TEIXEIRA, MARTINS
ADVOGADOS

LEGAL GUIDE TO FOREIGN INVESTMENT IN BRAZIL

Câmara de Comércio
BrasilÍndia

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DISCLAIMER

This publication is designed to provide information in regard to the subjetc matter covered, that is, general overview of the Brazilian Legal System and should not be regarded as specific legal advice. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.

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The Brazil India Chamber of Commerce (CCBI for its acronym in Portuguese) is a non profit, non governmental institution, which, however, counts on the active participation of entrepreneurs and government representatives of both countries. It is the only chamber of commerce in Brazil officially supported by the Indian Consulate in São Paulo and by the Indian Embassy in Brazil.

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I. Introduction

Overview of Brazil

Brazil is a federative republic, comprised of a union of states, municipalities, and the Federal District. Government is divided in three levels: federal, state and municipal. The federation (the Union) is composed of the states, which in turn, are made up of municipalities.

Brazil has a multi-party democracy, based on a presidential system. It has three independent branches: the Executive, Legislative, and Judiciary, as expressly established in the Federal Constitution in effect, enacted October 1988.

The states have their own state constitution, governor, and legislation. Municipalities are also governed by their own executives (mayors) and municipal legislation.

The Executive Branch is run by the President (Head of State), who is elected for a four-year term, and may be re-elected for another four. Currently the position is filled by President Luis Inácio Lula da Silva, whose current term in office ends in 2010.

The Head of the Executive Branch is in charge of direct administration through Ministers, Secretariats, Committees, etc., as well as indirect administration through governmental bodies, government-owned companies, regulatory agencies, etc.

The Brazilian Legislative Branch is a bicameral composed of the Federal Senate (*Senado Federal*) and the House of Representatives (*Câmara dos Deputados*). Senators represent each State in the federation and the Federal District. Federal Deputies are elected based on proportional representation of the electorate. All congressmen are elected by popular vote – however Senators are elected for an eight-year term, while Deputies are elected for a four-year term.

In order to enact a law, both houses of the National Congress must pass the bill, which must be subsequently sanctioned by the President of Brazil.

In turn the highest court in the Brazilian Judicial Branch is the Federal Supreme Court (*Supremo Tribunal Federal* – STF) and the Brazilian Legal System, which, according with Roman-Germanic legal tradition is based, primarily, on statute, as further detailed in Chapter XVI.

The Constitution defines the authority of the Federal Government, States, Federal District, and municipalities to legislate, being understood that any legislation

other than the Constitution is subject to the rules and principles of the Federal Constitution, and may be challenged in court. It is worth noting that case law through precedent decisions in Brazil do not hold the same effect as the law; being used merely as guidelines, with exception of Binding Judicial Precedents published by the STF.

Brazil has 26 states and a federal district (where the federal capital, Brasília, is located), which are subdivided in 5 geographical regions: North, Northeast, Southeast, South, and Midwest.

In 2008, despite the global economic crisis, Brazil's GDP (Gross Domestic Product) totaled US$1.3 trillion[1], among the top ten worldwide. São Paulo, Rio de Janeiro, and Minas Gerais, states all located in the Southeast Region, are the largest contributors to the GDP. The São Paulo State Stock Exchange is the largest in South America.

As a result of Brazil's diversified economy, ability to control its historic inflation, large domestic market, expressive fiscal surplus, which allowed the country to manage its federal domestic debt, its currency reserve that is higher than its external debt, relatively low number of problem assets within the financial system, among other factors, the country has been able to mitigate the impact of the global financial crisis which erupted in the last quarter of 2008.

Case in point: the Brazilian banking system has been little affected by the crisis. The amount of foreign credit available in the market did, nonetheless, decrease and loans granted by the private sector dwindled somewhat.

It is worth mentioning that Brazil is also a member of Mercosur, along with Argentina, Paraguay, Uruguay and Venezuela. Free trade agreements between these countries, and with associate member countries (Bolivia, Chile, Colombia, Ecuador and Peru), facilitate multimodal cargo transportation within Brazil and throughout South America.

Brazil is also one of the four BRIC countries; Brazil, Russia, India and China. BRIC does not refer to a political or economic bloc per se, but an informal alliance which, since 2002, has resulted in a number of trade and cooperation treaties. The term was coined in 2001 by the economist Jim O'Neill to designate the four key emerging nations in the world.

Additionally, internally, Brazil has been implementing incentive programs to develop and preserve its infrastructure.

[1] Source: the Brazilian Trade and Investment Promotion Agency (*Agência Brasileira de Promoção de Exportações e Investimentos* – APEX Brasil).

In 2000 the current administration created a plan to build thermal power plants, whereby private initiative would have a majority stakeholding. In 2004, the framework for Public-Private Partnerships (PPP) was established. The objective of these PPPs, as detailed in Chapter VIII, is to foster infrastructure projects, including highway, railway, port, and irrigation projects. And in 2007 the federal government launched the Accelerated Growth Program (PAC).

The objective of the PAC is to recuperate, exclusively through Government funds or in partnership with private initiative, public assets that have run down as result of years and years of neglect. The initial investment earmarked for the Program was R$503.9 billion by 2010. The government recently announced, as a strategy to reduce the impact of the global crisis, that investments would total R$646 billion by 2010, and forecast that R$1.148 trillion will be invested after this period[2].

The PAC also includes projects to gradually implement measures to increase credit, improve environmental regulation, decrease tax burden, among other measures.

Within the current market reality, there is little doubt that Brazil offers a promising future, able to provide the security and good prospects for potential investors.

Brazilian 2008 foreign trade overview

According to official reports published by the Ministry of Development, Industry, and Foreign Trade (MDIC), Brazilian foreign trade remained on an upward trend in 2008, reaching a record-breaking total of US$371.1 billion, representing a 32% increase in comparison to 2007, when it totaled US$281.3 billion.

In the last two months of 2008, exports and imports decreased in relation to the expansion achieved up to October, as result of the international financial crisis, which led to a drastic drop in international agricultural and mineral commodity prices and in the demand for consumer goods.

Brazilian exports reached, at the end of 2008, an all-time high of US$197.9 billion. Likewise, imports reached a record-breaking total of US$173.2 billion. In comparison to 2007, exports grew 23.2% and imports increased 43.6%.

These figures indicate that the liberalization of the Brazilian economy continues to be a reality and that Brazil is increasing its participation in the international market. The trade balance totaled US$24.7 billion in 2008, lower than that registered in 2007, i.e.

[2] Source: APEX Brasil.

US$40.0 billion, given greater amount of imports in relation to exports, which is mainly due to the valuation of the local currency and the growth of the Brazilian economy.

Exports of all product categories – basic, semi-manufactured and manufactured – have increased and achieved record-breaking results. In comparison to 2007, basic products evolved 41.5%, semi-manufactured, 24.2%, and manufactured, 10.4%. Industrialized goods account for over half (60.5%) of Brazil's total exports.

Brazilian imports are closely correlated with production investments. Purchases of raw and processing materials represent 48.1% of the total imports, and capital goods account for 20.7% of the imports. Imports of fuels and lubricants increased 56.7% in comparison to the previous year; capital goods grew 43.0%; consumer goods increased 40.5%; raw and processing materials likewise increased 40.2%.

Diversification of the destination of domestic product sales has continued. Exports to Asia, Eastern Europe, the Middle East, Latin America, the Caribbean, and Africa grew in 2008. Additionally, markets which traditionally purchase Brazilian products, such as MERCOSUR member countries, the European Union and the US, also increased their Brazilian imports.

Diversification within productive regions has been equally important for Brazil to continue to increase Brazilian exports. The increasing participation of states who in the past accounted for a smaller portion in the foreign trade also has helped sustain the continued expansion of international sales.

2000-2008 Brazil-India trade

BRAZILIAN TRADE TOTALS BRASIL-INDIA - US$ FOB THOUSAND							
	Exports		Imports		Results		
Year	US$ FOB THOUSAND (A)	Var. %	US$ FOB THOUSAND (B)	Var. %	BALANCE (A - B)	Current Trade (A + B)	Coverage (A/B)
2000	217,450	===	271,355	===	(53,905)	488,806	0.8
2001	285,407	31.25	542,791	100.03	(257,383)	828,198	0.5
2002	653,737	129.05	573,184	5.60	80,553	1,226,921	1.1
2003	553,696	(15.30)	485,744	(15.26)	67,952	1,039,440	1.1
2004	652,553	17.85	556,070	14.48	96,483	1,208,623	1.2
2005	1,137,930	74.38	1,202,914	116.32	(64,984)	2,340,844	0.9
2006	938,889	(17.49)	1,473,952	22.53	(535,062)	2,412,841	0.6
2007	957,854	(15.82)	2,164,928	79.97	(1,207,074)	3,122,783	0.4
2008	1,102,342	17.41	3,563,604	141.77	(2,461,261)	4,665,946	0.3

Source:SECEX/MDIC

II. Foreign Capital

National Monetary Board and Central Bank of Brazil

The National Monetary Board (CMN) is the highest level authority within Brazil's financial system. The primary purpose of the Board, which was founded in 1964, is to establish monetary and credit policies, to maintain the stability of the Brazilian currency – the Real –, and the economic and social development of the nation.

The Central Bank is an independent federal authority linked to the Ministry of Finance[3]; its objective is to ensure the stability of the purchasing power of the currency and maintain a solid and efficient financial system[4].

The Central Bank acts as the Executive-Secretariat of the CMN and has important duties, such as (i) directing monetary, exchange, credit and international financial relations' policies; (ii) controlling the settlement system and money supply; and, (iii) regulating and supervising the national financial system, including the Brazilian Foreign Exchange Market[5].

Brazilian Foreign Exchange Market

CMN Resolution No. 3.265/2005 determined that Brazil would only have one official foreign exchange market, referred to as the Foreign Exchange Market, which in turn is regulated by the Central Bank of Brazil.

The Foreign Exchange Market is an abstract environment where foreign exchange operations are carried out between agents authorized by the Central Bank of Brazil, such as banks, brokers, tourism agencies, and their respective clients[6].

The Foreign Exchange Market covers: (i) foreign currency purchase and sale operations; (ii) operations in local currency between residents, domiciled or with a

[3] The Ministry of Finance is the body that within the structure of the Federative Republic of Brazil fundamentally supervises and controls the development and execution of economic policies.
[4] http://www.bcb.gov.br/pre/portalCidadao/bcb/bcFaz.asp?idpai=PORTALBCB
[5] Ditto 1
[6] http://www.bcb.gov.br/pre/bc_atende/port/perguntasCambio.asp

registered address in Brazil, and residents, domiciled or with a registered address abroad; and, (ii) operations using other exchange instruments, carried out through institutions authorized to operate in the foreign exchange market by the Central Bank of Brazil[7].

Any and all transactions relating to the purchase and sale of foreign currency, as well as operations between non-residents in Brazil and Brazilians, in local currency, must be carried out through the Foreign Exchange Market.

Foreign Capital in Brazil

Foreign capital includes goods, machinery, and equipment that have entered Brazil without initial disbursement of monies and are destined for the production of goods or services. Financial or monetary funds remitted to Brazil for investment in economic activities are also deemed to be foreign capital.

This capital must mandatorily belong to individuals or legal entities residing, domiciled or with a registered address located abroad[8].

Regardless of where the foreign capital will be invested or the manner in which it was transferred to Brazil, the value thereof must be converted into Brazilian reais through the Foreign Exchange Market.

Types of Investment: Direct and Indirect

Investments made in Brazil by foreigners may be classified as direct or indirect. Equity holdings in the capital stock of companies in Brazil[9] are deemed to be direct investments, while indirect investments are those made through the financial market, which does not necessarily include shareholding in Brazilian companies.

In both cases the investment amount must be registered with the Central Bank of Brazil.

Registration of Foreign Investments with the Central Bank

Pursuant to the terms of Circular No. 2.997/2000 issued by the Brazilian Securities and Exchange Commission (CVM), foreign investments must be registered in the Central Bank's Information Database System, referred to as the RDE-IED Module.

[7] Article 1, sole paragraph of National Monetary Board Resolution No. 3.265/2005
[8] Article 1 of Law No. 4.131/1962
[9] Article 2 of CVM Circular Letter No. 2.997/2000

Registration in the RDE-IED Module must be made within 30 days of the date the foreign investment was made in Brazil[10]. The party responsible for the RDE-IED registration must keep documents confirming the information registered, which must be available for the Central Bank of Brazil for a period of five years as from the date of each registration[11].

Equity investment in the stock capital of Brazilian companies, through goods imported from abroad, must also be registered in the RDE-IED. This registration must be submitted within 90 days as from the date when the customs authority cleared the goods for entry into Brazil.

Remittance of Profit Abroad, Repatriation and Reinvestment in Funds.

Brazil has no restrictions with regard to the distribution and remittance of profits, dividends or interest paid on equity capital arising from direct investments in Brazil abroad.

Foreign Capital Restrictions

In some activities, deemed to be strategic, Brazilian legislation, despite allowing foreign capital investments, imposes certain restrictions. Some examples of restricted fields include ownership and management of newspapers, magazines and other publications, radio and television networks; postal and telegram services; as well as the aerospace industry.

In the last few years, the Brazilian government has been inclined to lower, and in some cases, eliminate this type of restriction. Please note that congress recently enacted Constitutional Amendment No. 36 and Law No. 10.610/2002, which allow foreign investors to indirectly hold up to 30% of the voting capital in news and television networks through a Brazilian subsidiary.

[10] Article 4 of CVM Circular Letter No. 2.997/2000
[11] Article 27 of CVM Circular Letter No. 2.997/2000

Brazilian Development Bank - BNDES

The Brazilian Development Bank (*Banco Nacional de Desenvolvimento Econômico e Social* – BNDES) is a public federal company, organized as a private legal entity and having its own assets; it is linked to the Ministry of Development, Industry, and Foreign Trade.

The primary function of the BNDES is to contribute towards the development of Brazil, by granting long-term loans at competitive rates, specifically directed towards, among other things: large-scale industrial projects, infrastructure projects, trade and service[12].

The BNDES has two fully-owned subsidiaries: FINAME (Special Agency of Industrial Financing) and BNDESPAR (BNDES Participações) set up to (i) finance the sale of machinery and equipment, (ii) and facilitate the underwriting of securities in the Brazilian capital markets, respectively. Jointly the three companies comprise what is referred to as the "BNDES system"[13].

[12] http://www.bndes.gov.br/empresa/default.asp
[13] Ditto 7

III. Direct Investments

Types of Business Organizations

As previously mentioned, direct investments are either investments made by acquiring equity interest or establishing a company, which in general are business organizations.

Business organizations are private legal entities that engage in economic activities, established through the execution of an agreement by at least two individuals who undertake to contribute with goods or services in order for the company to achieve its intended goal[14].

Therefore, investors who intend to carry out economic activities in Brazil should establish one of the following types of business organizations: Simple Company, General Partnership, Limited Partnership, Limited Liability Company or Corporation.

Although there are several different types of companies in Brazil, Limited Liability Companies and Corporations are the most common given that partners' and shareholders' liability is limited.

Limited Liability Companies

Limited liability companies are governed by Law No. 10.406/2002 (Civil Code) and, on a complementary basis, by Law No. 6.404/76 (Corporate Law - LSA)[15].

The articles of association of this type of organization must contain all relevant information regarding the company, including: head office address, term, capital stock, and corporate purpose.

The Company only comes into existence when its articles of association are registered with the Commercial Registry of the State in which its head offices are located.

[14] Article 981 of Law No. 10.406/2002

[15] The articles of association/incorporation must establish that Brazilian Corporate Law will be use complementarily.

(a) Quotas

Capital stock of limited liability companies is divided into quotas. Each partner subscribes[16] a portion of the capital stock, which must be subsequently paid in[17]. Partners may pay in their quotas with Brazilian legal tender or assets, but under no circumstances, with services.

In general, the partner may sell its quotas to other partners or third parties, provided that the sale is approved by at least one-forth (¼) of the quota-holders, except if otherwise established in the articles of association.

(b) Liability

Liability in this type of business organization is unlimited in regard to its obligations, and partners' liability is limited and subsidiary to said obligations.

Each partner's liability vis-à-vis the company is restricted to the amount paid in relation to his/her quotas. In the case of third party claims, all partners are jointly responsible for the quotas which have not yet been paid in.

If one of the partners has not paid in the amount related to its respective quotas, and the company incurs a debt that it is unable to settle, all partners, including those who have already paid in their quotas, will be jointly liable for the amount corresponding to the unpaid capital stock.

(c) Partners and Management

The administration of limited liability companies may be carried out either by the partners themselves or third parties, provided that they are individuals residing in Brazil or foreigners who have permanent visa to remain in the country. The appointment of the company's administrators must be either formalized in the articles of association or in a separate instrument, which must be filed with the Commercial Registry.

Administrators may perform all activities required for the company's management; the scope of their management authority may be defined in the Articles of Association.

Administrators may be held liable for potential losses caused to the company if their acts are not aligned with partners' orientation or not within the scope of his/her duties.

[16] To subscribe is to commit to invest a specific amount of Brazilian reais in a company.

[17] To pay in is to effectively invest, in Brazilian legal tender or assets, the amount subscribed by the partner/shareholder.

(d) Other Important Requirements

Partners must attend the General Shareholders' Meeting at least once a year to approve the financial statements of the previous fiscal year.

Limited liability companies are the most common type of business organization in Brazil. However, establishing this type of company with foreign partners is not generally recommended, given that certain recent court decisions have established that, to be deemed to be a legally valid company, the parties are required obtain authorization with the Federal Government, which in turn demands the parties to meet several other requisites, thus delaying, and even sometimes preventing, the establishment thereof.

