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ADVOGADOS

ACQUISITION OF RURAL PROPERTIES BY  
BRAZILIAN COMPANIES WITH FOREIGN  
INVESTORS AND/OR FOREIGN PARTICIPATION

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## Rural Properties – Concept:

- n Article 4 of Brazilian Statute of Land (Brazilian Federal Law nº. 4,504/1964) defines rural property as ***“the rustic building in a continuous area, wherever it is located, which is intended for agricultural, livestock, mining exploration and agro-industry, either by means of public plans for recovery or private initiative”***.
- n According to this concept, rural property:
  - ü must possess great potential for agriculture, mining (or other extractive activity) or other general agribusiness activities;
  - ü can be considered a rural property even if located in an urban area; and
  - ü must have a continuous area.

## Acquisition of Rural Properties by Foreigners – Applicable Legislation:

- n Article 190 of Brazilian Federal Constitution states that *“the law shall regulate and delimit the acquisition or the lease of a rural property by a physical individual or a foreign legal entity, and it shall establish the cases that are to depend on the authorization of the National Congress”*.
- n The limitations to the acquisition of rural properties are regulated, specially, by the **Federal Law nº. 5,709/1971**, and its regulatory **Decree nº. 74,965/1974**, as well as by **Federal Law nº. 8,629/1993**.
- n Foreign individuals that do not reside in Brazil and foreign entities that are not authorized to perform its activities in Brazil are not allowed to purchase rural properties in Brazil. This is not applicable to urban properties.

## Acquisition of Rural Properties by Foreigners – Applicable Legislation:

- n **Foreign individuals that resides in Brazil and Foreigners entities authorized to perform its activities in Brazil is allowed to purchase rural properties in Brazil, since it is observed the restriction established by Brazil Federal legislation (Federal Law nº. 5,709/1971, and its regulatory Decree nº. 74,965/1974, as well as by Federal Law nº. 8,629/1993).**
- n **Equiparation of Brazilian Companies with Foreign Capital to Foreign Companies authorized to perform its activities in Brazil: § 1º of article 1 of Federal Law nº. 5,709/1971, and article § 1º of Decree 74,695/1974 establish that the **restrictions** applied as to the acquisition of rural properties by foreign legal entities authorized to perform its activities in Brazil **also apply to Brazilian legal entities of which, for any reasons or methods, participate foreign physical individuals or foreign legal entities that have most of their capital stock and which reside or have their headquarters abroad.****
- n **According to article 172 of the Brazilian Federal Constitution, the law shall regulate, based on national interests, the foreign capital investments, shall encourage reinvestments and shall regulate the remittance of profits.**

## Rural Properties – Historical Facts:

- n With the advent of the Brazilian Federal Constitution in 1988, there was a controversy regarding the revocation or not of the § 1º of the article 1º of Federal Law nº. 5,709/1971 (as it is a hierarchical inferior and former to the Brazilian Federal Constitution).
  
- n This controversy led the Attorney-General of the Union to issue the legal opinion GQ-22/1994, in which it was ruled that the § 1º of the article 1º of Federal Law nº. 5,709/1971 was revoked with the advent of the Brazilian Federal Constitution, because of what was disposed in the article 171 of such Major Law. Even though this legal opinion was approved by the Attorney-General of the Union, since its was not formally approved by President of Republic it was not a binding rule.

## Rural Properties – Historical Facts:

- n Afterwards, it was published an amendment to the Brazilian Federal Constitution (number 6 of 1995) that expressly revoked the article 171 of the Brazilian Federal Constitution that distinguished a Brazilian Company from a Brazilian Company with national capital.
  
- n Since this distinction was used as an argument to the legal opinion mentioned above (GQ-22/1994), the Attorney-General of the Union issued a new legal opinion addressing the same matter. In this new legal opinion GQ-181/1998 the Attorney-General of the Union, in general lines, decided that even with the revocation of the article 171 of the Brazilian Federal Constitution the § 1º of the article 1º of Federal Law nº. 5,709/1971 remains without effect (revocated). This legal opinion was approved by the President of Republic and became a binding rule.

