It was only in 1958 that the Minister of Finance issued an order limiting to 5 percent of sales the payments for both technical assistance and patents and trademarks. This limit was the maximum, and it was scaled down in accordance with the activity to which it referred, with a minimum of 1 percent. The maximum limit for payment for the use of trademarks was 1 percent. Until then, and for many years previously, the payments and remittances to foreign licensors could be made in accordance with agreements entered into between the interested parties with nearly no interference from the authorities. After 1962, when the registration of these remittance agreements became mandatory, the position became more difficult as the Central Bank required much more information than had previously been supplied. But, compared to today, it was still easy and simple.

18 Argentina, Bolivia, Brazil, Chile, Columbia, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela.
19 Portaria No. 436 of Dec. 30, 1958, a regulation issued by the Minister of Finance.
20 Lei de Capital Estrangeiro, art. 3(b), 9, supra note 2. See also GARLAND, supra note 2, at 153, 155.
Then came the National Institute for Industrial Property (INPI) and the position changed considerably. The INPI stated that it would require full information in regard to the technical assistance to be paid for and it would also examine the amount to be paid even if it fell within the limits previously established by the Minister of Finance. In September 1975, the INPI issued its Regulation No. 15 and it became obvious that the INPI was determined to have the last word in regard to all transfer of technology to Brazil. Only that which the INPI considers worthwhile for the country will be allowed, and payments will be possible only if they are within the limits which the INPI will establish case by case. Full information will have to be supplied by the licensor, and the licensee will also have to satisfy the INPI that it has the ability required to fully absorb the new technology within the period of the agreement, which cannot exceed 5 years. The policy clearly stated is that the licensee, during this period, will acquire the technical information so that after the license expires the Brazilian company will be in a position to continue the manufacture of the goods for which it acquired the necessary foreign technology. No restrictions on the use of this acquired technology are acceptable and this has the result that the Brazilian company will be in a position to compete with the former supplier of technology in other countries of the world. The effect that this new policy has had is disastrous as many MNCs which possess advanced technology have simply refused to supply it either to their local subsidiaries or to others interested in the subject. In the opinion of many, these new provisions of the INPI are harmful to the country and will have the reverse effect of that expected; in other words, that all advanced technology will not be transferred to Brazil. The argument of the INPI is that if some MNCs will not make this transfer, others will. There is undoubtedly considerable competition going on in Brazil between MNCs of different nationalities and it is possible that the INPI is right in its new policy. Time will tell. At the moment, in any case, the fact is that to obtain the approval of any technical assistance agreement has become very difficult and time consuming. And this approval is essential for any remittances to be made and for the amounts due to be considered as an ordinary business expense of the local company. This is one of the problems facing American MNCs in Brazil.

21 The INPI was established by Law No. 5648 of Dec. 11, 1970, 7 Coleção 84 (1970).
in regard to their subsidiaries. A provision in Law No. 4131 prohibits the payments of royalties for the use of patents and/or trademarks if the voting control of the Brazilian company is in the hands of the licensor either directly or indirectly.\(^2\) The same, or nearly the same, applies to the payment of fees for the supply of technical assistance. In these cases, the fees may be paid if the agreement is approved by the INPI, but the amount so paid is not an ordinary business expense to the Brazilian company, meaning that the amount is added to the taxable income of the company. Furthermore, the same amount is added to the profits distributed to the recipient company and this, coupled with a regular remittance of dividends, may make the total subject to the supplementary tax thus causing an unreasonable cost to all involved. For the American MNC, the problem is increased because, as I understand it, it is possible for the Internal Revenue Service to allocate to the technical assistance provided, or to the patent and trademark, a certain return on which the American MNC will be taxed in the United States.\(^2\) This problem has caused considerable concern and attrition but, in all fairness, it must be said that the impossibility of these payments has not caused a reduction either in the foreign investment in Brazil or in the expansion of existing facilities.