Corporations

Corporations are governed by Law No. 6404/76.

The capital stock of this type of company, also referred to as *companhia* [in Portuguese], is divided in shares. Shareholders' liability is limited to amount paid in relation to his/her subscribed shares or the price of the purchased shares. Unlike the liability of partners in a limited liability company, shareholders are not jointly liable for the capital stock that has not yet been paid in.

Corporations must be made up of at least two shareholders, except for the fully-owned subsidiaries, which are allowed to operate solely with one Brazilian legal entity as a shareholder.

Corporations can be either publicly-held company (listed) or closed company (unlisted), depending whether their shares are traded in the securities market[18]. Management of publicly-held companies (listed) is subject oversight of the Brazilian Securities and Exchange Commission (CVM), an independent federal government agency. This oversight is not required in Closed companies (unlisted).

(a) Shares

The capital stock of corporations is divided into shares, which may be classified as common, preferred or fruition stock.

Common shares entitle holders to common shareholders and voting rights.

[18] Article 4 of Law No. 6.404/76

Preferred shares entitle holders to economic advantages as set forth in the articles of incorporation, such as: priority in the distribution of dividends and priority in the refund of capital stock; however, voting rights thereof may be restricted. Fruition shares are granted to shareholders whose common or preferred shares have been amortized.

Shares are either registered or book-entry shares. Registered shares are those whose shareholder's name is specified in the Registered Share Record. These shares may only be transferred by an instrument drawn up in aforementioned record and in the Registered Share Transfer Record. Book-entry shares are held in the shareholder's deposit account.

Additionally, shareholders may execute a shareholders' agreement in regard to the purchase and sale of shares, preemptive rights, voting rights or management control, all of which must be observed by the Company if the agreement is filed at its corporate head offices.[19]

(b) Shareholders

Owners of shares in a corporation may be classified as ordinary, controlling, dissident or minority shareholders. All ordinary shareholder rights and duties are defined in Law No. 6.404/76, such as being entitled to: dividend payments, the company's assets in case of liquidation, to audit corporate activities, preemptive rights in the subscription of shares and withdrawal.

A controlling shareholder is any individual who owns the majority of the voting shares or a group of individuals bound by a voting agreement under common control.[20] Controlling shareholders have the authority to elect the majority of the company's administrators, manage corporate activities and direct the company's committees. As a result of this authority, controlling shareholders are liable for damages arising from any abuse of power.

Dissident shareholders are those that withdraw from the company because they do not agree with resolutions passed in the general shareholders' meetings; however receiving the book value for their shares.[21]

Minority shareholders are shareholders who are not part of the company's control.

[19] Article 118 of Law No. 6.404/76
[20] Article 116 of Law No. 6.404/76
[21] Article 45 of Law No. 6.040/76

(c) Corporation Structure

A Brazilian corporation is generally composed of the following bodies: General Shareholders' Meeting, Board of Directors, Board of Officers, and an Audit Committee.

- General Shareholders' Meeting: when all shareholders meet to decide upon business activities related to the corporate purposes, and to take decisions in regard to defense and development thereof [22] it is the company's highest-level decision making body.

- Board of Directors: a decision-making body that establishes economic and financial policy of the corporation and defines the general direction of business activities. This body is elective in publicly-held company (listed) and required in publicly-held company (listed). It should be composed of at least three shareholders elected in the General Shareholders' Meeting.
  This body, together with the Board of Officers, is responsible for the management of the company.

- Board of Officers: body responsible for legally representing the corporation vis-à-vis third parties [23] and implementing the resolutions passed by the General Shareholders' Meeting and Board of Directors. It should be composed of at least two officers, whether they are shareholders or not, residing in Brazil, and the term thereof should not exceed three years.

- Audit Committee: a body responsible for inspecting management's activities, and overseeing if legal and statutory obligations are being fulfilled; providing a statement in regard to the management's annual report; and providing a statement on proposals submitted by any board to the general shareholders' meeting in regard to proposed amendments to the corporate bylaws, either in whole or in part. It must be composed of no more than five members and no less than three members. It is not a permanent body.

[22] Article 121 of Law No. 6.404/76
[23] Article 144 of Law No. 6.404/76

Publicly-held Corporation

Publicly-held company (listed) raise funds in capital markets and, therefore, as previously mentioned, their management is subject to oversight by the Brazilian Securities Commission (CVM). Such oversight is required to ensure the security and liquidity of investments therein.

To establish a publicly-held company (listed), prior registration with CVM is initially required. CVM conducts a feasibility analysis of the project and once it is approved, the company must obtain the services of a financial institution to issue and trade its shares on the stock exchange.

Additionally, publicly-held company (listed) must appoint an investor relations officer, to be responsible for providing information to investors, CVM, and the stock exchange.

(a) Securities

To raise funds in capital markets, corporations may issue different types of securities; some of the most common include shares, debentures, participation certificates, and subscription bonuses.

Debentures are investment securities that entitle debenture holders to fixed return from the corporation, under conditions established in the issuance deed[24]. This type of security may be convertible or non-convertible into shares.

Participation certificates are trading instruments, with no par value, that are not part of the capital stock. The holders of these securities are not shareholders, but they are entitled to up to 10% of the company's profits [25] .

Subscription bonuses are trading securities which entitle holders thereof, under certain conditions provided in the certificate, to the subscription of shares during a capital increase.

(b) Disclosure

Publicly-held companies (listed) are required to submit "periodic" and "extraordinary" information[26] to CVM.

Periodic information include: (i) financial statements, consolidated financial

[24] Article 52 of Law No. 6.404/76
[25] Article 46 of Law No. 6.404/76
[26] Article 7 of CVM Instruction No. 270

statements, management reports and independent auditors' reports; (ii) the general shareholders' meeting call notice, (iii) updated bylaws; and, (iv) minutes of the general shareholders' meeting[27]. Extraordinary information includes special or extraordinary shareholders' meeting minutes; shareholders' agreement; material fact notice, among others[28].

Said information is made available to the public by CVM, except for information potentially deemed to be confidential.

Foreign Companies

Foreign companies, i.e. companies established abroad, may carry out activities in Brazil through branches, offices and structures, provided that they have received authorization from the Federal Executive Branch. Authorization application is submitted to the Ministry of Development, Industry and Foreign Trade, which in turn submits it to the approval of the National Trade Registration Department (DNRC).

Joint Ventures

Joint ventures are companies constituted by two companies, be it a Brazilian or foreign company, to carry out a specific project. Each company contributes with specific market and/or technical know-how for the development of the joint venture.

Change in corporate structure, Takeovers, Mergers and Spin-offs

(a) Transformation

A change in corporate structure is any operation that changes the business' organization classification. Accordingly, the company must comply with the legal requirements of the new business organization structure; however, rights and obligations acquired under the previous structure are not thereby extinguished.

The transformation may only occur upon unanimous approval of the totality of the partners/shareholders, i.e., should only one partner/shareholder disagree with the change, it will not occur.

[27] Article 11 of CVM Instruction No.270
[28] Article 12 of CVM Instruction No. 270

(b) Incorporation

An incorporation is when one company incorporates another, regardless of its corporate structure, and the acquired company no longer exists. The company that acquired the other maintains its corporate structure and all rights and obligations of the incorporated company will be transferred the former.

Both companies must hold general meetings, so that the partners and shareholders may approve the takeover, being understood that this operation is different from an acquisition. In acquisition transactions, the acquiring company uses its own funds to purchase the other and in this case, the purchased company does not cease to exist.

(c) Merger

A merger is a transaction whereby two or more companies come together to create a third company, and in this case the two initial companies cease to exist. All rights and obligations of the extinguished companies will be transferred to the company product of the merger.

(d) Spin-Off

A spin-off is a transaction whereby a company fully or partially transfers its assets to one or more companies, duly established or not; the transferee may or may not cease to exist. The transferee only ceases to exist when all of its assets are transferred.

In the event of a partial spin-off, the assets transferred to other company must be deducted from the capital stock of the transferee, i.e. capital stock must be accordingly reduced in relation to the transferred assets.

The company which receives the shareholders' equity of the transferee will assume all rights and obligations arising therefrom.

Spin-offs must also be approved by the shareholders or partners of the companies involved in this corporate transaction.

IV. Commercial Agreements

Commercial purchase and sale agreement

Through a Commercial Purchase and Sale Agreement a seller undertakes to transfer ownership of a certain thing and a buyer undertakes to pay to the seller the value, in legal tender, for the purchased object[29].

The main characteristics of this type of agreement are: (i) the object must be a moveable asset, real estate property or livestock; (ii) the purchased object must be resold or leased by a buyer seeking to make a profit; and (iii) the buyer must be a businessperson.

Unless specified to the contrary in the agreement, expenses incurred with registering the object's deed are borne by the buyer and expenses relating to the transfer of title are borne by the seller.

Commercial Lease

A Commercial Lease Agreement is executed by and between a lessor and a lessee. The lessor undertakes to make the real estate property that is intended to be used for commercial activities available at the price and for a specified term, while the lessee undertakes to pay the lease amount.

Commercial leases may be renewed through a lease renewal claim, if the following requirements are fulfilled: (i) the commercial lease agreement has been entered in writing and has a definite term; (ii) the minimum term of the agreement to be renewed is five years; (iii) the lessee has been conducting its business activities in the same sector for at least three consecutive years.

[29] Article 482 of the Code Civil

Commercial Representation Agreement

Law No. 4.886/65 governs commercial representation agreements. This type of agreement is entered into by and between the representative and a represented party. The representative is a legal entity or individual that continually liaises with parties for the purchase and sale of goods manufactured or sold by the represented party, drafting proposals or orders to transmit them to the represented party. Furthermore, representatives may carry out acts related to the business activities[30].

Commercial representation is an independent activity and, therefore, the representative has no formal employment tie with the represented party. In the event that the representative becomes a subordinate of the represented party, then the representation agreement may become subject to labor law.

The law governing representation requires the inclusion of a number of clauses in the commercial representation agreement, including the specification of: (i) representation terms and conditions; (ii) the products that will be the object of the representation; (iii) the term, whether it is definite or indefinite; (iv) area where representation will be applicable; (v) the exclusivity or non-exclusivity of representation area; (vi) the exclusivity or non-exclusivity of representation per area; (vii) the deadline for informing the represented party regarding proposal decline; (viii) payment amount, methods and terms; (ix) compensation for representative in the case of termination of the agreement through no fault of its own; and any additional obligation of the parties.

Distribution

A distribution agreement is a type of agency agreement between a producer and distributor. There is a certain amount of trust between the signatories of a distribution agreement, in that the distributor will offer the goods to end users and will be liable for payment of the sale of the goods to the manufacturing company.

Currently, the most common type of agreement is distribution, whereby the distributor does not receive the goods that it will sell as result of the distribution agreement, but solely acts as an agent for proposals.

[30] Article 1 of Law No.4.886/65

Franchise

Franchise agreements are regulated by Law No. 8.955/94; it is a business agreement whereby a franchisor assigns the right to use technical know-how, technology, systems, trademarks and patents, among others, to the franchisee.

Franchisee operation and profit earnings are subject to franchisor guidelines, which cover matters such as, the selection of suppliers, machines, location where the business is to be developed, hiring of employees, and system implementation.

A franchise operation is detailed in a Franchise Offering Circular, provided by franchisor to the potential franchisee, at the latest ten days prior to signing of the franchise agreement[31].

International Leasing

A leasing agreement is defined by Brazilian legislation as leasing (*arrendamento mercantil*). It is a lease agreement with a final purchase option, with terms ranging between two to five years.

If a leaseholder opts to buy the asset the amounts paid as the lease will be amortized from the outstanding amount, and thus only a "residual value" will be due.

Leasing agreements entered into with international entities must be registered with the Central Bank of Brazil. The same rules apply as those in a leasing agreement between Brazilian parties, but such agreements must include clauses as laid down by the Central Bank of Brazil, regarding the entry of foreign capital and the remittance of monies abroad.

The leasing of assets located abroad through a local institution is allowed, however only corporations specifically approved by the Central Bank of Brazil and other specific financial institutions are authorized to carry out such leasing operations.

[31] Article 4 of Law No. 8955/94

V. Real Estate and Property Law

Property law and its social role

In accordance with the Federal Constitution, property is a fundamental right that should be assured to Brazilian citizens and foreigners residing in Brazil. Civil Code, likewise, ensures that owners may exercise all rights inherent with the property, i.e. to use, enjoy, dispose and repossess the property. Civil Code additionally establishes the legal mechanisms which enable owners to exercise their rights inherent in property.

However, although property is deemed to be a fundamental right, it cannot be treated as an absolute right, given that the Federal Constitution states that full right to property is **only guaranteed if it performs a social role**. In other words, owners' rights must be aligned with the society's interests, which include environmental preservation and protection of neighborhood rights, to name a few.

Acquiring Real Estate in Brazil

In general acquisition of real estate is formalized by the registration of the conveyance title deed at the respective Real Estate Registry (article 1.245 of the Civil Code). Conveyance may result from an *inter vivos* (purchase and sale, donation, etc.) transaction or *causa mortis* (inheritance) event.

Common practice in the Brazilian real estate market is to enter a promissory purchase and sale agreement that, despite not being a property deed, represents a bilateral legal covenant, a pre-agreement or preliminary agreement of sort, whereby the parties undertake to execute, in the future, the real estate purchase agreement.

The promissory purchase and sale agreement may be a public or private instrument. It is an agreement by which a committed seller undertakes to dispose of, for an agreed amount, conditions and terms, after fulfillment of all obligations, to grant the real estate property deed, which is to be used as the acquisition instrument that may be recorded in the real estate title.

Once the obligations set forth in the promissory purchase and sale agreement have been fulfilled, the committed buyer may demand that the committed seller grant the definitive deed. Should the latter refuse to grant it, the committed buyer may either demand the fulfillment of the obligation or consider the business transaction to be cancelled and file a suit for damages.

Adverse possession (*usucapião*) and natural accession are other methods of acquiring property, neither of which does the new owner establish a contractual relationship with the former owner of the real estate property. Natural accession consists in the increase of the value or volume of the real estate property arising from an external element, in general a natural event.

Adverse possession is a method of acquiring title to real property by possession for a certain period, without paying any monetary amount. This type of possession occurs when the real estate property remains in possession of an individual who intends to assume title thereof, uninterruptedly and without opposition, for a statutory period.

After the statutory period has elapsed, the interested party must file an adverse possession claim to obtain a court decision transferring the title of the real estate thereto, and subsequently, take the said decision to be duly filed with Real Estate Registry.

(a) Ordinary adverse possession (article 1.242 CC)

Transfers ownership of the real estate property to the individual who, intending to become its owner, remains in possession of said property, undisputedly and without opposition, for a continuous period of 10 years. In order to be able to transfer the title of property under the ordinary adverse possession, one must have a just title, i.e. a document that provides proof of the individual's possession of the real estate property, even if it contains some irregularity.

(b) Extraordinary adverse possession (article 1.238 CC)

Transfers ownership of the real estate property to the individual who remains in possession of said property for a continuous period of fifteen years, regardless of the existence of any proof. If the real estate property is the owner's residence or if the individual has carried out works or productive services, the statutory period is reduced to ten years.

(c) Special urban adverse possession (article 1.240 CC)

An individual who is not a title-owner of an urban or rural property and remains in possession of urban property, as his/her place of residence for a continuous period without any opposition, will be granted title to said real estate property. The property may not exceed 250 square meters and must be the place of residence of the owner or his family.

(d) Special rural adverse possession (article 1.239 CC)

An individual who is not a title-owner of an urban or rural property and remains in possession of rural property for a continuous period of five years, having made the area productive through his or his family's efforts, without any opposition, may acquire title to said property. In addition to working the land object to adverse possession, the individual in possession must reside there, given that the social nature of this regulation is to establish man in the field. The total area of the rural property must not exceed 50 hectares.

Right of Possession

Possession is the right of use and fruition of property. Although the individual in possession has one or more rights inherent to the property, possession does not represent ownership, because if that were the case, solely the owner could have possession.

For example, a lessee, despite having possession of the real estate property for a definite or indefinite term, is not the effective owner. The lessee is the actual possessor of the asset, whereas the lessor is the constructive possessor.

Constructive possession is not canceled by actual possession; for instance, in the example above, if the lessee defaults on payment of the lease amount, the lessor may repossess the real estate property by filing lawsuit (eviction lawsuit as result of nonpayment).

Constructive possessors are protected by law against the following scenarios: (i) trespassing, by filing an action of trespass, (ii) trespassing vi et arms, by filing a repossession suit, and (iii) fear of abuse, filing a prohibitory interdict suit.

[32] **Violent possession:** obtained upon violet action.

[33] **Clandestine possession:** acquired through a concealing process, without publicity of the exercise of the possession intention, which should be clear in addition to being physical and external.

[34] **Non-precarious possession:** arising from abuse of trust, as in case of business manager or simple servant (holder).

Nonviolent[32] , non-clandestine[33] or precarious[34] possession is legal (article 1.200 of the Civil Code).

Building Condominium

Condominium is where there is a pool of owners, given that there is more than one title to the same asset, whereby all parties have equal rights. The most common type of condominium is that found in buildings.

Each condominium owner may use the asset according to its need, and may file claim against third parties, claim repossession thereof or dispose of the respective ideal fraction, or even encumber it (article 1314 of the Civil Code). However, no condominium owner may neither change the use of the common areas nor convey its possession, use or fruition to third parties, without the consent of the other condominium owners.