## Rural Properties – Recent changes:

- n Until last week, the Attorney-General of the Union legal opinion GQ 181/1998 was in effect. Thus, the restrictions provided in the Federal Law nº. 5,709/1971, and its regulatory Decree nº. 74,965/1974, as well as by Federal Law nº. 8,629/1993 were not applicable to the Brazilian Companies with Foreign Participation / Foreign Investors.
- n On July 13, 2010, a Commissioner of the National Justice Council of Brazil (“CNJ”) has issued a significant administrative ruling that restricted the ability of foreign parties to purchase legal properties in Brazil. Such measure was adopted by Minister Gilson Dipp in answer to the requirement made by the 5th Chamber of Coordination and Review of Federal Public Attorney’s Office (Ministério Público Federal – MPF) and it was directed to State Supreme Courts, which oversees the Real Estate Registries Offices in Brazil.
- n Such administrative ruling determined that the Real Estate Registry Offices must inform to the Commissioners of the Justice Courts every acquisition of rural properties in Brazil that are made by every Brazilian companies that are controlled by foreigners (entities or individuals). Their understanding was that Real Estate Registry Offices and Nottary Offices should observe all the rules and procedures determined by Brazilian Federal Law nº. 5,709/1971, including § 1º of article 1. At that time, Public Registries were given sixty (60) days to adapt their internal rules to such new administrative orientation.

## Rural Properties – Recent changes:

- n On August 23, 2010 was published on the Official Gazette of the Union (Diário Oficial da União – DOU) a new Legal Opinion of the Attorney-General of the Union (CGU/AGU Nº 01/2008 – RVJ), issued by the General Counselor of the Brazilian Republic and approved by the Attorney-General of the Union and the President of the Republic, which extends to Brazilian companies controlled by foreigners the limits to the acquisition of rural land by foreigners imposed by the applicable legislation (Federal Law nº. 5,709/1971, and its regulatory Decree nº. 74,965/1974, as well as by Federal Law nº. 8,629/1993).
  
- n This **New Legal Opinion (CGU/AGU Nº 01/2008 – RVJ)** ends with the controversy regarding the constitutionality of § 1º of the article 1º of Law nº. 5,709/1971, that governs the acquisition of rural land by Brazilian companies with foreign participation, and it is based on the Principle of Sovereignty (*soberania*) applied to the economic order and takes into consideration changes in the social and economic context in Brazil, as well as the increase of value of the agricultural commodities, the foods' world crisis and the biofuels' development.
  
- n Hence, as of **August 23, 2010** all requirements established on the Federal Law nº. 5,709/1971, and its regulatory Decree nº. 74,965/1974, as well as by Federal Law nº. 8,629/1993 must be observed by Brazilian companies with foreign participation which intend to purchase rural real estate properties in Brazil.

## Requirements that shall be observed in accordance with Brazilian Law:

n Brazilian Federal Law nº. 5,709/1971, which is regulated by Decree nº. 74,965/1974, provides the following **limitations to the acquisition of rural properties by foreign companies authorized to perform its activities in Brazil and by Brazilian companies with foreign participation:**

Ü foreign legal entities may only acquire rural properties to implement agricultural, cattle-raising, industrial or colonization projects, to the extent that such activities are included in the Brazilian subsidiary's bylaws which must be approved by the Ministry of Agriculture and Food Supply or the Ministry of Development, Industry and Commerce, as the case may be (article 5 of Federal Law nº. 5,709/1971 and article 11 of Decree nº. 74,965/1974);

Ü the total area of the rural properties that is owned by physical individuals or **foreign** legal entities cannot be more extensive than **¼ (one fourth)** of the **total area** of the respective municipality (article 12 of Federal Law nº. 5,709/199971);