MNCs are highly criticized all over the world for the price manipulation upon which, it is said, they rely heavily in order to obtain undisclosed profits from their subsidiaries. It is indeed possible to adjust prices for the export or import of commodities, where minimal variations can have considerable effects. The same, on a higher scale, may also be applicable to the exports to the MNCs in the developing countries, of parts and components of products manufactured by the subsidiary. And, if the subsidiary exports to the parent company, the same is also possible at the time the prices for the goods are established. In Brazil, this possibility also exists, although its success is somewhat reduced. In the first place, Decree-Law No. 37 of November 18, 1960,\(^2\) makes it an offense to indulge in under or over-invoicing and establishes a high fine if it is proved that this occurred. At

\(^2\) Lei de Capital Estrangeiro, art. 14, supra note 2. See also Garland, supra note 2, at 156.

\(^2\) Internal Revenue Code of 1954, § 902.

\(^2\) Decree-Law No. 37 of Nov. 18, 1966, art. 169, 7 Coleção 56 (1966).

For a brief description of the procedure and penalties involved, see generally J. Nabuco & I. Zanotti, A STATEMENT OF THE LAWS OF BRAZIL IN MATTERS AFFECTING BUSINESS 16 (3d ed. supp., 1965).
the same time, for the export from or import into Brazil, there is a
department in the Bank of Brazil, namely CACEX, with au-
therity to examine the prices stipulated by the parties. By now,
CACEX has considerable knowledge of world prices and of inter-
company prices so that, even though variations may occur, the
differential margin cannot be too wide. There is always the case,
naturally, of a new product, the world price of which is not yet
established. One other way in which the Brazilian government
can limit the ill effects of this kind of manipulation of prices is by
issuing orders for "prices of reference" to be adopted by the
Customs authorities in determining the import duty to be paid.
This presents the possibility of avoiding dumping practices which
on occasion are tried but are quickly done away with.

Exports by MNCs from Brazil may present a problem both
for them and for the host country. Whatever the incentives
provided for by local law in regard to exports, it may be that the
policy of the parent company is against such activity as it may
interfere with arrangements established in other countries. This
is one of the problems facing the Brazilian authorities and all
attempts are being made to have the local subsidiary of the
MNC determine by itself the conditions under which exports
may become possible. This, again, would take from the parent
company the control over the subsidiary which seems to be es-

tential for the existence and growth of MNCs. This can be an
area of conflict, but in Brazil the MNCs have cooperated whole-
heartedly with the government and have accepted the need to
export both to the countries of the parent companies and others.
In this sense it has been possible for a number of MNCs to
supply the parent company with parts and components and entire
product lines required for the expansion of the MNC in its
country of origin. The benefits provided in Brazil for such ac-
tivities make this arrangement very attractive.

Brazil also boasts an antitrust law, modeled after the Sher-
man Act of the United States. It was enacted in September 1962
and should be accepted as an indication of the feeling then prevai-
ing in the country against MNCs. Since then, a few poor attempts
have been made to apply the law, but nothing much has come of
such efforts. It is clearly difficult for the government to apply the
law, since one of its present policies is to obtain the growth of Bra-

25 Carteira de Comércio Exterior (Foreign Trade Department) of Banco do
Brazil, S.A.

zilian companies by way of mergers and consolidations so that they achieve a size enabling them to complete with MNCs. In the present circumstances, all the provisions of the antitrust law have to be put aside to enable this growth of local companies. In regard generally to foreign companies and MNCs, the attempt is to prevent them from entering into agreements clearly contrary both to the policy of the government and to the reasonable commercial interests of Brazilian companies. Otherwise, the law has not yet made itself felt.