In the case of "horizontal" or "building" condominiums, the land, building structure, roof, general water, gas and electricity distribution network, central heating and ventilation, and other common facilities, including access to public roads may not be disposed of, be it separately or as a fraction (article 1.331, paragraph 2 of the Civil Code).

Condominium owners are required to, in proportion to their space, contribute in covering the development conservation expenses, as well as bear other expenses.

Acquisition of Rural Property by Foreigners

Acquisition of a rural property by a foreigner residing in Brazil, or a foreign legal entity authorized to conduct activities in Brazil, is regulated by Law No. 5.709/1971. The same law is applicable to Brazilian legal entities whose major shareholder is foreigner or foreign legal entity that are domiciled or registered headquarters are located abroad.

Only foreigners with valid permanent residency in Brazil and holders of the identity card for foreigners (RNE) are allowed to acquire rural property, except in the case of legal succession.

Foreign individuals may only purchase rural property which are under 50

[35] Undefined Exploration Module: is a measure unit, in hectares, based on the concept of 'rural module', not taking into considering economic exploration thereof, established for a specific and defined region, which is referred to as a ZTM (Module Typical Zone) established by Incra (National Institute of Colonization and Agrarian Reform) (Source: www.incra.gov.br)

undefined exploration modules[35], be it in a continuous or discontinuous area. However, if the area of the real estate property is equal to less than three modules, the purchase is free of any such demands, authorization or license requirements, except for general requirements established by law.

And foreign legal entities may only purchase rural properties for the implementation of agricultural, farming, industrial or development projects[36], if they are associated with their core business as identified in their statutes.

Any rural property purchased by a foreigner must be duly carried out and documented through a public deed, which must include the buyer's identity card number; proof of residence in Brazil; and, authorization of the respective authority or prior consent issued by the General Secretariat of the National Security Board (article 9 of Law No. 5.709/71), as applicable.

Surface rights

Surface is a right *in rem* whereby property owner may grant a third party the right to build or plant on its land, for a determined period, upon registration in the Real Estate Registry.

The surface right may be transferred to third parties or the successor of the party exercising such right, however underground work may not be carried out, unless in cases in which the object of the concession also provides for such exploitation.

The party exercising the surface right granted will bear the taxes levied on the property. Any understanding otherwise must be established in a formal agreement. (Article 1.371 of the Civil Code)

At the end of the concession period, the owner shall resume full possession, free of any indemnification, should there be no contractual covenant in this regard. Termination of the agreement must be duly registered in the Real Estate Registry (*article 1.375 of the Civil Code*).

[36] "Article 60. For the purpose of this Law, the term 'private development companies' are deemed to be any Brazilian or foreign individual, resident or domiciled in Brazil, or legal entity organized and with registered offices in the Brazil, whose core business is to implement a development program to increase value of the area or redistribute plots."

VI. Indirect Investments

Stock Exchange

The Stock Exchange is part of the capital market where the purchase and sale of securities is carried out; it is regulated by the Central Bank of Brazil (BACEN) and the Brazilian Securities and Exchange Commission (CVM).

It determines the requirements for issuing the securities that are to be traded on the trading floor (*pregão*), where members of the stock exchange meet to enter stock and bond purchase and sale agreements with brokers.

The Brazilian Stock Exchange is referred to as BM&F BOVESPA S.A. - Bolsa de Valores, Mercadorias e Futuros (the Securities, Commodity and Futures Exchange). It was established in 2008 after the consolidation of the Commodity and Futures Exchange (*Bolsa de Mercadorias & Futuros* - BM&F) and the São Paulo Stock Exchange (BOVESPA) and is the third largest stock exchange worldwide in terms of market value and the second largest in the Americas.[37]

Foreign investments in the Stock Exchange

Foreign investors who wish to invest in the Brazilian Stock Exchange must previously register with the CVM and appoint a legal and fiscal representative, as well as a custodian.

The legal representative is responsible for submitting registration information to Brazilian authorities. The fiscal representative is responsible for overseeing the foreign investor's tax and fiscal matters vis-à-vis Brazilian authorities. The custodian is responsible for updating documents, controlling all the foreign investor's assets in separate accounts and providing information that may be requested, at any time, by authorities or the investor[38].

Funds of foreigners in Brazil may not be used in security market operations if they arise from shares or purchases in the unregulated over-the-counter market or from entities or companies not authorized by the CVM[39].

[37] Awww.bovespa.com
[38] http://www.cvm.gov.br/port/relinter/info_invest_estrang.asp
[39] Article 8 of CVM Resolution No. 2.689

The above restrictions do not apply in the case of the underwriting, dividend distribution, conversion of debentures into shares, stock-referenced indexes or the purchase and sale of quotas in open-end investment funds, among others.[40]

Assets and stock traded by foreign investors, as well as other types of financial investments, must be registered and kept in custody or in bank deposits by a CVM- or Central Bank-authorized institution.

Investment Funds

In Brazil, an investment fund is a legal entity, i.e. a pool of investors who own part of the total shares of the fund. Each fund has its own statute that defines the rules and degree of risk of the investment. Every fund has a fund manager certified by the CVM, who supervises investment purchase and sale decisions.

Thus, when an individual invests in a fund, he/she must concur with the investment policy, specified in the statute.

The same products offered by Stock Exchanges to Brazilian residents are available to foreign investors; however, please note that startup company investment funds are exclusively destined for non-residents.

Startup Company Investment Funds

Mutual Funds aimed at startup companies are a pool of funds of individuals or legal entities residing abroad, in a closed-end fund, authorized by the CVM, for a maximum term of ten years, destined to apply in a diversified portfolio of shares issued by startup companies.[41]

Startup companies are those whose net annual revenue is less than R$60,000,000.00 (sixty million reais).

These funds may not invest in affiliated companies, whose consolidated shareholders' equity (net worth) is equal to or greater than R$120,000,000.00 (one hundred and twenty million reais).

The management of the fund is incumbent upon the individual authorized by the CVM to carry out the management of the investment portfolio and its quotas may be traded on the Stock Exchange.

[40] Ditto
[41] Article 1 of CVM Instruction No. 278

VII. Foreign Trade

Key Brazilian government authorities

In general the Ministry of Development, Industry and Foreign Trade (MDIC) is the department that establishes and promotes Brazilian international trade policies. Some of the key areas it is responsible for include: technology transfer; foreign trade policies; regulation and execution of foreign trade programs and activities; application of commercial defense mechanisms; and, participation in international discussions related to foreign trade, among others.

The following are linked to the MDIC: Manaus Free-Trade Zone Authority (SUFRAMA); Brazilian Patent & Trademark Office (INPI); National Institute of Metrology, Standardization and Industrial Quality (INMETRO); and the Brazilian Development Bank (BNDES).

Another important agency for the MDIC is the Chamber of Foreign Trade (CAMEX), which is a member of the Government Committee, whose function is to draft, adopt, launch and coordinate policies and activities related to the international trade of goods and services, including tourism.

The highest level decision-making body for CAMEX is the Ministers' Council, which is composed of the Minister of Development, Industry and Foreign Trade, who presides over the Ministers' Council; the Minister of Home Affairs; the Foreign Affairs Minister; the Finance Minister; the Minister of Agriculture, Livestock and Supply; and the Minister of Planning, Budget and Management.

Please note that acts published by CAMEX must mandatorily comply with international covenants signed by Brazil, particularly those entered into with the World Trade Organization (WTO), the Southern Cone Common Market (*Mercado Comum do Sul* -MERCOSUR) and the Latin American Integration Association (ALADI).

There is yet another important body within the MDIC, i.e. Secretariat of Foreign Trade (SECEX), which is responsible for providing tools required for the implementation of foreign trade incentive policies issued by the MDIC, specially the CAMEX.

The SECEX is subdivided in four departments, each of which has a specific function. They include: Department of Foreign Trade Planning and Development (DEPLA); Department of Foreign Trade Operations (DECEX); Department of International Negotiations (DEINT); and the Antitrust Department (DECOM).

But it is the Ministry of Finance that is responsible for auditing and controlling Brazilian foreign trade. In general terms, it is incumbent upon the Ministry of Finance to coordinate foreign trade policies, especially in regard to fiscal, tax, customs and exchange matters, once there is a certain amount of national finance interest involved in this type of operation.

Overview on import and export regulation

Pursuant to the duties determined by law, the MDIC, through the Secretariat of Foreign Trade (SECEX), has established general rules and procedures for import and export through the issuance of SECEX Ministerial Directive No. 25, dated November 27, 2008.

According to the mentioned Ministerial Directive, exporters and importers who carry out business in Brazil are automatically included in the Export and Import Company Registration (REI) of the Secretariat of Foreign Trade (SECEX).

Registration occurs when the first import or export operation is carried out at any point connected with the Integrated Foreign Trade System (SISCOMEX).

After registration, SISCOMEX operations may be carried out by an import or export company, by the company itself, after obtaining authorization, or through certified representatives, according to the terms and conditions established by the Brazilian Revenue Service.

MERCOSUR – Southern Cone Common Market

(a) Overview

Argentina, Brazil, Paraguay, and Uruguay are members of the Southern Cone Common Market (MERCOSUR), which was established March 26, 1991, through the "Treaty of Asunción". The objective of this trade bloc is to expand the coverage of the respective domestic markets; integrate the four Member Countries, in order

to create free circulation of goods, services and feedstock; establishment of a single foreign tariff and common commercial policy; alignment of pertinent legislation as to consolidate this integration, however always upholding social justice.

The Bolivarian Republic of Venezuela is currently undergoing the process of becoming a MERCOSUR Member-Country, which will occur once its accession protocol is ratified.

The common external tariff is a very important factor in regard to the MERCOSUR as it has provided an essential commercial policy mechanism that regulates aspects such as free trade zones and customs union. The common external tariff was established by a Supplemental Protocol to the Treaty of Asunción, executed at a meeting of Heads of State, held in the city of Ouro Preto, Brazil, in December 1994, known as the "Ouro Preto Protocol", which established MERCOSUR's current organization structure and vested it with a legal personality under international law.

(b) Objectives

MERCOSUR seeks to consolidate free trade zones and customs unification, as to create a single marketplace in order to foster growth of the economies of Member Countries, by taking advantage of the multiplying effect of specialization, economies of scale and negotiation as a block.

Macroeconomic and sector policies between Member Countries are coordinated, and they may be agricultural, fiscal, monetary, exchange or capital in nature or of any other nature as agreed to between the parties, aiming at establishing proper conditions for competition between the members.

According with article 2 of Chapter I of the regulatory provisions of the Treaty of Asunción, *"the common market is based on the reciprocity of rights and obligations between the parties"*, thus, illustrating the equal economic and political value between the Member Countries.

The Treaty of Asunción does not have a pre-established number of members; in fact other countries may become members, upon unanimous approval of the already existing Member Countries and negotiation with the Member Countries of the Latin American Integration Association (ALADI), which is detailed below.

Another important aspect of the Treaty is that citizens from the Member

Countries may freely cross borders thereof without a passport, solely using their national identity card.

(c) Brazilian commercial exchange with MERCOSUR (1,000 US$ FOB)*

Year	Imports	Percentage**	Exports	Percentage**	Balance
1996	8,301,547	15.6%	7,305,282	15.3%	-996,265
1997	9,426,133	15.8%	9,045,111	17.1%	-381,022
1998	9,416,203	16.3%	8,878,234	17.4%	-537,969
1999	6,719,418	13.6%	6,777,872	14.1%	58,454
2000	7,795,394	14.0%	7,733,070	14.0%	-62,325
2001	7,009,316	12.6%	6,363,655	10.9%	-645,661
2002	5,611,215	11.9%	3,310,817	5.5%	-2,300,398
2003	5,685,151	11.8%	5,671,853	7.8%	-13,999
2004	6,390,320	10.2%	8,912,111	9.2%	2,521,790
2005	7,053,727	9.6%	11,762,094	9.9%	4,672,367
2006	8,967,777	9.8%	13,985,828	10.1%	5,018,052
2007	11,629,864	7.2%	17,353,576	14.4%	5,723,712
2008***	3,703,914	10.3%	4,799,081	12.4%	1,095,167

* MERCOSUR figures do not include Venezuela and Bolivia. ** Over total trade. *** 1Q figures
(Source: http://www.fazenda.gov.br/sain/boletim/2008/boletim-marco.pdf)

NAFTA –North American Free Trade Agreement

(a) Overview

NAFTA – North American Free Trade Agreement is an agreement executed by and between the US, Canada, and Mexico as to explore free trade and low customs tariffs to facilitate exchange of products between Member Countries.

The establishment of NAFTA implied the reduction of commercial costs between Members, thus increasing competitiveness in the current globalized market.

One of the mechanisms that was most taken advantage of in this Treaty was the setting up of American and Canadian industrial plants in Mexico, which decreased labor costs and generated more jobs for the Mexican population. The US has a direct interest in increasing employment figures in Mexico once it hopes that this will decrease illegal immigration to its territory.

(b) Objectives

NAFTA has the following key objectives:

- eliminate customs barriers and facilitate the movement of products between Member Countries;

- create the conditions for fair competition in this area of free trade;
- promote more investment opportunities for affiliated countries;
- decrease the number of illegal immigrants in North America; and,
- establish a single structure for future trilateral, regional and multilateral cooperation, to further expand the benefits of the agreement.

In 1994 the US and another 33 countries, including Brazil, Argentina, Mexico and Canada, signed an agreement to establish negotiations to form economic bloc encompassing almost all of the Americas: the Free Trade Area of the Americas (FTAA).

If the FTAA ever effectively comes into being, it is likely that it would include NAFTA and MERCOSUR; however the Brazilian Government honestly questions whether this economic bloc would bring about significant benefits for the country, especially in view of the disputes with the US (agricultural subsidies) and Canada (meat and jets). Thus MERCOSUR has focused its political initiatives on commercial negotiations with the European Union.

ALADI – Latin American Integration Association

ALADI is the largest Latin American trade integration block. It is composed of twelve member countries: Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela, altogether representing 20 million square kilometers in territory and over 500 million inhabitants.

The 1980 Treaty of Montevideo (TM80), the global legal, constitutional and regulatory framework of the ALADI, signed August 12, 1980, established the following general principles: pluralism in political and economic matters; progressive convergence on partial initiatives to create a common Latin American market; flexibility; differential treatment based on the level of development of member countries, and multiplicity in regard to the arrangement of commercial instruments.

Within its framework, upon express authority granted to its bodies, member countries may enter a variety of different agreements, without needing another legal text for the authorization therefor.

The ALADI promotes the creation of an area of economic preferences in the region, aiming at a Latin American common market, through three mechanisms:

- regional tariff preference granted to products originating in the member countries, in relation to tariffs in force for third party countries;
- regional scope agreements (among all member countries); and,
- Partial scope agreements, between two or more countries of the area.

Either regional or partial scope agreements may cover matters such as: tariff relief and trade promotion; economic complementation; agricultural trade; financial, fiscal, customs and health cooperation; environmental conservation; scientific and technological cooperation; tourism promotion; technical standards and many other fields expressly provided in the Treaty of Montevideo or not.

Countries at a relatively less advanced stage of economic development in the region (Bolivia, Ecuador and Paraguay) benefit from a preferential system. Through lists of market opening, special cooperation programs (business rounds, pre-investments, loans, technological support) and compensatory measures in favor of Mediterranean nations, the association seeks to foster full participation in this integration process.

Any Latin American country may join the 1980 Treaty of Montevideo. On July 26, 1999, the Republic of Cuba formalized, in Uruguay (the administrative center of the Association), its accession through the Accession Agreement, thus becoming the twelfth full member on August 26, 1999.

The ALADI also widens its reach to the rest of Latin America through multilateral ties or partial agreements with other countries and integration areas within the continent.

It likewise provides for horizontal cooperation with other integration movements around the globe and partial initiatives with other developing countries or their respective integration areas outside Latin America.

The ALADI legal framework allows for dynamic sub regional, pluri-lateral and bilateral integration agreements, which increasingly appear in the continent (MERCOSUR, Andean Community of Nations, etc.).

Consequently, as the institutional and normative “umbrella” of regional integration, the Association aims to support and favor every effort in order to create a common economic area.[42]

[42] Source: ALADI.

WTO – World Trade Organization

(a) Overview

Founded in 1994 and headquartered in Geneva, Switzerland, the WTO (World Trade Organization) was the successor of the General Agreement on Tariffs and Trade (GATT) established in the post-World War II panorama. It was a time of significant change in world order; when the IMF, World Bank and the United Nations were also created.

The aim of the WTO is to deal with the regulation of trade between countries. The primary function of the WTO is to foster trade worldwide, be a forum for such commercial transactions and help resolve economic dispute between members.

(b) Regulatory principles

The WTO regulatory framework is detailed in the GATT (General Agreement on Tariffs and Trade), as well as in its general principles, which are as follows:

- Non-Discrimination: basic rule that bars differentiated treatment between domestic and imported products, when the objective is to discriminate against the imported product in detriment to competition with the domestic product.
- Predictability: ratification of tariff commitments for goods and list of services being offered, in addition to other provisions under the WTO regulation that seek to curb abuse by countries to restrict trade, thus ensuring trade operators' access to market information;
- Fair competition: fair trade, which prevents unfair commercial practices, such as dumping and offering subsidies, which distort trade conditions between nations;
- No restrictions on quantities: bars countries from setting limits on quantities of imports (trade prohibitions and quotas) as a protection mechanism. The only protection mechanism allowed is the application of tariffs, given that it is the most transparent;
- Special and differentiated treatment for developing countries: developed countries will forgo their right to reciprocity in tariff negotiations. WTO Agreements in general offer developing countries more favorable treatment.