Ü physical individuals or foreign legal entities from the **same nationality** are not allowed to be the owners of an area more extensive than **10%** of the **total area** of the respective municipality (article 12, § 1º of Federal Law nº. 5,709/1971);

## Requirements that shall be observed in accordance with Brazilian Law:

n The **limitations to the acquisition of rural properties** continue:

Ü if the size of the rural land to be acquired exceeds three (3) indetermined exploitation unit (minimum fraction permitted by Brazilian Institute for the Agrarian Reform – INCRA to that specific area), a previous authorization from INCRA shall also be required by the public registries in order to register acquisitions by companies controlled by foreigners (article 7, § 2º of Federal Law nº. 5,709/1971);

Ü the acquisition areas that exceeds one hundred (100) indetermined exploitation unit (*módulo de exploração indefinida*, which varies from 5 to 100 hectares, depending on the conditions of the different regions in Brazil) by foreign legal entities depends on the National Congress (article 23 of Federal Law nº. 8,629/1993); and

ÜThe acquisition must be performed by a public deed of purchase and sale.

## Effectiveness:

- n Paragraph 1 of article 40 combined to article 41 of Complementary Law nº. 73/1993, which instituted the Organic Law for the Federal Union's Attorney-General's Office, established that the opinions of said Attorney General, or those issued by the Consultant General of the Federal Union are submitted by the latter for the approval of the President of Republic, and once approved and published together with the Executive Order, entail the Federal Administration, being direct and indirect agencies and entities whereof obliged to abide by it (including INCRA, Real Estate Registry Offices, Notary Offices among others).
  
- n The Judiciary, by its turn, is not comprised in such federal segment and, therefore, does not have to observe said Legal Opinion (CGU/AGU 01/2008 – RVJ). The Judiciary is independent to give to such Federal Law its own interpretation. However, the Brazilian Courts shall probable observe the Federal Union Attorney-General's new legal opinion (CGU/AGU 01/2008 – RVJ).

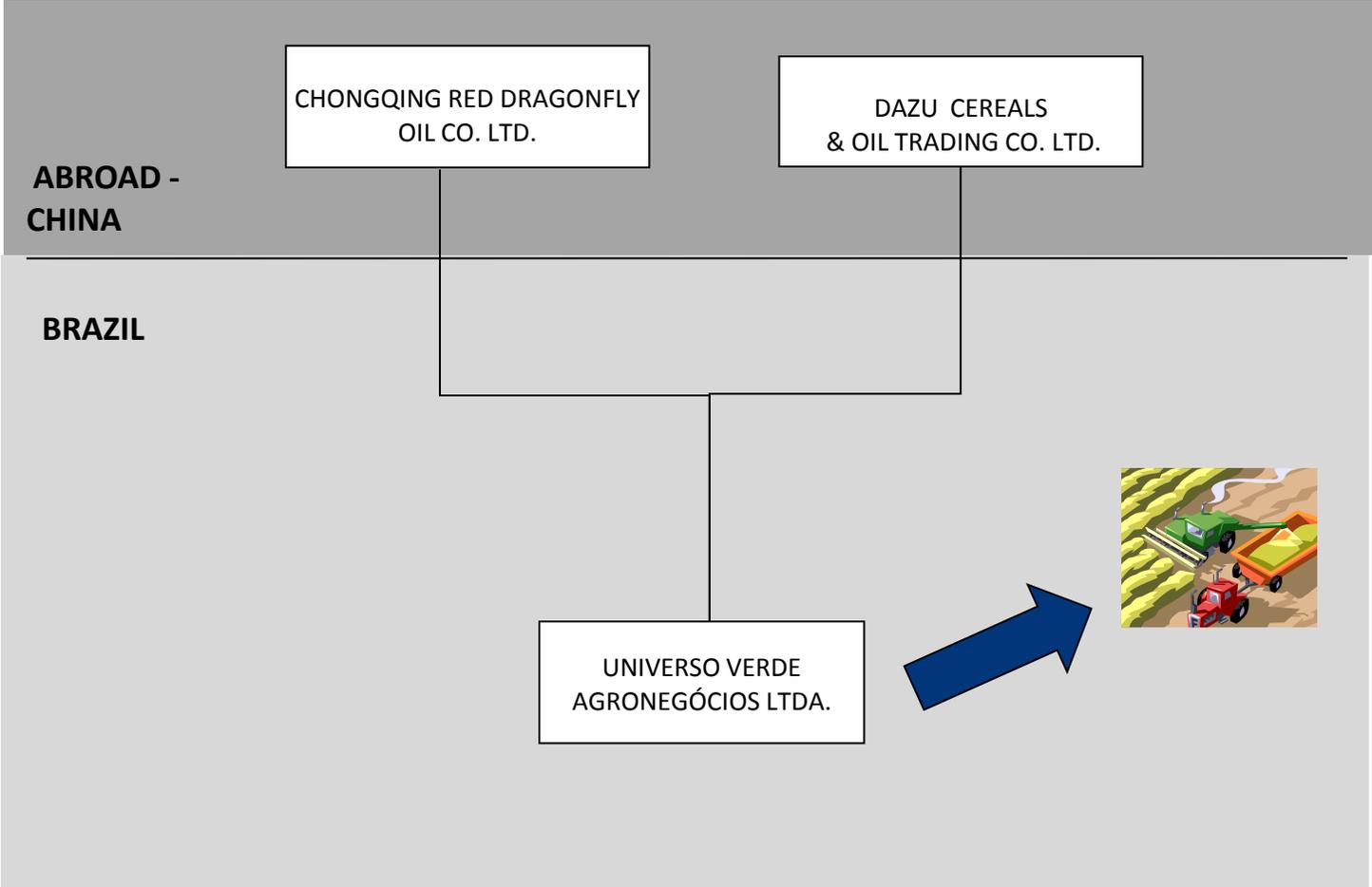
## Consequences:

- n Acquisition of rural land that does not observe the restrictions set forth in Federal Law 5,709/1971 and Decree 74,965/74 is deemed to be **null and void**.
- n The notary public officer who prepares the public deed for the acquisition of the envisaged rural land and the Real Estate Registration official who registers such deed in violation of the law are **civilly and criminally liable**.
- n Transaction involving foreign parties must be **registered in special books** in the applicable Real Estate Registry Offices. All the registrations of acquisitions made by foreigners, included those made by Brazilian companies controlled by foreigners, will have to be **quarterly informed** to the Judicial Department of the relevant State and to the Ministry of Agricultural Development.

## Conclusions:

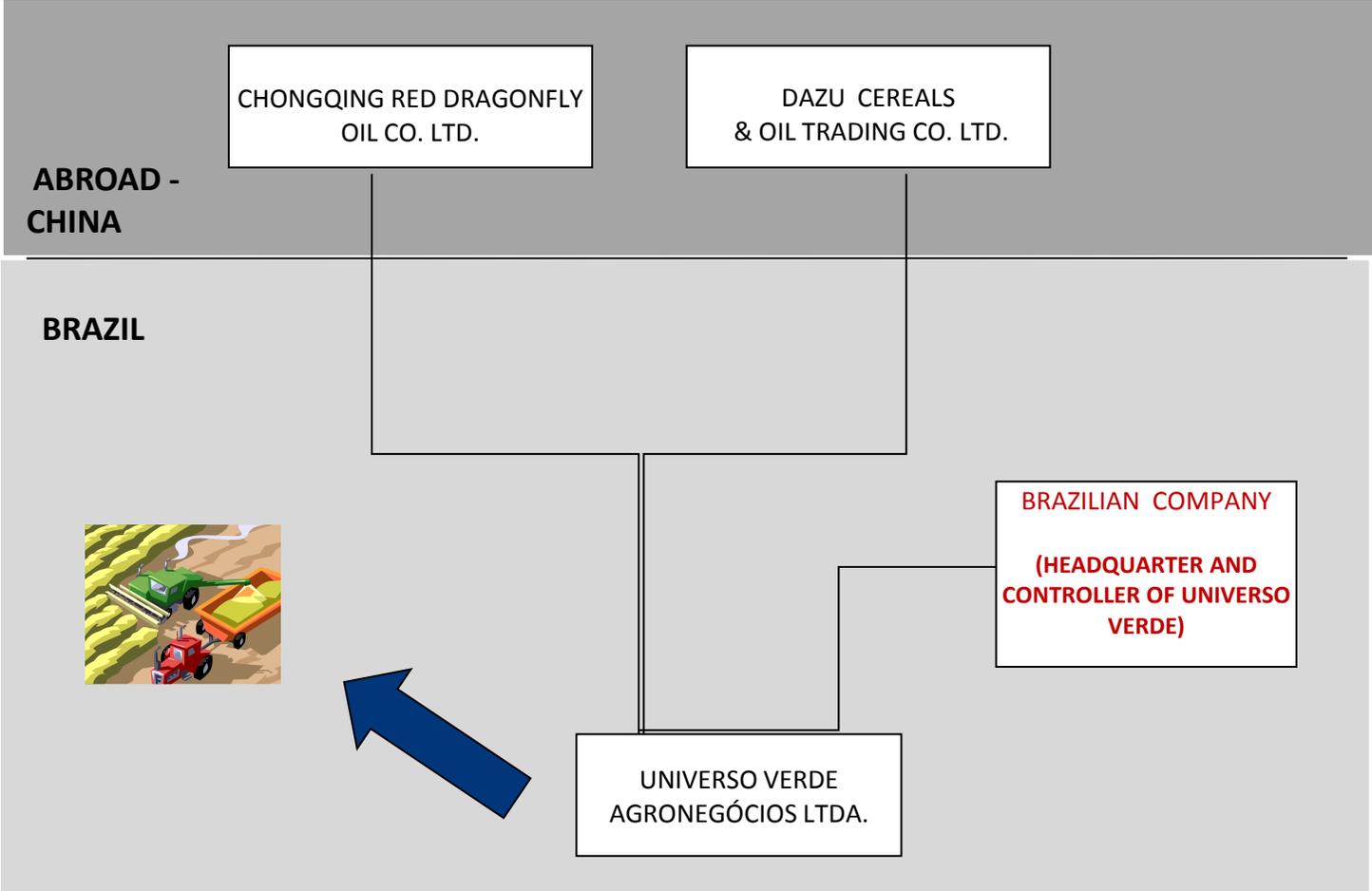
- n The Legal Opinion published on **August 23, 2010** is of extreme importance due to the fact that it is binding on the Federal Administration, since the General Attorney Office of the Union (Advocacia Geral da União - AGU) has the authority to rule the official interpretation of the Constitution, laws, treaties and other administrative acts and **it has been approved by presidential order** and published in the Official Gazette of the Union. Hence, as of **August 23, 2010** all requirements established therein must be observed and, as well as that, INCRA will have to follow the conclusions expressed in this new Legal Opinion (CG/AGU 01/2008 – RVJ) in its analysis of any request submitted by a Brazilian company controlled by foreign individuals or legal entities which intends to purchase rural real estate properties in Brazil.
  
- n In view of the above, two (2) aspects shall be observed in connection with Chongqing:
  - Ü **participation in the Company that will purchase the rural properties);** and
  - Ü majority of capital stock (**headcontrol of the company**) - article 116 of Brazilian Federal Law nº. Lei 6,404/1976.