The Brazilian government has stated quite clearly that it prefers direct investment to foreign loans. This is a problem to some MNCs when their policy is to under-capitalize their subsidiaries. In a special situation in Brazil, when a request for tax incentives is made, such as exemption from import duties on plant and equipment to be brought to Brazil, the government department involved may establish that at least one-third of the value be paid by a direct investment, with not more than two-thirds being financed from abroad either by the MNC itself or by other sources. Direct investments carry with them the right to a permanent transfer of profits, and it is clear that with a transfer of 12 percent net every year, the parent MNC will benefit heavily from its investment in Brazil as long as the local venture is a profitable one. In the case of financing, even if for a period of 8 years as is now quite common, the principal would be liquidated and Brazil would not carry any other burden after that time.

Loans must be serviced through interest. This problem in Brazil is also an interesting one. The basic local assumption is that a company should not be allowed to pay a higher interest rate than that prevailing at the time in the country where the loan originates. Naturally, these rates can vary. For a long time it was thought to be more appropriate to Brazil to allow foreign loans with a fixed rate of interest. The variable rate was not sufficiently understood. But the fixed rate enabled the parent MNC to buy participation in the loan with a higher rate of interest and thus reap as a windfall gain the difference between the rate of interest on the loan taken by it to buy the participation and the rate which the Brazilian subsidiary was paying to service the loan initially contracted. This is a possible means for MNCs to increase the return on their investment in a developing country and until this kind of practice is dealt with by the government not much can be done against them.

The Brazilian government exercises considerable authority in the granting of permission to incur foreign loans as one of the
means it utilizes to control the country's balance of payments. This control is also used to foster loans in respect to activities which the government considers of interest to Brazil, and even to grant an exemption from tax on the interest in certain cases. To qualify for this exemption the loans must be for a period of not less than 8 years.\textsuperscript{27} In other cases, the government grants to the taker of the loan, namely the Brazilian company, whether or not an MNC subsidiary, a financial benefit equal to 85 percent of the tax on the interest so that for the Brazilian company the expense of the interest is considerably reduced.\textsuperscript{28} As a proper receipt for the tax at source is normally issued by the taxing authority, in the case of a number of American MNCs, it might become possible to utilize this receipt as a tax credit in the United States. This is one instance of the imagination of Brazilian officials applied to ordinary business.

One other problem which the MNC faces when considering a joint venture with a Brazilian national is that of the protection of the minority shareholders. Brazilian law gives very poor protection to a minority and a prominent public figure in Brazil once said that in his country arithmetic does not always have the same meaning as in other countries: In Brazil, he stated, 51 is equal to 100. It is so in many cases as the Brazilian company law as it presently stands does not offer to a minority shareholder any substantial enforceable rights. When a \textit{limitada} is organized a better position may be obtained for the minority partner, but this form of business organization is not always fully understood in the United States and so is refused by the interested parties. It is possible to provide in the articles and by-laws some protective provisions for a minority stockholder but this again is thwarted by the official banks and banking institutions. These then consider that the foreign stockholder has veto rights which go against the full control of the company by Brazilian nationals and refuse to extend the credit which otherwise the company might have obtained. It is a difficult situation but one with which one has to live for the time being, as a new company law is being discussed.\textsuperscript{29} The draft of this new law has been circulated and it contains

\textsuperscript{27} Decree-Law No. 1215 of May 4, 1972, art. 1, 3 Coleção 8 (1972); Banco Central do Brasil Resolution No. 300 of Sept. 13, 1974, item I, D.O.U. of Sept. 18, 1974.

\textsuperscript{28} Decree-Law No. 1411 of July 31, 1975, art. 1, 5 Coleção 11 (1975); Banco Central do Brasil Resolution No. 335 of Aug. 5, 1975, D.O.U. 1,2, at 2965 (Aug. 13, 1975).

many interesting provisions. It is much more modern and up-to-date, and its adoption, which could occur this year, will provide Brazilian business with a very interesting means to achieve their objectives.