It is worth noting that in Brazil the establishment of commercial protection measures against foreign countries is incumbent upon the Secretariat of Foreign Trade (SECEX) and its Antitrust Department (DECOM).

After filing the respective administrative proceeding, these bodies may issue a final report requiring the implementation of a provisional or definitive measure vis-à-vis the exporting country, seeking to preserve the domestic market. Companies from countries that export to Brazil may therefore be subject to local investigation, which may in turn impact their commercial interests; however said investigation is always carried out in compliance with the due process of law.

In effect, the WTO created a Dispute Settlement system, often referred to as "WTO's unique contribution to the stability of the global economy".

Brazil itself has already obtained a number of victories with WTO's Dispute Settlement body, as was the case brought against the US regarding gasoline dispute panel, and more recently the sugar complaint against the European Community and cotton dispute against the US.

Foreign Trade Agreements

The agreement for international sale of goods is the most executed legal instrument between exporters and importers, once it represents the most common type of trade transaction carried out between different countries.

Thus, international bodies have employed much effort in an attempt to unify rules applicable to foreign trade. Currently the legal instrument that is most accepted internationally is the 1980 Vienna Convention (Convention on contracts for the International Sale of Goods), adopted at diplomatic conference held April 10-11, of that very year in the city of Vienna.

Although Brazil and other countries such as Portugal and the United Kingdom have not ratified the mentioned Convention, its importance is not only derived from the ratification by eleven countries as it came into force, early 1988, but also because it has been subsequently acceded by a number of nations.

Much in the same way as Brazilian law (please refer to chapter on agreements), the Vienna Convention establishes that the exporter's basic obligation is to deliver the goods pursuant to the quantity, quality and description specified in the agreement, submit any documents related thereto and, lastly, thereby transferring ownership of the goods.

On the other hand, the importer is required to pay the price according with the amount, place and deadline specified. Furthermore, the importer is required to inspect and receive the goods within the shortest timeframe possible, otherwise it may lose the right to claim any lack of conformity if it does not inform exporter within a reasonable time after he has discovered it or ought to have discovered it, or within, at most, two years from the date when the goods were effectively handed over thereto, unless this time-limit is inconsistent with the contractual period of guarantee.

In general terms, remedies available for importers and exporters in the event of a contractual breach are basically the same and they include, by and large, demanding specific performance established in the agreement; terminating the agreement; and filing claim for losses and damages.

The importer may, in the case of violation of the respective agreement by the exporter, demand that goods that are not in compliance with specifications be replaced; grant an extension in deadline for exporter to fulfill its obligations; or reduce the price of goods proportionately to the difference between the price of the goods effectively delivered, at delivery, and the price goods in compliance with the agreement would have.

Other relatively common international agreements that may be mentioned within this context include: commercial representation or agency, distribution, service and joint venture agreements.

Payment terms

(a) Advance payment

Payment method whereby importer pays exporter in advance, part or all, of the contract price prior to the shipment of the goods.

Although this method implies a certain degree of risk of default, which may be minimized through bank guarantees, for example, advance payments are usually used to cover, beforehand, potential expenses exporters incur in manufacturing the goods to be exported.

(b) Open account

Open account payment consists in the delivery of customs documentation by exporter directly to the importer, so that the latter may carry out payment after clearance of the goods at destination. Despite also implying in a certain amount of

contractual risk, this payment method is commonly used because of the convenience it gives the importer in clearing the goods, as well as the fact that it reduces costs that would be otherwise incurred as finder's fees.

(c) Cash Payment or Draft Payment

In general terms, this payment method may be described as follows: exporter, after having arranged the shipment of the goods to the importer and sent customs documentation, also sends a bill of exchange (also referred to as draft) to the remitting bank, which receives from drawer (exporter) the details of the outstanding collection to be made. The remitting bank then forwards the documentation to the collection bank, which in most cases also carries out the function of the presenting bank; being the latter responsible for charging the importer (drawee).

The importer (drawee) pays the amount set forth in the agreement, and subsequently receives the documentation required for the clearance of the goods. The payment then follows the reverse path in relation to the documentation, and it is incumbent upon the remitting bank to transfer the amount received to the drawer (exporter), after receiving from the collection bank the respective cash transfer.

(d) Documentary credit

Documentary credit (or letter of credit) is one of the safest payment methods adopted in international trade transactions. In this type of payment, the importer (payor or borrower) requests its bank (issuing bank) to issue a letter of credit in favor of the exporter (beneficiary), giving the latter the possibility of obtaining the amount specified in the letter from the advising/confirming bank (generally indicated by the beneficiary, it is responsible for confirming receipt of the letter of credit), provided that the documents required in the same letter are delivered.

Please note that since the confirming bank conducts a detailed and formal analysis of the documents submitted in order to authorize or deny withdrawal of the credit granted, it undertakes the responsibility of honoring the payments of the amount, on behalf of the importer.

Guarantees

(a) Bid bond

Also referred to as tender bond or tender guarantee, this instrument, under the terms of CCI Publication No. 325, article 2, item a, is a written obligation undertaken by a bank, an insurance company or another third party (the guarantor), or issued according to instructions of a bank, an insurance company or another third party, given under the order of a party who takes part in the tender (the ordering party), for the benefit of the party who called the tender (the beneficiary), by which the guarantor undertakes, in the event of non-fulfillment by the ordering party of the tender conditions, to pay the beneficiary, within the caps of the agreed amounts.

This type of guarantee seeks to protect the beneficiary if the bidder withdraws or cancels its offer or does not sign the agreement object of the tender, and in general the object thereof is to guarantee payment of a certain percentage of the total agreement price.

(b) Performance bond

Also referred to as performance guarantee, according to item b of the aforementioned CCI Publication, it represents a obligation undertaken by a bank, an insurance company or another third party (guarantor), upon the order of a supplier of goods or services or any other contracting party (the ordering party), or according to instructions received from a bank, an insurance company or another third party, upon request of the ordering party (institution that provides instructions), for the benefit of a buyer or contracting party (beneficiary), by which guarantor undertakes to pay beneficiary, within the caps established, or, if so determined by the terms of the guarantee and at the guarantor's discretion, to require performance of the agreement in the event of non-fulfillment by ordering party of its obligations undertaken in the agreement executed by and between the grantor and the beneficiary (the agreement).

This type of guarantee is generally used in long-term agreements, and the objective is to provide a guarantee in the event of failure to comply with the terms of the agreement.

(c) Repayment guarantee

Repayment guarantee, also known as an advance payment bond, repayment bond, repayment guarantee or refundment bond, represents a commitment undertaken by a bank, an insurance company or another third party (guarantor), upon request of a supplier of goods or services or any other contracting party (the ordering party), or according to instructions received from a bank, an insurance company or another third party, upon request of the ordering party (institution that issues instructions), for the benefit of the buyer or contracting party (beneficiary), according with CCI Publication No. 325, article 2, item c.

Guarantor undertakes to make payment to beneficiary of any amount paid in advance or paid by beneficiary to the ordering party and not yet reimbursed, within the caps of the agreed amounts, in the event of the ordering party's failure to comply with the obligation to reimburse, under the terms and conditions of the agreement executed by and between the ordering party and beneficiary.

(d) Standby letter of credit

The objective of a standby letter of credit is to ensure fulfillment of contractual obligations; an interesting alternative given that it is not only a payment method, but also a letter of credit for contractual performance.

It is the same as a bank guarantee issued by a bank, upon request and according with instructions of payor or in its own behalf, which ensures payment to seller or service provider upon presentation of documentation previously established and fulfillment of credit terms and conditions.

Standby letters of credit are provided for in the ICC Uniform Rules for Demand Guarantees, specified in CCI Publication No. 458.

Insurance

As a general rule, clauses contained in international trade agreements establish the type of insurance to be taken out, the respective coverage, the one who will bear such costs, the risks to be undertaken by the exporter and by the importer, etc.

In reality, there is a wide range of international insurance policies directly related to international trade agreements, especially in regard to the purchase and sale

of goods, international transportation of goods, insurance coverage against operational liabilities, export credit insurance, among others.

One of the most common international trade insurance provides coverage for cargo transportation from the exporting country to the importing country. This type of insurance can be broken down into a number of sub-fields, such air transportation insurance, luggage insurance, lake and river transportation insurance, sea transportation insurance, ship-owners liability insurance (cargo), etc.

Likewise, the risks to be covered by the insurance company for the benefit of the policy holder, as well as the respective costs, in general, will depend on the requirements and interests of the contracting party, which may underwrite insurance or accept policies with greater or lesser guarantees, which, consequently, will provide more or less comprehensive risk coverage.

It is worth noting that in Brazil air transport insurance rates are established by IRB Brasil Resseguros S/A (IRB), by way of instructions provided for non-tariffed insurance, and for international import shipment the rates specified in the Minimum Rate Table of International Travel Insurance in effect are applicable.

Individual travel insurance is regulated by agreements between insurance companies and according with legislation issued by Brazil's Insurance Regulatory Agency (Susep), and is also governed by the international treaty signed within the scope of the MERCOSUR agreement, dubbed the International Surface Transport Agreement of the Southern Cone countries.

Lastly it is also worth mentioning the export credit insurance, developed with the objective of securing Brazilian exports of goods and services against political, commercial and unforeseen risks that may be prejudicial to economic and financial transactions associated with these operations.

VIII. Taxes

Overview of the Brazilian Tax System

The Federal Constitution distributes the responsibility of taxation between Federal, State, Federal District and municipal administrations, ensuring that each one of these federative units have the power to demand tax payment.

In Brazil taxes are subdivided in the following categories: taxes, charges, improvement charges, compulsory loans; and special contributions.

Tax revenues are not linked to any service subsequently rendered by government. These are taxes whose respective taxable event do not depend on any specific government activity.

Fees are collected based on fiscalization/police authority (administrative charges) or as result of a specific and individualized public service rendered or made available to Brazilian citizens (service fee).

Improvement contributions (non-recurring charges) are charged to cover public works that increase real estate value. Special contributions are taxes established by the Federal Government, not associated to any specific taxable event, but instead for a specific end – social security, healthcare, professional class entity interests, intervention in the economic domain, etc.

Compulsory loans are taxes established by the Federal Government with the enactment of a Complementary Law, levied in the event of public calamity, international war or imminence of war, and public investment of a urgent and relevant nature.

Each unit in the federation has limited authority to enact tax legislation, as follows:

Federal Taxes

The Federal Government may legislate in regard to: taxes levied on any type of income and gains (IR); export tax levied on national products (IE); import tax levied on foreign products (II); tax levied on credit, exchange and insurance operations, or

related to securities and bonds (IOF); excise tax on manufactured goods (IPI); tax on rural real estate (ITR); wealth tax (IGF); Special contributions; Fees; Improvement Contributions; and, new taxes.

(a) Taxes levied on any type of income and gains (IR)

The taxable event for income tax to be levied is the acquisition of funds or legal title to income arising from equity, labor or the combination of the two, of type of earnings, pursuant to article 43 of Brazilian Tax Code.

Individual income tax (IRPF) is levied on income received by individuals residing in Brazil from either national or foreign entities, at a rate ranging between 15% and 27.5%, according with the tax base calculation value. A single rate of 15% is used to tax capital gains.

Some international tax, fiscal and accounting concepts/principles are different or nonapplicable in Brazil, as for example with the consolidated filing of income statement for economic groups.

Corporate income tax (IRPJ) is levied on profit and capital gains arising from activities carried out in Brazil or abroad. The tax calculation base for legal entities is either the taxable profit or assumed profit, or in cases provided by law, court-determined profit (Decree No. 3.000/99 – Income Tax Regulation).

One must not confuse taxable profit (*lucro real*) with net profit, given that the latter is an accounting value calculated according to rules established in specific legislation, i.e. Law No. 6.404/76 (Corporate Law). Taxable profit, the IRPJ calculation base, is obtained after a series of deductions, exclusions and compensations provided in fiscal legislation, which are not the same as the ones provided for in legislation dictating net profit. Thus, based on the ascertained net profit, which is calculated applying the accounting method, and after the legal deductions, exclusions and compensations have been made, is that one identifies the taxable profit.

A company whose annual revenue is less than R$48,000,000.00, may opt to adopt the more simplified taxation system, referred to as assumed profit (*lucro presumido*), provided that it does not fall under any of the statutory exceptions (some exceptions include mortgage companies and companies partially held by the government). The tax calculation base is determined by multiplying a percentage, defined according to the activity carried out by the company, by the revenue.

Court-determined profit is used as the calculation base when a legal entity that

previously used the taxable income system no longer fulfills its accessory obligations, when calculation base is determined in a fraudulent manner, information submitted to tax authorities is false, that is, when one is unable to determine taxable profit or assumed profit.

The current income tax rate in effect is 15%, regardless of the activity a company performs. An additional 10% income tax is applied on the portion of the profit (taxable, assumed or court-determined) that exceeds the amount obtained from multiplying R$20,000.00 (twenty thousand reais) by the number of months in the calculation period (Law No. 9.430/96, article 2, paragraphs 1 and 2).

Corporate income tax (IRPJ) is levied on a quarterly basis, and the taxpayer under the taxable profit system may opt to ascertain the tax owed on an annual basis, however making monthly advance payments. In the quarterly payment method, the taxable event is the end of each quarter, and, annual payment method, the taxable event is December 31, of each calendar year.

Withholding income tax (IRRF) is levied, among other cases, on the amount paid, credited, remitted or given to nonresidents as (i) interest accrued on loans and royalties remitted abroad; (ii) earning arising from capital market investments; (iii) commissions and other bonuses; and (iv) disposal of foreign investments. IRRF is levied at a rate of 15% or 25% according with the nature of the income and the country where the beneficiary resides.

Dividends based on profits ascertained as from January 1, 1996, paid or credited by companies are not subject to income tax – be it withholding or income statement –, regardless if they are paid to individuals or legal entities domiciled in Brazil or abroad.

(a.1) Transfer pricing

Rules on transfer pricing seek to annul international commercial practices that attempt to allocate profitability of economic groups in different countries, according to the tax burden.

Certain rules were introduced, as from January 1, 1997, to income tax legislation to regulate transfer pricing in transactions carried out between Brazilian individuals and legal entities with foreign parties, in relation to import, export and payment of interest abroad.

Such rules apply to transactions carried out by Brazilian companies that do business with parties abroad and Brazilian individuals or legal entities that transact with parties, whether they are affiliated or not, domiciled in countries where taxation on income is less than 20%, doesn't exist or whose legislation allows for secrecy regarding participation in capital or ownership of company.

(a.2) International Treaties

Brazil is signatory to a number of International Tax Agreements/Treaties as to avoid double taxation. Brazil currently has valid agreements with the following countries: South Africa; Argentina; Austria; Belgium; Canada; Chile; China; Korea; Denmark; Ecuador; Spain; Philippines; Finland; France; Hungary; India; Israel; Italy; Japan; Luxembourg; Mexico; Norway; the Netherlands; Portugal; Slovac Republic; Czchec Republic; Sweden; and, Ukraine.

In general, in the event of any disagreement/difference between a provision of an international treaty and domestic legislation, the provision contained in the international treaty will prevail, unless in benefit of the taxpayer, such as when domestic law determines the application of lower rates than those specified in the respective treaty.

(a.3) Tax incentives

A number of income tax incentives exist as to attract new projects to Brazil. International investors have practically the same access to such incentives as local investors.

Tax incentives are common in Brazil and are generally provided in the form of financing with subsidized interest rates, tax exemptions or lowering taxes, instead of cash donations.

At the state and municipal level, which have more specific objectives, such as increasing employment in the region, generally local administrations offer tax exemptions or deferment of indirect taxes or taxes levied on property under its jurisdiction, and they also help potential investors obtain access to federal programs.

(b) Excise tax on manufactured goods (IPI)

Excise tax on manufactured goods (IPI) is levied once the good is transported out of the facility in the case of imports and upon a successful bid of apprehended industrialized

products. A manufactured good is deemed to be one that has undergone any type of processing that changes its nature or end purpose, or improves it for consumption.

The calculation base for the tax is:

- importation of a manufactured good – the value that is used or will be used for the customs tax calculation base, upon customs clearance, plus the total of these taxes and exchange rate charges effectively paid, or owed, by the importer;
- auction of apprehend or abandoned products – hammer price;
- other operations – price of the operation that generates the taxable event, represented by the product value plus freight and other additional expenses incurred by the buyer or recipient.

The rates are proportional and vary according with the nature of the product; the most common rate is 10%, and may increase or decrease through presidential sanction. IPI is not levied on exports.

IPI is a tax levied on the added value; it must be recorded in the product tax credit and debit journal (*livros de entrada e saída*), in which the amount owed is calculated, as result from the difference between the credits related to the entry of raw materials and feedstock, and debits related sale of products. However, said mechanism does not apply to fixed asset credits.

(c) Tax on Financial Transactions (IOF)

IOF is levied on the total amount of transactions in gold, credit, exchange, insurance and securities transactions carried out by financial institutions. Authorities may demand payment of the tax in the same fiscal year of the Law that established such tax or Decree that determines the increase thereof. The tax rate varies depending on the type of transaction carried and it may vary between 0% and 25%, being understood that certain operations have a 0.38% surcharge.

(d) Import Tax (II)

Import Tax (II) is a tariff levied upon the entry of foreign products in national territory. The calculation base is determined according with the type of rate used, i.e. specific or *ad valorem*. When using a specific rate, the calculation base is determined by the amount of goods, expressed in a specific measurement unit value by the tariff. When ad *valorem rates* are used, the calculation base is the customs value determined

according to the principles set forth in article 7 of the General Agreements on Tariffs and Trade (GATT).