**Chongqing's Current Situation:**



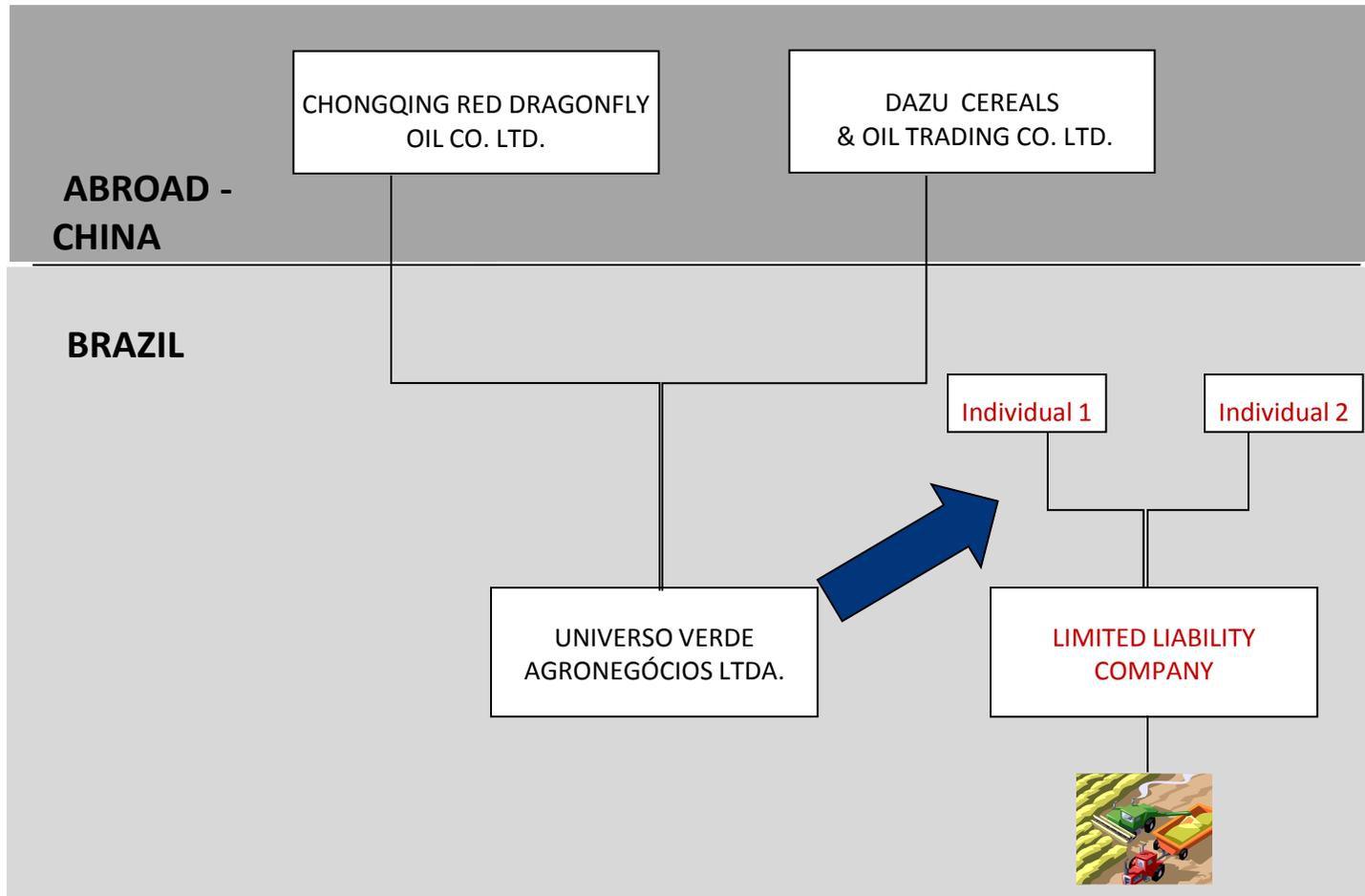
**Proposed Alternative (Option A):**

§ Transference of the head control to a Brazilian Company (with Brazilian capital) or Individual



## Proposed Alternative (Option B):

§Purchase participation – quotas/stock of the Company that owns the rural properties instead of buying the rural properties directly (more risky).



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