When considering where to locate its business in Brazil, an MNC has to examine various possibilities. In the great cities such as São Paulo, life is becoming constantly worse due to pollution, traffic problems and the lack of better qualified employees. The local government is attempting to prevent the creation of new establishments as it considers that these will only increase the problems with which the city is faced. The "social cost" of such a new establishment is too high and the state government is allied with the municipal authorities in an attempt to divert new ventures from São Paulo and to direct them to other cities in the state where conditions are much better than in the capital city. This then presents to MNCs another problem, namely that of acquiring land for their venture. If the land is within the urban perimeter of the city there is no problem, as a purchase of land within the city is always possible. But if the area is outside the city limits and is considered as rural land, then approval from the federal government is required as there exists in Brazil a law prohibiting foreigners and foreign firms from purchasing rural land unless a project for its development is approved.30 In this case, although the local company may be considered by law a Brazilian firm, if the majority of voting shares is in the hands of a foreign concern, then for this purpose the company is deemed to be foreign.31

One of the interesting points to be considered by an MNC when starting to do business in Brazil is that of the profit obtained by the seller of the shares of an existing company. If the seller is a person, the profit does not attract any tax.32 If the seller is a company, then the profit has to be added to its taxable


In order to obtain the approval of a project for the development of rural land, it is necessary to submit the relevant documents to the appropriate authorities. Foreign companies authorized to operate in Brazil and Brazilian companies with the majority in foreign capital may only acquire rural property when it is destined for agrarian, livestock, industrial or colonization projects, in connection with statutory objectives. These projects must be previously approved by the Ministry of Agriculture, after hearing the federal authority responsible for the development of the respective region. When the project is industrial the Ministry of Industry and Commerce must be consulted.

31 Law No. 5709, supra note 30, art. 1 §1.

32 Brazilian Income Tax Law, supra note 7, art. 22, item Z.
income. In Brazil, capital gains made by a person on the sale of shares or "quotas" are not taxable. If the MNC were to sell its interest in Brazil with a profit, this profit would only be subject to the same 25 percent withholding tax at source which is applicable to remittances of dividends and interest. There have been a number of cases in Brazil of MNCs liquidating or reducing their investment in the country, with the sale of their investment either to another MNC or to local parties, and the remittance of the capital gain has been effected without any problem after the 25 percent tax was paid.

There is a provision in Law No. 4131 to the effect that if the balance of payments of Brazil becomes difficult, then the authorities have the right to reduce the amount of dividends that can be remitted. This provision, fortunately, has not yet been applied and even though Brazil is suffering with other nations of the world the effects of the oil crisis, it is not expected that a situation will arise that will make it necessary for the provision to be applied.

In spite of this possible restriction, it is a fact that foreign investment in Brazil on the part of MNCs has been growing steadily. But this is in regard to foreign investment in general. The trend of investment from the United States has been decreasing. In accordance with a statement of the Planning Minister, the total foreign investment of the United States in Brazil was reduced from 48 percent to 34 percent during the period 1969-1974, as compared with investments from MNCs based in Europe, which increased from 30 percent to 40 percent, and of Japan, which increased in the same period from 3 percent to 10 percent. It becomes quite clear that there is competition from MNCs of various sources, and this should be to the benefit of Brazil. If MNCs bring to the host country their financial resources and their technical advancement, they also create new and better jobs requiring more sophisticated methods and knowledge. This is a gain to the host country which must be utilized to the full.

Summing up, it can be said that the co-existence of MNCs and a developing country with liberal views has been beneficial for

33 Supra note 7, art. 127.
34 Supra note 7, art. 22, item Z.
35 Supra note 7, art. 344, item I.
36 Lei de Capital Estrangeiro, art. 28, supra note 2. See also Garland supra note 2, at 159-60.
37 Supra note 16.
both of them. The MNCs have grown and prospered and, on the whole, have behaved quite well. As for the country, there can be no doubt that benefits have been derived from the presence of the MNCs, not only in the greater number of jobs and more up to date technology, but also in management principles and lines of credit. On the whole, it has been a most satisfactory experience which should continue as the imaginative traits of the Brazilians make good use of all the advantages that the presence of the MNCs in their country can provide.