The rates are established in the Common External Tariffs (TEC), which is based on the Mercosur Common Nomenclature. According to the Mercosur Treaty all Member Countries must apply the same tariff on the import of products from third party countries. The rates applied to Mercosur Member Countries is 0%.

(e) Export Tax (IE)

Export Tax (IE) is levied on Brazilian export products and is paid when the transaction is registered in the Integrated Foreign Trade System (SISCOMEX). The government, seeking to promote exports, seldon levy this tax. This tax is used to control foreign trade and the government is able to establish rates depending on Brazil's economy, currency balance and domestic market demand.

Only the following products are currently taxed: (i) cigarettes purchased by South and Central American countries; (ii) certain types of animal fur and skins purchased by any country; and (iii) weaponry.

The tax is levied by the normal export price. This price is equivalent or similar to the price practiced in a free and competitive market: it may not include other taxes and financial costs.

State and Federal District Taxes

The states and Federal District may legislate in regard to: Taxes levied on circulation of goods, interstate and inter-municipal transportation, and telecommunication services, (ICMS); Motor Vehicle Tax (IPVA); Inheritance and donation tax (ITCMD); Fees; and Improvement Contributions.

ICMS is the main state tax and it is levied on each transaction – legal operation or business whereby there is a transfer of goods or rights – in which there is circulation and sale of goods, including imports, on interstate and inter-municipal transport and communication services. ICMS is a tax levied added value, which allows taxpayers to use tax credits paid on the purchase of raw materials, processing materials and packaging. The credits related to fixed assets only benefit from this in certain cases.

It is worth noting that (i) sale of company assets; (ii) sale of goods for export; (iii) resale of goods with ICMS withheld at the source; and (iv) transportation of the

company's own cargo, do not incur ICMS tax.

ICMS calculation base varies according with the taxable event; for transport and communication transactions, it is the price of the service; for sale of goods, it is the value of the total operation; and, for imports it is the value of the good plus II (import tax), IPI (tax on manufactured goods), IOF (tax on financial transactions) and other customs charges.

Rates levied within the states vary between 7% and 25% (the average rate levied is 18% in the states of Rio de Janeiro, São Paulo, Minas Gerais and Rio Grande do Sul, and 17% in other states and the Federal District); rates levied on interstate operations are 7% or 12% depending on the destination. ICMS is not levied on exports.

Municipal Taxes

The municipalities and the Federal District may legislate in regard to: Taxes levied on municipal real estate (IPTU); Taxes levied on the conveyance of real estate (ITBI); Taxes levied on services (ISS); Fees; and, Improvement Contributions.

ISS is the main municipal tax. It is levied when services are rendered, as specified in Complementary Law No. 116/2003. The minimum rate is 2% and the maximum is 5%.

This tax is generally levied on the total gross value of the service. However, certain types of services rendered by what is referred to liberal professional companies (such as law firms) the tax is calculated in a different manner; the rate is based on the number of professionals that work at the company.

Special Contributions

The federal government may levy special contributions specifically to finance the administration activities in certain situations established in the Federal Constitution (CF), which allows it to demand the following:

Social Contributions

The objective of social contributions is to finance social security services. Brazil has the following social security contributions:

(a) Social Contribution Tax on Net Income (CSLL)

CSLL is levied on net income of the company prior to income tax and after adjustments for deductible and non-deductible items have been made. CSLL rate is 9%.

Law No. 10.637/02 established a tax compliance bonus. This bonus is a 1% reduction of the CSLL calculation base for taxpayers who have complied with their tax obligations, both in the taxable or assumed profit systems, in the past five years.

(b) Social Integration Program Contribution (PIS)

PIS is levied on a monthly basis, it is calculated based on gross sales of goods and services, and there are three ways of calculating the contribution. In the cumulative system, PIS is levied on monthly gross sales at a rate of 0.65%. In this case, PIS accumulates whenever there is a sale or service is provided.

Additionally, there are specific rules which apply to certain types of products such as perfumes, cosmetics, medicine, oil and gas, vehicles and auto parts. For these products, an antievasion rule established the responsibility of the importer of the products to pay PIS levied throughout the entire production and sale chain. This rule is referred to as *regime monofásico* (loosely translated as single taxpayer liability).

Lastly, the non-cumulative system whereby the rate 1.65%, allows taxpayers to deduct from the contributions all credits arising from the use of the same rate in products acquired for resale or as a processing material to be eventually sold or rendering of services, as well as in financial, depreciation, lease or other expenses caused by other legal entities.

This calculation method is applicable to legal entities in general, except financial institutions, credit securitization companies, companies under the "SIMPLES" taxation system, companies under the assumed profit taxation system, as well as income from activities subject to single-taxpayer liability, which is subject to PIS payment as previously set forth, at a rate of 0.65%, in lieu of higher rates.

(c) Social Security Financing Contribution (COFINS)

COFINS, just like the PIS contribution, is also levied on a monthly basis, calculated at a 3% rate based on gross sales of goods and services.

Moreover there are similar rules related to the single taxpayer and non-cumulative systems. The COFINS rate for companies under the non-cumulative system jumped from 3% to 7.6% and, just like PIS, companies are allowed to offset

some credits with COFINS debits.

(d) Social Security Financing Contribution (COFINS) and Social Integration Program Contribution (PIS) levied on the import of goods and services

COFINS-Import and PIS-Import are levied on the customs value of the goods or service price, including the contribution themselves, at the rate of 7.6% and 1.65%, respectively, or specific rates in certain cases.

Companies under the non-cumulative system are allowed to offset PIS and COFINS paid on their imports with PIS and COFINS accumulated on earnings.

(e) Social Contribution on Payroll (CINSS)

Employers must withhold 11% of employee salary and pay CINSS in name of their employees; free-lancer pay 20%; in the case of employees, the contribution calculation base is set at a cap of R$3,218.90 – which is adjusted on a monthly basis since January 2004. Companies pay 20% CINSS on payments made to free-lancers for services they render, contribution thereof has no cap.

Contribution for Intervention in the Economic Domain (CIDE)

CIDE is levied on specific activities, in order to allow the government to intervene in specific areas of the economy. CIDE/Fuel is levied at specific rates on the import and sale of fuel in the domestic market; and CIDE/Remittance is levied on the value of the remittance abroad, for royalty payments, and any payment for technology transfer, at a rate of 10%.

Brazilian Corporate Taxes

Brazilian legislation has identified a few taxable events in a company, whereby collection for some of these taxes are incumbent upon the government. Companies conducting business in Brazil, with certain exceptions, incur taxes at the following taxable events:

- Having **profit**, more specifically Net Profit, approximately 34% is transferred to the federal government as IR and CSLL;

- **Added value** – the difference between the purchase/sale – between 20% and 35%, is transferred to the federal and state administration as PIS/COFINS/ ICMS/IPI, the exact percentage varies depending on the product and its respective rate;
- **Revenue**, the total income, approximately 3.65% as PIS/COFINS in commercial and manufacturing companies, and for service providers, including ISS, up to 5%;
- **Payroll** – total paid to employees and third party free-lance contractors –, approximately 28%, at the expense of the company alone, as social security contribution, plus 8.5% for FGTS, in addition to contributions made by the employee him/herself;
- **Imports** – purchase of goods from abroad is subject to PIS/COFINS/IPI/ ICMS/IOF/II, the exact percentage varies depending on the rate of each tax specified herein;
- **Financial operations** are subject to IOF/IR taxes, through withholding;
- **Real Estate Property**, both acquisition as well as sale, lease or simple ownership of real estate property incur IR/PIS/COFINS/IPTU/ITR;
- **Directors compensation**, taxation will depend on the manner in which compensation is to be paid. As a general rule directors will be subject to income tax (IR) and social security contributions (INSS);
- **Exports** incur practically no taxes, in exceptional cases, government authorities may levy export tax (IE)

IX. Labor Laws in Brazil

Labor legislation in Brazil, especially the Consolidation of the Brazilian Labor Laws enacted in 1943, was conceived at a time when economic and social inequality was very much a reality. State intervention, through the ratification of imperative, mandatory and unrenounceable legislation, was required in order to ensure that employee basic rights were upheld.

A number of principles have since been established as the underlying basis in protecting labor-management relations, which are only classified as such if they have the following characteristics: (i) non-transferability of work – an employee may not stand in as a substitute in the performance of duties of another employee; (ii) regularity – an employee must recurrently perform his duties throughout the time of his/her employment; (iii) onus of payment – an employee must receive compensation in consideration for the work performed and, (iv) subordination – the employee must comply with the rules and structure imposed by the company.

Unrenouceability of rights, protection and application of the most favorable rule are essential principles within Brazilian Labor Law, all of which are based on employees' weaker position.

The principle of unrenounceablity simply means that no employee is allowed to waive his/her rights. It is precisely in view of this principle that labor legislation is, as a general rule, imperative, statutory and limits free will to a certain degree.

In turn, the principle of protection seeks to correct any inequalities that may exist between parties. The objective is to try to remedy inequalities by creating legal framework that favors employees, in view of their vulnerability in relation to their employers.

The principle of the most favorable rule allows employees to enjoy the most favorable condition regardless of his/her position.

The 1988 Federal Constitution, the Consolidated Brazilian Labor Laws, a few other laws and collective labor regulation (*normas coletivas de trabalho*) – referred to as collective bargaining agreements executed between unions representing a certain class of employees and unions representing the corresponding employer's class or the employer itself – are currently the primary source for labor legislation.

Detailed below are the minimum legal requirements employers must abide

by in Brazil. Please note, however, that other obligations may be established through collective bargaining agreements, which in general, are valid for one year.

Hiring Employees

When hiring employees companies are required to comply with a number of formalities, such as registering them in the company's employee book or on government-authorized employee registration forms, as well as making annotations in their Work and Social Security Record (CTPS).

Employment agreements may be verbal or written (preferably written), may be valid for a definite or an indefinite term; however they may not be unilaterally amended by the employer. Even when mutually agreed amendment is made, it must not be prejudicial to the employee, otherwise the agreement may be deemed null and void.

Employment agreements valid for definite terms may be entered, and they, as well as their respective maximum terms, are expressly provided for in labor legislation.

Typically, an employment probation contract is entered into for a definite term, which by law cannot exceed 90 (ninety) days. At the end of this period, the employment agreement is deemed to be legally terminated if the employee ceases to work for the company.

However, if the employee continues to work for the employer, at its will, the probation contract is automatically converted into indefinite term employment agreement. If the employer terminates employment without just cause, the company will be required to pay all severance amounts as provided by law or collective bargaining agreement, as detailed ahead.

Working Hours

Brazil's Federal Constitution establishes a maximum work day of eight hours and a maximum work week of 44 hours. However, employers may, through collective bargaining agreements or individual employment agreements, establish a compensatory time work arrangement so that overtime worked on any given day may be offset by correspondingly decreasing working hours within the same week.

Any organization that employs more than 10 (ten) employees is required to keep a written record (be it electronic or manual) of working hours of each employee,

except for employees who work externally and are unable to keep such record (employees in field services, for example) and management level staff (managers, department heads, and officers).

Hours exceeding the maximum work day established by law, that is up to the limit of two hours per day, and that have not been compensated, will be deemed to be overtime and must be accordingly paid, at a minimum rate of time and a half of the employee's regular hourly rate.

Furthermore, any compensation for work carried out between 10 pm of one day and 5 am of the next day must include a minimum 20% extra as night shift pay.

The time an employee spends commuting to and from the workplace and his/her residence, when the transportation service is provided by the company if no regular public transport service exists, must be included in the employee's working hours given that the employee is at the employer's disposal.

Amounts that may be paid by a company as overtime must be included when computing employees' remunerated weekly day off, which as a general rule, should fall on a Sunday.

Salaries

Salary is the amount paid to an employee by the company in consideration for the work performed. It is comprised of a base fixed amount, certain benefits offered by the employer, commissions, allowances, bonuses, awards, and daily extras that exceed 50% (fifty percent of an employee's base salary).

Extras paid on a recurring basis have also been deemed to be part of an employee's salary. Extras may include additional pay for overtime, night shift work, unhealthy or hazardous conditions, and relocation. Relocation compensation may only be computed as salary in specific cases defined by law.

Some benefits provided by employers, such as, clothing and equipment supplied in order to perform services; education; transportation to and from the workplace; health care plan; life and personal accident coverage; and, private pension funds, are not classified as salary in nature. This differentiation is extremely important, once both taxes and contributions, whether they are employee withholdings or paid with employer's own funds, are levied solely on compensation that is classified as salary.

Companies are mandatorily required to offer subsidized transportation

vouchers, known as *vale-transporte*, to all employees who use public transportation for their commute to and from the workplace and their residence. Employers must purchase the vouchers from specific governmental bodies and may require employees to contribute, up to 6% (six percent) of their base salary, by directly deducting the respective amount from their payroll.

Salary pay periods cannot be longer than 30 days. Employee salaries must be paid in Brazilian legal tender and cannot be lower than the minimum wage in effect. Since March 2008 the federal minimum wage has been R$415.00 (four hundred and fifteen Brazilian reais) per month and the minimum wage in the state of São Paulo is R$450.00 (four hundred and fifty Brazilian reais) per month; these values may vary for specific occupations.

Employers are expressly prohibited from decreasing employees' salaries, except in special situations, however only upon entering a collective bargaining agreement.

Employers are strictly forbidden from paying individuals doing the same work different salaries. If this occurs, the employee receiving the lower salary for essentially the same work will be entitled to an increase until they have equal pay.

Taxes and contributions levied on salaries

To subsidize the cost of the Brazilian Social Security System (*Instituto Nacional do Seguro Social* – INSS) employers are required to contribute, on a monthly basis, the equivalent amount of twenty percent (20%) of the total payroll. In addition to salaries paid directly by the employer, other amounts rewarded for services provided, even if paid by third parties, such as tips, are included in the total payroll figure.

Employers are also required to make contributions, calculated based on their total payroll, in favor of entities referred to as "third parties" in the payroll, i.e. 1.5% to SESI, 1% to SENAI, 1.5% to SESC, and 1% to SENAC.

Additionally, companies are required to pay a contribution to subsidize the cost of allowances granted as a result of occupational injury arising from workplace risks and early retirement; the percentage varies between 1% and 3% and, as from September 1, 2009, this percentage may vary between 0.5% and 6%.

On the other hand, employees also have social security (INSS) contributions and Withholding Income Tax (IRRF) deducted from their paycheck. Percentages deducted from employee paycheck vary in accordance with the tables below:

Social Security Contribution	
Monthly contribution salary (R$)	***INSS Deduction (%)***
Up to 965.67	8,00
From 965.68 to 1,609.45	9,00
From 1,609.46 to 3,218.90	11,00
Interministerial Directive No. 48, dated February 12, 2009	

Source: www.mpas.gov.br

Withholding Income Tax		
Monthly base salary for calculation (in R$)	***%***	***Amount to be deducted from tax (in R$)***
Up to 1,434.59	-	-
From 1,434.60 to 2,150.00	7.5	107.59
From 2,150.01 to 2,866.70	15.0	268.84
From 2,866.71 to 3,582.00	22.5	483.84
More than 3,582.00	27.5	662.94

Source: www.receita.fazenda.gov.br

Severance Fund – FGTS

In addition to paying employees' salaries, employers are required to deposit, on a monthly basis, an amount into an account in the employees' names for this specific purpose, referred to as the Severance Fund – FGTS.

Employers are required to deposit the equivalent of 8% (eight percent) of the employee's salary, in addition to 0.5% (half a percent) as social contribution. This is likewise applied to the amounts paid to the employee as prior notice and 13th salary bonus.

If an employee is terminated without just cause, the employer is required to deposit a severance fine equivalent to 40% (forty percent) of the total amount deposited in the respective employee's FGTS account and also pay 10% (ten percent) as social contribution.

Vacation

Every employee is entitled to 30 (thirty) days of vacation after having worked for a 12- (twelve) month period. Employees are entitled to their vacation in the 12 (twelve) months following the vacation accrual period and must receive their regular pay plus an additional 1/3 (one-third) of their salary.

If, for any reason whatsoever, the employee is unable to take this time off within 12 months after the accrual period, the company must pay twice the corresponding amount.

13th Salary Bonus

The government mandated 13th salary bonus, also known as a Christmas bonus, must be paid to all employees by December 20 each year. The amount owed is equivalent to 1/12 of their monthly pay, for each month they effectively worked in the respective year.

Prior Notice

The prior notice is simply the notice given by one party to another, informing the latter that it intends to terminate the employment agreement. It may be given either by the employee or the employer.

The prior notice period may be worked or paid; in the latter the employee is entitled to his/her monthly salary pay.

Temporary tenure

Please find below the main situations where temporary tenure is achieved, in accordance with legislation currently in effect:

(a) Pregnancy: pregnant women are entitled to tenure as from the beginning of the pregnancy up to five months after delivery.

(b) CIPA: any member of the Internal Committee to Prevent Occupational Accidents (Comissão Interna de Prevenção de Acidentes – CIPA) is entitled to tenure

as from the moment his/her candidacy is submitted up to one year after the conclusion of their term, which is also one year. This tenure is also applicable to alternate members.

(c) Union leaders: union leaders are entitled to tenure as from the moment his/her candidacy is submitted up to one year after the conclusion of their term.

(d) Occupational accident or work-related illness: any employee who has been absent from work more than 15 (fifteen) days, as result of an occupational accident or work-related illness, is entitled to tenure for up to one year after he/she has returned to his/her activities.

Employers may not terminate employment of employees who are entitled to tenure, unless for just cause, as detailed below. Otherwise, the employer will be required to indemnify the employee for the remaining period until the conclusion of the respective job tenure.

Termination of the employment agreement

In Brazilian Labor Law there is no provision that bars employers from terminating any given employment agreement. However, there are financial implications related to such termination.

There are four main common types of termination of an employment agreement: dismissal without just cause, dismissal with just cause, voluntary termination (aka resignation) and the conclusion of the term of an employment agreement with definite term.

In the first case – dismissal without just cause – the employer informs the employee of his intention to terminate the employment agreement without having to give any reason for its decision. In this case, the employer must pay the following amounts to the employee: (a) prior notice period; (b) prorated 13th salary bonus for the current year; (c) unused earned and prorated vacation, if any; (d) salary balance for days worked during the month of termination; and, (e) 40% fine calculated on the total FGTS deposited by the company, being understood that in this case the employee may withdraw 100% of the amounts deposited in his/her FGTS account.

The second type of involuntary termination – dismissal with just cause – is

an extreme measure adopted when an employee engages certain activities expressly provided in the Consolidated Brazilian Labor Laws, and in this case the burden of proof falls exclusively upon the employer. The following are cases when an employer may dismiss an employee with just cause: (a) dishonesty; (b) improper conduct or act; (c) recurrently engaging in competitive negotiations in relation to employer core business; (d) conviction; (e) negligence; (f) repeated drunkenness; (g) disclosure of company's trade secrets; (h) disruptive behavior or insubordination; (i) performing any prejudicial act against the honor and goodwill of any person while performing work for the employer; (j) slander against the employer; and (k) continually engaging in gambling.

In this case, the employee will solely be entitled to (a) unused earned vacation; and, (b) salary balance for days worked during the month of termination; being understood that the employee will not be allowed to use the funds in his/her FGTS account.

In the third type of employment termination – employee resignation – the employer must pay (a) prorated 13th salary bonus for the current year; (b) unused earned and prorated vacation, if any; and (c) salary balance for days worked during the month of termination. The employee will not be allowed to use the funds in his/her FGTS account and must give the employer 30 days prior notice.

In the last scenario – conclusion of the term of an employment agreement with definite term – the employee is entitled to (a) prorated 13th salary bonus for the current year; (b) unused earned and prorated vacation, if any; and, (c) salary balance for days worked during the month of termination. The employee may use the funds deposited in his/her FGTS account.

Employment quota requirements

(a) Underage employees

Hiring employees under the age of fourteen is strictly prohibited by the Federal Constitution, unless as apprentices and provided that they are more than twelve years old, under the terms of labor legislation. All organizations are required to employ apprentices.

The employment of minor apprentices and employees under 18 (eighteen) must comply with certain differentiated conditions; for instance they are not allowed to work night shifts, in unhealthy or hazardous conditions, to name a few.

(b) Employing persons with disabilities

Employers with a workforce of one hundred or more employees are required to have in its staff, between two percent (2%) and five percent (5%), persons with disabilities or recovered. Noncompliance with such requirement is qualified as an administrative infraction that may be fined by the Ministry of Labor (MTE).

Other types of employment

(a) Temporary labor

Hiring temp workers is allowed in two cases: exceptional increase in demand of work or to replace a regular or permanent employee. Employers are only allowed to hire a temp employee for a period of three months, through a temp agency that in turn maintains the employment relationship with the temp worker. The mentioned period may be extended in certain situations, as set forth by law, upon written notice submitted to the Ministry of Labor (MTE).

Noncompliance with the requirements established for the hiring of temp services is qualified as an administrative infraction that may be fined by the Ministry of Labor. Additionally in the case of such violation the contracting party of such services may be held fully liable as the direct employer or jointly liable, being ordered to undertake all labor obligations related to the hired temp workers.

(b) Interns

Brazilian legislation allows university students, and students enrolled in technical schools, to work for companies as interns, in their respective field of study, without establishing a formal employment tie. This is permitted as long as certain conditions established by law are complied with; i.e. the need to execute an internship agreement between the student, the university and the company granting the internship, as well as compliance with the maximum work day.

If any legal requirement is not complied with, said breach will be qualified as an administrative infraction that may be fined by the Ministry of Labor. In such a case the contracting party may be held fully liable as the direct employer being ordered to pay all labor and social security taxes and contributions for the period that said intern was employed.

Work environment

Employers must also comply with minimum occupational safety and health guidelines when hiring employees as to safeguard their health.

These guidelines are, in general, published by the Ministry of Labor, in accordance with the type of activity carried out by the employer. These guidelines establish requirements ranging from the supply of Personal Protective Equipment – PPEs to workstation ergonomics.

For instance, all employers are required to implement an Occupational Health and Medical Control Program (PCMSO). The PCMSO encompasses a number of preventive procedures related to personnel health.

Among other measures, the PCMSO determines that companies must require employees to take medical tests, at certain occasions, including: (a) when they are recently hired by the company; (b) periodically (the frequency is directly correlated to the type of activity carried out by the employee); (c) whenever an employee assumes a new position or function; (d) when the employee returns to work, in the event that said employee was absent from work more than 15 (fifteen) days under the INSS; and, (e) upon termination of employment.

This program seeks to identify illnesses contracted by employees as result of their occupational activities, as well as eliminate occupational health risks.

Employers are also required to implement Environmental Risk Prevention Program (PPRA), seeking to preserve employee health and integrity, by identifying, acknowledging, assessing and consequently controlling work environment risks, also taking into consideration the preservation of the environment and natural resources.

Noncompliance with this obligation, in addition to being qualified as an administrative infraction that may be fined by the Ministry of Labor, may result in employer's civil liability for potential damages caused to employees or even third parties.

Unhealthy work premium

Brazilian legislation determines that employees who work under conditions deemed to be unhealthy must receive a premium equivalent to 10%, 20% or 40% of the official minimum salary, depending on the severity of the condition.

Legislation also sets forth that unhealthy work conditions may be reduced or completely removed by providing Personal Protective Equipment; in this case the premium for unhealthy work conditions is not required. It is worth noting, however, that employers will only be discharged from the obligation of paying the unhealthy work premium if they effectively check and demand that PPEs given to the employees be used.

Hazardous work premium

Hazardous work, (i.e. work carried out close to inflammable or explosive products and/or with electricity) must be paid at an additional thirty percent of the employee's salary.

Foreigners working in Brazil

In Brazil, Brazilian citizens and foreigners residing in the country have the same rights, but in order for foreigners to be allowed to work in Brazil they must obtain prior authorization from the Ministry of Labor, through the Immigration Coordination (CGIg).

According with Law no. 6.815/80, the Ministry of Foreign Affairs has the authority to grant seven different types of visas: transit, tourist, temporary, permanent, courtesy, official and diplomatic.

Foreigners who wish to work in Brazil are in general granted, upon authorization from the Ministry of Labor, temporary business travel visas; temporary work visas in Brazil; and permanent work visas in Brazil.

Once a work visa is granted, be it temporary or permanent, the foreigner residing in Brazil is required to, within thirty days as from his/her entry into the country, register to obtain an identity card for foreigners (referred to as *Registro Nacional de Estrangeiros* - RNE). Foreigners must also enroll with the Individual Taxpayers' Registry (*Cadastro Nacional de Pessoas Físicas* - CPF) of the Ministry of Finance, so that they may pay taxes, hold a bank account, invest in Brazil, etc. If employment is based on an employment agreement, the employee must obtain a Work and Social Security Record (CTPS), as well as enroll in the government mandated Social Integration Program (PIS).

Temporary business travel visa

The temporary business travel visa allows a foreigner to enter Brazil to offer products, participate in meetings and seminars, visit potential clients and carry out market research. This type of visa, however, does not allow individuals to carry out any type of work, be it technical or administrative, be it paid or not. Normally, it is granted for periods of up to five years and allows bearers to enter multiple times, for up to ninety days.

Work visas

Work visas may be temporary or permanent. This differentiation will depend on the type of work carried out by the foreigner in Brazil and the manner in which he/she was hired.

In order to decide whether or not to grant a visa, the Ministry of Labor checks the convenience of hiring a foreigner in place of a Brazilian, requiring, for such, that the applicant provide information regarding the his/her professional competence, family, about the company and his/her compensation package abroad.

Employers are barred from hiring foreigners if, by doing so, the number of foreign employees in the company exceeds one-third of the total workforce or one-third of the total payroll cost. Additionally, if the Brazilian company already employs a professional who performs the same function, the foreigner's salary must not be lower than that of the Brazilian professional.

Once the visa has been granted, the foreigner may work solely for the company who hired the employee. If the professional provides services to any other company, even if it is within the same holding of the company who sponsored the visa, he/she will need to obtain another authorization from the Ministry of Labor.

For tax purposes, a foreigner who remains in Brazil for over 183 (one hundred and eighty-three) days, consecutive or not, within a 12-month period, he/she will be considered a resident of Brazil and, therefore, subject to income tax withholding/payment.

(a) Temporary work visa

Temporary work visas are commonly granted to foreigners who come to work in Brazil under an employment agreement. This type of visa has a validity of at most

two years and, thus any employment agreement entered into with a foreigner will be effective for up to two years. The term may be extended for the same amount of time upon request submitted to the Ministry of Foreign Affairs, and based on a new employment agreement.

After having worked in the same capacity for a period of four years, the foreign employee bearer of the temporary work visa may request that it be converted into a permanent visa. The request will first be submitted to the Ministry of Labor and then to the Ministry of Foreign Affairs. Any foreigner who intends to be a director or manager of a Brazilian non-merchant or business corporation should also request the conversion of his/her visa.

Temporary work visas for technical services have some differentiated rules. In general it is granted for a maximum period of one year, and may be extended for the same amount of time, once the parties are able to provide evidence of the need of said services. The parties need not execute an employment agreement in the case of technical services.

In order to obtain this type of visa, the contracting company must confirm the specific need and temporary nature of the technical service, that the activity is unlike the core activities developed by the company and that it depends on highly specialized labor that is not available in the Brazilian work market. The engagement of this type of professional is quite common in the case of technology transfer agreements entered into between foreign and Brazilian companies.

While the technical personnel from abroad render services in Brazil, despite these services being provided without any formal employment tie, said professionals will be entitled to certain benefits provided in Brazilian labor legislation, such as the right to the minimum salary, weekly rest, employer's liability insurance coverage and social security.

In exceptional cases, if the company is able to prove the urgent nature of the technical services to be provided, one may obtain visas for periods of up to ninety days, through a simplified procedure, upon prior authorization granted by the Ministry of Labor.

(b) Permanent work visa

Permanent work visas are granted to foreigners who are going to take managerial positions in Brazil, such as officers, executives, managers or board

members of non-merchant or business corporations, as well as to foreign investors.

In general these visas are valid for an initial term of five years. During this period, the foreigner is not allowed to move from the stated residence, change companies/employers or change his professional activity.

In order to obtain this type of visa, the shareholding company or foreign partner who has appointed the manager to work in Brazil, must be able to prove that it has invested at least US$200,000.00 (two hundred thousand US dollars), for each administrator, or corroborate that it has been able to generate ten new jobs and invested US$50,000.00 (fifty thousand US dollars).

Another case in which permanent work visas are granted is when a foreigner intends to reside in Brazil as to invest his/her own funds in the country. Thus, he/she must provide evidence that he/she has invested, in foreign funds, the equivalent to R$150,000.00 (one hundred and fifty thousand Brazilian reais) or more. In this case, the visa may have an initial term of up to two years.

The permanent visa may also be granted to foreigners married to Brazilian spouses, who have Brazilian children or to join family members.

X. Government Contracts

Administrative Agreements

In general, contracts between private entities (be it national or foreign) and the government is formalized through the execution of administrative agreements. Just like in private instruments, contracts with the government are governed by two basic principles: (i) the agreement defines the law between the parties (*lex inter partes*), preventing the parties to change the terms thereupon agreed, and (ii) the need to comply with the agreed terms (*pacta sunt servanda*).

Additionally, administrative agreements must conform with the principles established in article 37 of the Federal Constitution, which includes the principles of legality, impersonality, morality, disclosure and efficiency.

The entering into contract with the government is subject to certain restrictions and strict formal procedure, such as undergoing tender process prior to the signing of any given agreement.

In Brazil, administrative agreements are governed by Law No. 8.666/93.

(a) Legal system and characteristics of administrative agreements

The legal system of administrative agreements is governed by the principle of supremacy of the government, which determines that private initiative is subject to the government's prevailing authority. It is based on this principle that any given contractual condition may be unilaterally amended, provided that the economic balance is preserved.

Another important principle is the principle of supremacy of the public interest. Thus, government contracts must always be public, certain procedures must be carried out prior to the signing of any contract (i.e. public tenders) and the contractual relationship must abide by strict terms of the law.

(b) Excessive clauses and/or prerogatives imposed by the government

Law No. 8.666/93 ascribes certain rights to Public Administration when entering into contracts with private entities, referred to as excessive clauses[43], which

[43] Set forth in article 58 of Law No. 8.666/93.

allow Government Authorities to carry out certain unilateral measures, such as:

- make amendment to agreements in order to more adequately meet the needs of public interest, observing the economic and financial balance between the parties;
- terminate the agreement in the event of partial or complete noncompliance thereof;
- inspect agreement performance;
- apply penalties arising from partial or complete non-performance of the agreement; and,
- in the case of essential services, temporary appropriation of chattel, real estate property, personnel and services correlated to the object of the agreement, if an administrative proceeding is required to verify potential contractual breach by the contractor, as well as in the event of termination of the administrative agreement.

(c) Contractor Rights and Obligations

The contractor is required to fully comply with the terms agreed to with the government authority, remedying, at its own expenses, any problems arising from the non-performance or inaccuracy of its actions, as well as being responsible for labor, social security, tax liabilities and any other costs arising from the agreement, indemnifying the government authority and/or third parties for any moral or property damages potentially incurred.

Conversely, based on the theory of unpredictability of circumstance, and in view of supervening and unforeseen events that change the initial economic and financial balance of the agreement, the private entity may request to review the agreement entered into with the government. Law No. 8.666/93 expressly establishes that it is necessary to maintain the economic and financial balance of administrative agreements[44].

Currently, this type of request to review terms of an administrative agreement does not need to be ratified in court; contractual amendments may be entered into with the government administration, provided that the latter believes there is just cause to amend the terms originally agreed.

[44] Article 65 - Paragraph 6 In case of unilateral amendment to an agreement that increases the contractor's charges, the government authority must reestablish, through advance payment, the initial economic and financial balance.

Even if the government authority does not acknowledge the need to amend the respective agreement, the contractor reserves the right of filing a claim for indemnification, either at the administrative or judicial level, after it has concluded its work. This is precisely because private entities are not allowed to suspend the performance of an administrative agreement, but they are entitled to subsequently seek indemnification for amounts due by the government.

This provision is an important legal safeguard for contractors, who are therefore not subject to all kinds of impositions by the government authority, provided it is able to demonstrate that a significant and unexpected change occurred in relation to the situation at the beginning of the agreement.

Public Tender Process

Contracts entered into with government authorities must only be done so after a public tender process has been carried out. The objective of the public tender is to select the best proposal submitted – based on the same conditions and compliant with pre-established conditions – by parties interested in executing a contract with the a government authority.

Article 37, item XXI of the Brazilian Federal Constitution establishes that *"projects, services, purchases and disposals will be object of administrative contracts after a due public tender process is carried out; the tender process must provide the same conditions for all tender participants, and include clauses regarding payment obligations, furthermore upholding that proposal conditions must be maintained, under the terms of the law."*

The aforementioned Law No. 8.666/93 regulated article 37 of the Federal Constitution. The main amendments to this law were introduced by Laws Nos. 8.883/94, 9.648/98 and 9.854/99. Article 3 of Law No. 8.666/93 defines the scope of public tenders as follows: *"The purpose of the public tender is to assure compliance with the constitutional principle of isonomy, and select the best proposal for the government authority; the tender must be processed and judged in strict compliance with basic principles of legality, impersonality, morality, equality, disclosure, administrative adequacy, aligned with the tender notice, objective criteria and related principles."*

The basic principles applicable to public tenders are detailed below.

(a) Basic Principles

- *Legality:* according to this principle, activities carried out by the government must comply with legislation in force. Thus the tender process must strictly observe provisions of Law No. 8.666/93, and government officials may not freely change procedures or assessment criteria, unless as established in legal provisions.
- *Morality:* the government administration's actions, not only must observe legal requirements, but also conform to the principles of good morals and ethics, as well as good practices in the management of public affairs.
- *Impersonality:* embodied by the principle of end goal, and correlated with the general principles of isonomy and objective criteria, this principle simply means that administrative actions mush be aligned with specific legal goal, i.e. the objective identified by law. Therefore, public tenders must not apply subjective or personal criteria not specified in the tender notice as assessment criteria.
- *Disclosure:* public tenders are public and any party is entitled to access to the measures and decisions taken by the administration.
- *Alignment with the tender notice:* the criteria, rules and tender conditions, both for participation therein and judgment thereof must be established in the tender notice, being understood that they must be complied with from the onset of the tender to the signing of the administrative agreement. If the need arises to amend any significant item, the entire bid process must be restarted and new bidders will be allowed enter the process.
- *Objective criteria:* related to the previous principle, means that the government administration's decision regarding the winning bidder must be based on objective criteria and on the proposal which best meets the tender notice requirements.

(b) Requirements to participate in public tenders

Any individual or legal entity that meets the requirements established in the tender notice may participate in the public tender. Foreign companies may also participate in tenders, however different procedures are adopted depending whether it is a national or international tender.

In the case of national tenders (object to be executed in Brazil and paid in Brazilian legal tender), the foreign company will be qualified to participate, provided

that it is duly authorized to operate in Brazil, pursuant article 1134 of the Civil Code[45].

For international bids (object to be executed abroad and potentially paid in foreign currency), the foreign company may participate regardless of register or operation in Brazil.

(c) Different types of public tenders

There are seven different types of tender processes and the aforementioned principles are applicable to all of them. However, each has specific rules which are detailed below.

Public tenders include: bidding, request for quote, price survey, contest, public sale, auction and online auction:

- *bidding:* this is the most common type of public tender process adopted, applicable to extremely complex agreements or that involve high amounts. A bidding process is required in the case of purchase or sale of real estate, concession of use, service concession, concession of public works and international bids.
- *request for quote* (RFQ): adopted in simpler tenders that involve smaller amounts. In this case the government authority must request at least three entities to quote; other companies that were not invited may participate, provided that they have previously registered as providers of the good or service object of the bid.
- *price survey:* adopted in tenders involving an average amount of money and with previously registered providers.
- *contest:* a tender process for engaging providers of technical, scientific or artistic services, whereby winners are awarded or paid for services.

[45] "Article 1.134. Foreign companies, regardless of its object, may operate in Brazil without authorization from the Executive Branch, not even through subordinate companies; however, it may be a shareholder in a Brazilian corporation, except for cases set forth by law.
Paragraph 1 The authorization request must be submitted along with the following documentation:
I – proof that the company has been organized under the laws of its country;
II – complete copy of its articles of association or by-laws;
III – list of members of all management bodies of the company, including name, nationality, profession, domicile [of its members] and, except in case of bearer shares, the amount of ownership interest of each one in the company's capital;
IV – copy of the document which authorized the operation in Brazil and establishes the capital allocated to the operations in Brazil;
V – proof of appointment of the representative in Brazil, with express powers to accept the conditions required for the authorization;
VI – last balance sheet."

- *public sale:* objective is the sale of public chattels obtained from seizure or pledge operations, or chattels obtained from lawsuits or payment in kind, which have little or no use for the government authority.
- *auction:* unlike a public sale, the objective of an auction is the purchase of goods or services commonly available in the market. Because of this nature, it may be objectively defined in the tender notice and the goods/services with the lowest price will be purchased.
- *online auction:* this is also a type of tender for the purchase of goods and services at the lowest price; unlike the attended auction, an online auction is used when the participants bid electronically via the internet.

(d) Procedure

Tenders are composed of the following five phases: publication of the tender notice, qualification of participants, examination and classification of proposals, homologation and award.

Publication of the tender notice is the initial phase, whereby the criteria, rules and object of the tender are defined, as well as the deadlines to be met by bidders who intend to qualify to participate in the tender.

Qualification is the second phase, which begins after the deadline established in the tender notice for submission of proposals by the bidders. In this phase, the authority solely assesses if bidders have complied with formal requirements (documentation) established in the tender notice, thus identifying whether the bidder is qualified or not to proceed in the public tender.

The qualification phase is concluded, examination and classification of the proposals, in order of preference according with criteria previously established in the tender notice, begins.

Once proposals have been classified, the parties proceed to the homologation phase, in which the authority immediately above the one which carried out the public tender, assesses the bid process, thus determining the legality of the tender, ratifying the public tender or ordering its partial or complete annulment.

Finally, the same authority that homologates the tender, awards the object of the public tender to the best proposal, authorizing the government body to execute an administrative agreement with the winner.

(e) Administrative Appeals

Please note that private sector companies may appeal measures and decisions taken by government authorities, if the former believes that any of its rights has been violated. The appeal is filed directly against the public authority.

Law No. 8.666/93 also establishes that appeals regarding bidders' qualification or proposal assessment decisions have an injunctive effect, i.e., the public tender will be postponed until the appeal is judged by the government administration.

Public service concession

Having detailed the tender process for government contracts, we deem it important to make some remarks regarding public service concessions. Article 2, item II, of Law No. 8.987/95, refers to the *"delegation of services, by the Granting Authority, based on a bidding tender, to a legal entity or consortium that has demonstrated its capacity to carry out the object thereof, on its own account and risk for a definite term"*.

Although the Federal Constitution determines that public services are incumbent upon the Government, additionally establishing monopolies of said services in certain industries deemed to be strategic, a private entity may be granted a service concessions.

Through a public service concession, the Granting Authority delegates the rendering of such service, with or without construction works, to a private entity (be it a company or consortium), winner of a bidding tender, at its own risk and account.

The winner, which is referred to as the concession holder, must provide concession services in accordance with the principles of the public service, being understood that it may be subject to inspection and intervention by the government administration. In the regulatory law chapter we will make other considerations in this regard.

Last but not least, concessions may be cancelled as a result of takeover (whereby the Granting Authority, as a result of public interest, assumes the rendering of the service), forfeiture (concession holder fails to perform services) annulment or termination.

Public-Private Partnerships

As previously mentioned administrative contracts, governed by Law No. 8.666/93, are contracts engaging private entities to perform work or provide services, thus entitling said entities to payment in consideration therefore, to be paid by

the public treasury. After the execution of a work or a concession term has ended, management of such works or service fall upon the government authority.

In the case of a public service concession, obtained through a bidding tender process, regulated by Law No. 8.987/95, the service is transferred to the private sphere, which then performs and manages such services at its own expenses, being entitled, therefore, to compensation and profit arising therefrom.

Public-Private Partnerships ("PPP") governed by Law No. 11.079/04, despite also being a concession granted by way of a bidding tender process, does not fall into any of the above-mentioned categories. In PPPs, private entities and the government authority share the risks.

There are two types of PPPs in Brazil: (i) sponsored concession and (ii) administrative concession.

Sponsored (or subsidized) concessions are those in which despite users paying a fee to benefit from a service, does provide sufficiently adequate or attractive compensation for a concession holder, who is willing to amortize the investment, and that is why the government is required to complement said payment.

The purpose of administrative concessions, as defined in article 2, Paragraph 2, of Law No. 11.079 is *"the rendering of services which the government administration is either a direct or indirect user, even if it involves performance of work or rendering of services and installation of goods,"* i.e. activities which may not be charged, and therefore the private entity will only be paid upon conclusion of the project.

In PPPs private entities may be paid based on performance and fulfillment of predefined goals[46].

Still regarding PPPs, it is important to mention that before entering a contract with a government authority, the private entity will have to set up a Special Purpose Entity (SPE) responsible for the implementation and management the object of the partnership, as set forth by law.[47]

SPEs may be organized as publicly-held companies, traded on the stock market, must comply with corporate governance norms and adopt standardized accounting and financial statements, pursuant to regulation in force. SPE ownership control may be transferred, subject to government authority's authorization, in accordance with the terms of the tender notice, the administrative agreement and legal provisions. The government administration may not hold the majority of the SPEs' voting capital.

[46] Article 6, sole paragraph of Law No. 11.079/04.
[47] Article 9 of Law No. 11.079/04.

XI. Administrative Law

Introduction

As a result of the global trend whereby governments are decentralizing their activities by implementing regulatory systems and eliminating bureaucracy in certain sectors within the economy, Administrative Law has continually developed in Brazil since 90s.

Having the Brazilian government transferred various activities and services to the private sector, shifting from its previous interventionist stance, a number of Regulatory Agencies were established, mirroring successful experiences abroad. These agencies are responsible for granting concessions, permits and authorizations to private entities, to execute services previously controlled by the government, as well as for overseeing respective operations.

Regulatory agencies

Regulatory agencies have political and financial autonomy, they are governed and managed according to their own rules and play a fundamental role in the government oversight of private sectors, ensuring that certain criteria are met by private entities when rendering said services, seeking to guarantee social welfare.

The main federal regulatory agencies in Brazil are:

- ANATEL – National Telecommunications Agency;
- ANEEL – National Energy Agency;
- ANP – National Agency of Petroleum, Natural Gas and Biofuels;
- ANAC – National Civil Aviation Agency;
- ANVISA – National Sanitation Surveillance Agency;
- ANA – National Water Agency;
- ANS - National Agency of Supplemental Health;
- ANTT – National Land Transportation Agency;
- ANTAQ – National Waterway Transportation Agency; e,
- ANCINE – National Cinema Agency.

In addition to these regulatory bodies, it is important to note that the country relies on the Brazilian Competition and Antitrust Council (CADE), which is responsible for adopting preventive and repressive measures to guarantee free competition in the different areas of the economy. The CADE, its operation and other information pertaining thereto is detailed in Chapter XII.

Please find below an overview on some of the key agencies in Brazil. It is worth mentioning that the majority of the services granted by said agencies to the private sector depend on prior bidding tender process, as is detailed in the previous Chapter.

(a) ANATEL – National Telecommunications Agency

ANATEL, created in 1997 by Law No. 9.472 (General Telecommunications Law), is linked with the Ministry of Communication. According to article 8, paragraph 2 of said law, ANATEL benefits from *"administrative independence, no subordination, fixed mandate, stability of its executives and financial autonomy."*

The agency's internal management is regulated by Presidential Decree No. 2.338/97.

ANATEL declares that its mission is to *"promote the development of telecommunications in Brazil, providing the nation with cutting-edge and efficient telecommunication infrastructure, capable of providing society adequate and diversified services at fair prices, throughout the entire domestic territory"*[48].

Some of the agency's key functions include controlling and regulating the telecom sector by issuing general and specific regulation. ANATEL is also authorized to grant authorizations, permits or concessions to private entities to offer telecommunication services, for the rights of use of radio frequency and aerospace in Brazil.

ANATEL is responsible for overseeing the industry, which includes activities carried out by both private initiatives as well as by government authorities, preventing violations and applying penalties.

Finally, at the administrative level, ANATEL is called upon to resolve disputes between telecom service providers, as well as between providers and users.

(b) ANEEL – National Energy Agency

ANEEL, created in 1996 by Law No. 9.427, is linked to the Ministry of Mines and Energy; its primary function is to *"regulate and inspect production, transmission,*

[48] Contained in: http://www.anatel.gov.br/Portal/exibirPortalInternet.do#.

distribution and sale of electric energy, in compliance with the policies and guidelines established by the federal government"[49].

ANEEL seeks to achieve rational use of energy sources, promoting the development and expansion, as well as value Brazilian energy resources. It also is responsible for sector regulation, defending consumer's interest in respect to price, quality, and product offerings, promoting free competition, competitiveness and attracting investments to the sector.

(c) ANP – National Agency of Petroleum, Natural Gas and Biofuels

ANP is also an independent federal government body, linked to the Ministry of Mines and Energy. However, unlike ANEEL, it oversees the oil, natural gas and biofuel industry.

Before ANP was founded, the oil industry was a government monopoly, as set forth in the 1988 Federal Constitution, and all activities related to the sector (exploitation, refining, import, export and/or transportation) were carried out by PETROBRÁS, a government-owned company established specifically for this purpose.

ANP was created by Law No. 9.478/97 (the "Petroleum Law"), regulated by Decree No. 2.455/98, not only to develop, but also make new investments feasible in the sector, promoting the rational use of energy resources, ensuring the supply of energy feedstock, establishing guidelines for specific programs, such as the use of natural gas, alcohol, coal and thermonuclear energy, and drafting and publishing guidelines related to imports and exports, so as to meet all demands of domestic consumption of oil and its byproducts, natural and condensed gas, and ensuring the proper operation and energy supply in the domestic territory.

The Petroleum Law provided the market greater flexibility, allowing private entities, which received a concession grant, authorization or permit, to perform activities in the petroleum, natural gas and biofuels production chain, thus ending the PETROBRÁS monopoly.

PETROBRÁS continues to conduct its activities, however now competing with private initiative companies in certain areas of the Brazilian energy industry.

(d) ANAC – National Civil Aviation Agency

ANAC was established by Law No. 11.182/05.

Linked to the Ministry of Defense, this independent federal government body

[49] Article 2 of Law No. 9.427/96.

is responsible for regulating and inspecting the activities in the civil aviation sector in Brazil. Pursuant to article 8 of Law 11.182/05, ANAC must *"adopt the required measures to meet the public interest and develop and invest in civil aviation, aeronautics and airport infrastructure in Brazil, performing its duties in an independent, legal and impersonal manner, with full disclosure."*

Conclusion

The shift in Brazilian legislation, beginning in the 90s, introduced a liberal model whereby independent authorities are responsible for regulation and oversight, replacing the previously interventionist role adopted by the government, which gave rise to an extremely important field in Brazilian Law, i.e. Administrative Law.

Regulatory agencies' independent and arms-length conduct has provided the market and foreign investors a great deal of legal security.

Aligned with this trend, the development of and raising new funds for each industry is among the various agencies' goals.

Thus learning and analyzing administrative law and it legal implications in the different fields is gaining more and more importance.

XII. Intellectual Property

Overview

Intellectual property rights encompass the protection of trademarks, patents, industrial design and copyrights.

In 1967, the World Intellectual Property Organization (WIPO), an arm of the United Nations Organization (UN), was organized with the key objective of harmonizing domestic legislations regarding this matter.

Subsequently, in the scope of the World Trade Organization (WTO), during the Uruguay Round, the TRIPs (Trade-Related Aspects of Intellectual Property Rights) agreement was signed and the WTO members – including Brazil -- established a minimum level for protection of intellectual property, in order to prevent piracy and counterfeiting.

Brazil is also the signatory of the following intellectual property International Treaties: (i) Paris Union, (ii) Berne Convention; (iii) Patent Cooperation Treaty; (iv) Rome Convention; and, (v) Convention for the Protection of New Varieties of Plants.

At the national level, intellectual property is predominantly governed by the following legislation: (i) Law No. 9.279/96, which regulates the rights and obligations related to industrial property; (ii) Law No. 9.609/98, which addresses the protection of intellectual property of computer software and its sale in Brazil; (iii) Law No. 9.610/98, which amends and consolidates copyright legislation; (iv) Decree No. 5.244/04, which establishes the composition and operation of the National Council Against Piracy and Intellectual Property Crimes, etc.

Trademarks

In Brazil, a distinctive sign which is visually perceptible, used to identify a specific product or service, is protected as a trademark upon registration with the Brazilian Patent & Trademark Office (*Instituto Nacional de Propriedade Industrial* - INPI), a federal independent government agency.

The marks used to attest the conformity of a product or service with certain

technical standards or specifications (certification mark), and those used to identify products or services arising from members of a certain entity (collective mark) may also be protected under the Brazilian legal system.

Marks composed of: (i) text only (nominative); (ii) drawings and text (mixed); (iii) drawings only (figurative) may be registered.

Registration of trademarks that include official, public, national, foreign or international coat of arms, weapons, medal, flag, badge, monuments or symbols; signs against good morals; reproduction or imitation of an element characteristic or differentiator of a specific third party facility or company name, likely to cause confusion or association with said distinctive signs, etc. is strictly forbidden (Article 124 of Law No. 9.279/96).

Brazilian legislation assures special protection to well-known trademarks , as well as to marks known in its sector (ex vi of Article 6 bis (I), of the Paris Convention for the Protection of Industrial Property), regardless of being previously deposited or registered in Brazil.

As previously mentioned, title to and protection of a mark is obtained in Brazil through a validly approved registration, and the holder thereof will be entitled to its exclusive use throughout Brazilian territory.

Trademark holders or applicants are also entitled to: (i) assign the respective registration or registration application; (ii) license its use; (iii) care for the material integrity or reputation. INPI approval is required in the case of items “(i)” and “(ii)” for it to produce effects against third parties.

Individuals or legal entities, private or public, national or foreign, may apply for the trademark registration with the INPI. When filing its registration application the applicant must provide evidence that it legally carries out activities (production of goods or rendering of services) thereto related.

In general, the rights to a certain trademark are ensured by the first-to-file system, protecting the first party to submit application for registration of the respective mark with INPI. In exceptional cases, however, as for example a party which in good faith has been using a mark for at least six months in Brazil, as from the date the application was filed by a foreigner for registration of its mark in Brazil, shall have preference in the mark registration.

Trademark registrations in Brazil are valid for at least ten years, as from the registration approval, which may be indefinitely and successively extended for same term.

Protection of trademarks in Brazil is upheld both in the civil sphere, through compensation of potential damages incurred by a legal holder, as in the criminal sphere, whereby offenders may be subject to i) imprisonment for a period ranging between one month and one year, or ii) fines, in addition to injunction orders for search and seizure or bar on sale.

Authorities may increase the imprisonment period by one-third or by one-half if: (i) the agent is or was a representative, attorney-in-fact, agent, partner or employee of the patent or registration holder or respective licensee; (ii) the changed, reproduced or copied trademark is renowned, well-known or is a certification or collective mark.

Patents and Industrial Designs

It is particularly important for parties who intend to invest in Brazil to analyze the legal protection granted to patent holders in the country.

As a matter of fact, Brazilian legislation currently in force (Law No. 9.279/96) extends such protection to highly profitable technological-intensive sectors such as chemical, pharmaceutical, food, biotechnology industries, in conformity with the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement. However, Brazilian legislation prohibits approval of patents related to commercial techniques or methodologies, surgical techniques or methods, etc.

There are two types of patents in Brazil: (i) invention, and (ii) utility model.

The difference between the two is that the utility model consists in the mere improvement of use or manufacturing of a certain thing (minor inventions or improvements), through a simple inventive innovation. An invention, however, entails greater degree of inventiveness. The protection term granted for the respective patents are quite different.

In order to be granted a patent in Brazil the following pre-requisites must be met: (i) represent a novelty (invention that is not part of prior art); (ii) entail inventive action or activity (in case of invention or utility model, respectively); (iii) have industrial applicability.

The novelty requirement may only be mitigated only during the grace period, requiring the compliance with certain assumptions, in which the disclosure of the invention before the application with INPI is permitted.

Invention patent term is 20 years, whereas the utility model term is 15 years,

as from the respective application is submitted. In the event that INPI takes a long time in analyzing the application, the minimum patent term is ten or seven years for inventions or utility models, respectively.

After the third year an application has been submitted, a patent holder is required to pay an annual fee, until its term has expired.

The following may not be patented in Brazil: (i) scientific discoveries, theories and mathematical methodologies; (ii) purely abstract concepts (iii) computer programs per se, among others.

The main purpose of a patent is to grant its holder the exclusivity right to the production, use and sale of the patented object, being offenders subject to civil and criminal liability, as detailed below.

A party may be obliged to grant a compulsory license for a patent, which does not bar the titleholders right to full defense and response, if, for example, three years after the patent has been granted, manufacturing has been discontinued or partial manufacturing of the product or the entire patented process is not being applied, except in the event of economic unfeasibility in which case the party is allowed to import, or the in case of abusive exercise of the rights arising therefrom, or in the event of abuse of its financial position, corroborated by administrative or judicial ruling. Compulsory licensing may be required in cases of national emergency or public interest, as well as in case of dependence between patents, etc.

It is recommended that the patent holder manufacture the product or use the process in Brazil within a three-year period as from the date the patent is granted, so as to avoid potential requirements of compulsory licensing by third parties.

Brazilian legislation also sets forth the right to register the industrial design, based on an ornamental plastic form of an object or any ornamental arrangement of lines and colors that may be applied to a product, giving it a new and original visual effect to its external configuration, not comprised in prior art, that may be used for industrial manufacture. The term of protection thereof may be up to 25 years.

Protection of patents and industrial designs in Brazil is upheld both in the civil sphere, through compensation of potential damages incurred by a legal holder, as in the criminal sphere, whereby offenders may be subject to i) imprisonment for a period ranging between one month and one year, or ii) fines, in addition to injunction orders for search and seizure or bar on sale.

Licensing of trademarks and patents

A trademark or patent title holder may enter licensing agreements for the use of a trademark or patented invention.

As Brazil is a developing country, much interest exists in the execution of these agreements between Brazilian and foreign entities, and thus this matter is regulated by Law No. 9.279/96.

Please note that the remittance of royalties abroad arising from trademark and patent licensing agreements must be authorized by the Central Bank of Brazil (BACEN). Moreover, such contracts must be filed with INPI, as to: (i) allow the remittance of payment abroad for royalties, in compliance with tax and foreign exchange regulations; (ii) be valid vis-à-vis third parties, and (iii) allow party to apply tax deduction of said payment, in accordance with Brazilian tax legislation. While the agreement is not filed with INPI, BACEN will not authorize the remittance of royalties abroad.

INPI, in accordance with provisions set forth in federal tax regulation, bars the registration of trademark and patent licensing agreements held by a foreign legal entity that controls a local licensee, which establishes royalties fee greater than 5% of the total net sales thereof. In the event of a trademark licensing agreement of a foreign controlling company related to a Brazilian subsidiary (headquarter / subsidiary relationship), restrictions for remittance of royalties and tax deduction are even stricter – in this case, remittance of royalties may not exceed 1% of total net sales recorded by the Brazilian subsidiary.

Such strict restrictions have not been applied to franchise agreements, under the allegation that they are not typical trademark or patent licensing agreement. However, registration with INPI is still required, given that INPI will compare the royalties contractually agreed in said agreements with fees usually practiced in the respective segment.

Copyright

Copyright, regulated in Brazil by Law No. 9.610/98, is understood as rights arising from the creation and economic destination of intellectual works (literature, art and science).

Brazilian legislation is applicable to citizens and residents domiciled in countries which ensure that Brazilians or residents domiciled in Brazil have reciprocity in upholding copyrights or equivalent rights

Authors do not need to register their work in order to obtain copyright protection; externalizing the concept in any form is sufficient. An author may, at his discretion, register the intellectual work, which is useful if such right is violated in the future.

For legal protection purposes, computer programs are deemed to be copyrights and regulated by specific legislation – Law No. 9.609/98, Law No. 9.610/98 is only applied on a complementary basis.

According to Brazilin legislation computer program is an organized set of instructions, in natural or codified language, contained in any type of physical environment, to be necessarily used in automated data collection machines, devices, instruments or peripherals, based on digital or analogous technology, to make them operate as intended and for the specific means (Article 1 of Law No. 9.609/98).

Brazilian legislation assures protection of rights related to computer programs regardless of registration in Brazil or abroad, allowing the title holder, as aforementioned, to voluntarily register the program. Protection of the rights related to computer programs is valid for a term of fifty years, as from January 1 of the year subsequent to that of its publication, or, in the lack thereof, of its development.

In Brazil, as result of an express legal provision, deeds and agreements related to licensing of commercialization rights of foreign computer programs must establish the party liable for payment of respective taxes and charges, additionally setting forth compensation for the computer program title owner that is resident or domiciled abroad.

Software technology transfer agreements must be registered with INPI as to produce effects vis-à-vis third parties. Thus the party receiving such transfer must also receive complete documentation from technology vendor, especially the commented source code, detailed technical description, internal functional specification, diagrams, flowcharts, etc.

Protection of copyrights in Brazil is upheld both in the civil sphere, through compensation of potential damages incurred by a legal holder, as in the criminal sphere, whereby offenders may be subject to i) imprisonment for a period ranging between three month and four years, or ii) fines, in addition to injunction orders for search and seizure or bar on sale of illegal copies.

Piracy

Piracy is defined as any act that violates intellectual property rights.

Piracy in Brazil is one of worse in the world, and accordingly the country suffers with tax evasion, foreign currency drain, informal labor market, etc. This is why the there is much effort going into the fight against this practice.

In 2003, a Congressional Investigation Committee (CPI) was set up seeking to combat piracy in Brazil. At that time, the final report linked piracy to organized crime.

The immediate impact on legislation included the enactment of Law No. 10.695/03, which increased criminal penalties for these types of crimes, and Decree No. 5.244/04, which established the National Council Against Piracy and Intellectual Property Crimes (CNCP), which is composed of private initiative entities, and whose key objective is to establish guidelines and plans in the fight against the violation of intellectual property rights.

In addition to these changes to local legislation, there has been a significant increase the number of Brazilian inspections in the fight against piracy, whereby Federal Police, Public Prosecution Office and Judiciary Branch have played important roles.

XIII. Antitrust Law

Antitrust law is the body of law that focuses on the development or maintenance of fair market conditions, seeking to establish free competition as well as safeguarding consumer's rights.

Law No. 4.137/62 was the first piece of legislation to regulate the Antitrust Law in Brazil. However, the scope thereof increased with the enactment of the 1988 Federal Constitution, which established the constitutional principles of free initiative and free competition. Law No. 8.884/94 made preventive and repressive measures in this area of law more effective, particularly concerning educational measures, emphasizing the importance of this issue in the realm of Brazilian economics.

Brazil is currently deemed to be the country that has progressed the most in the field of antitrust matters, especially regarding anti-cartel efforts, according to the assessment report presented during the 57th American Bar Association Spring Meeting held in Washington (USA) in March 2009.

Monopoly, Oligopoly, Cartel, Trust and Dumping. Definitions

Before discussing the topic of free competition in Brazil, we must define the concepts of certain market malpractices which not only must be avoided, may come under scrutiny of the Brazilian Competition and Antitrust Council (*Conselho Administrativo de Defesa Econômica* - CADE).

Monopoly is a situation when only one company exclusively provides a service or product to the market, and therefore imposes its prices and conditions on consumers, restricting their freedom of choice. Although it is not considered a crime, this practice should be avoided.

Oligopoly, also known as *economic concentration*, is a situation whereby the market is dominated by a small number of companies in the industry. However no formal agreement exists among them and activities are unstructured, but given that they seek to increase profits; they no longer act in an individual manner. It is a kind of association between companies.

Cartel is a kind of oligopoly, however based on an agreement between competitors in a given industry, to fix prices, restrict and divide the market, aiming at eliminating competition and subsequently increase prices.

Trust is also deemed to be a type of oligopoly, since companies involved stop acting independently as to establish a single organization, as to dominate the market for certain products and/or services.

Lastly, *dumping* is the sale of goods well below generally practiced market prices, sometimes even below the cost thereof, in order to eliminate competition. Certain dumping practices are considered to be crimes or administrative infractions.

Brazilian Antitrust Protection System (SBDC)

The Brazilian Antitrust Protection System (SBDC) is formed by three bodies: the Brazilian Competition and Antitrust Council (CADE), the Secretariat of Economic Law (SDE) and the Secretariat for Economic Monitoring (SEAE).

The CADE, the regulatory body, is an independent government branch associated with the Ministry of Justice. It is the main body for protection of free competition in Brazil, which seeks to orient, audit, prevent and investigate abuses of economic power.

The SDE is also a branch associated with the Ministry of Justice; it assists the CADE. It is responsible for bringing economic concentration suits, as well as conducting investigations related to market violations. Its role is both repressive and preventive. It is also incumbent upon the SDE to conduct preliminary investigations to identify if violations of economic order have been perpetrated.

The SEAE also assists the CADE; however it is associated with the Ministry of Finance. Its role is to issue economic opinions in regard to concentration acts, as well as to conduct investigations of acts to be assessed by the SDE.

As to the preventive nature of the work carried out, all these bodies are responsible for analyzing concentration acts in the market.

Likewise, it is incumbent upon all these bodies to repress actions against free competition, by analyzing and condemning detrimental activities that seek to eliminate competition in a variety of market segments.

Concentration acts

Concentration acts refer to any operation which results, through corporate mergers and/or acquisitions, in the consolidation of 20% of the market share in the

hands of a single company or holding, or in which any of the parties involved published in their respective last balance sheet, an annual gross revenue equivalent to four hundred million reais (R$400,000,000.00) (article 54, paragraph 3, of Law No. 8.884/94).

In accordance with this legal provision, any concentration act must be submitted to the CADE, when (i) the market share of the resulting company is at least 20% of the market; or (ii) any of the companies involved in the operation published annual revenue in Brazil of least four hundred million reais.

It is incumbent upon the CADE to analyze such operations, in order to confirm if they may potentially be detrimental to free competition and society, and therefore approve it or not. Such approval may be subject to restrictions.

In case of approval with reservations, the involved party (ies) must either sign a Performance Commitment Agreement (TCD) or comity to comply with other conditions imposed by the CADE.

Concentration acts are only valid if approved by the CADE, and that is why any potential operation carried out by the new company may be annulled if the operation is not approved.

Please note, however, that the CADE may approve concentration acts which restrict or limit competition if the operation results in efficiencies instead of losses; such efficiencies must be provided for in law.

The assessment of a concentration act begins when the respective operation is informed to the CADE, by way of notice sent by interested party, which should be filed with the SDE within no more than 15 days as from the execution of the instrument that first binds the parties to the commercial transaction. Any delay in communicating said operations are subject to fines ranging from 60,000 to 6,000,000 UFIRs[50].

Additionally, interested parties must pay a processing fee to SBDC, which will in turn redistribute the amount among its bodies.

If the operation is qualified as a violation of the economic order, the company and its officers will be subject to the application of pecuniary penalties. In the event of recurrence, the value of the fines applied may double.

The statute of limitation for these types of violations is five years, which will be interrupted whenever another violation is identified through an administrative or judicial proceeding.

Decisions rendered by the CADE at the administrative level are non-appealable; however, these decisions may be challenged in the judiciary.

[50] 1 UFIR is equivalent to R$ 1.9372 in 2009.

Consultation

To mitigate risks, interested parties may submit inquiries to the CADE before concluding an operation that may be qualified as a concentration act. The response thereto will include the possibility of the act being considered - theoretically - detrimental to free competition.

In this response, the CADE may also cover aspects pertaining to (i) the market segment; (ii) conditions of new players in the market under analysis; or (iii) sector competitiveness, among other issues.

The response to the inquiry does not imply approval of the future concentration act; however, it reflects the body's understanding in regard to the implication the operation will have on competition in the sector.

Upon request, the inquiry may be kept confidential, thus avoiding the potential disclosure of the transaction.

Cartel

As previously mentioned, Brazil is one of the countries that has most progressed in its efforts to eliminate cartels over the past few years. Not only is this practice qualified as an administrative offense under Antitrust Law, but it is also a crime according to Brazilian legislation.

Given that cartels are the most detrimental to society, the Leniency Agreement was created in an attempt to combat this practice. Through this agreement, parties who cooperate in anti-cartel investigations receive benefits.

Investigations may also be canceled if the partied being investigated sign a Discontinuation Consent Decree (TCC), given that the key goal is to eliminate this practice.

Changes to the Brazilian Antitrust Protection System (SBDC)

The House of Representatives, one of Brazil's two legislative houses, passed Bill No. 3.937/2004, which intends to restructure the SBDC, as to improve and expedite procedures, as well as decrease bureaucracy. This bill is yet awaiting to be decided upon by the Brazilian Senate.

XIV. Environmental Issues

Overview of Brazil's Environmental Law

Historically, Brazilian regulations aimed at environmental protection were elaborated in order to address the different environmental aspects of the country. As a consequence, the country' environmental law began with the enactment of separate regulations regarding the use and exploitation of specific types of natural resources such as Forests (Brazilian Forestry Code - Law 4771/65); Minerals (Mining Code – Law Decree 227/67); Fisheries (Law Decree 221/67); Hunting in general (Hunting Code - Law 5197 / 67) and Water Usage (Water Code - Decree 24643/34).

The development of environmental concerns worldwide and the enactment of numerous international agreements resulted in a growing environmental consciousness in Brazil. This has influenced the adoption of a new set of environmental rules, imposing a more integrated protection of the previously "scattered" environmental resources and coordinating governmental agencies in charge of specific institutional duties in order to implement those environmental rules.

The enactment of the National Environmental Policy (Law 6938/81) resulted in a systematization of the institutional and governmental agencies and their respective duties, such as the Federal Agency (IBAMA, responsible for enforcement actions), the National Council for the environment (CONAMA, responsible for the creation of regulatory standards), and State Environmental Agencies. This law has also defined the main instruments of Brazil's environmental policy: environmental standards, environmental zoning, environmental licensing, evaluation of environmental impacts, penalties for the non-compliance with environmental measures, among others.

In 1985, another important law was enacted. It was Law n. 4.347/85, that created the so called Public Civil Action. Similar to the North-American law of Class Actions, the Brazilian law allows the Public Prosecution Office to bring lawsuits aimed at the protection of the environment, as well as conferring standing to Non-Governmental Agencies to bring suits under its terms.

The main principles and instruments for the protection of Brazil's environment received also a special protection under the current Brazilian Federal Constitution.

Enacted in 1988, it contains a whole chapter addressing environmental issues and creating a general duty to the Government and citizens to protect and defend environmental quality for present and future generations. Article 22 of Brazil's Federal Constitution also sets forth obligations applicable to the preservation and recovery of ecosystem and species; the preservation of the variety and integrity of the genetic patrimony, and the supervision of entities engaged in genetic research and manipulation; definition of territorial areas eligible for special protection; creation of three levels of liability to the ones incurring in environmental damages; amongst others.

More recently, in 1998, Brazil has enacted Law 9.605, establishing criminal sanctions to corporations and individuals incurring in the typified environmental crimes.

At present, regulations regarding environmental protection in the country abound. They range from nuclear-damage penalties to coastal-management rules or from the creation of conservation units to the requirement to implement environmental-education systems in schools, environmental quality standards to water, effluents, air emissions, and even post-consumption liability. Besides, both the states and the municipalities all over the country are empowered to implement their own regulations regarding environmental protection and the use of the natural resources at the regional and local levels respectively.

Main requirements applicable to industrial activities

With regard to industrial activities, applicable regulations generally require obtaining environmental permits *prior* to the commencement of a company's activity. Likewise, the competent authorities may decide on the need for a company to present an Environmental Impact Assessment before its activity can be implemented.

As to pollution control systems, they are implemented to a greater extent in largely industrialized centers like the states of São Paulo and Rio de Janeiro. Both the lack of environmental permits and the act of polluting might be deemed criminal acts, and trigger criminal sanctions in addition to administrative penalties (warnings, fines, interdiction of the company's activities among others), and civil sanctions (obligation to recover or compensate environmental damages).

Environmental Liability

Environmental liability, under the Brazilian law, may occur in three (03) different and independent levels: (i) civil, (ii) administrative, and (iii) criminal.

It is said that the three spheres of liability mentioned above are "different and independent" because, on the one hand, one sole action by the offender may generate environmental liability to it at the three levels: civil, administrative and criminal, and applicability against it of three (03) different sanctions. On the other hand, the absence of liability in one of those spheres does not necessarily exempt the offender from liability in the other spheres.

Environmental civil liability results from action or omission of the offender that implies environmental damage of any type and is characterized as a modality of strict liability. Such liability results in the civil penalty of repairing or indemnifying for the damage caused to the environment and, further, the consequent damage to third parties.

Administrative liability results from an action or omission of the offender that implies violation of a rule of environmental protection, irrespective of fault or of the effective occurrence of the environmental damage.

Finally, criminal liability depends on the verification of fault or malice of the offender, and occurs by the action or omission, of an individual or legal entity, that is typified in the penal law.

With regard to environmental liability, two more national rules are worth mentioning: strict liability and joint liability. The general provisions concerning environmental liability in Brazil provide for strict liability, i.e., the sanctions are imposed regardless of guilt (negligence). Joint liability will be mostly acknowledged in circumstances of outsourcing the transportation and final disposal of waste/residues.

Post Consumption Liability

Recent federal regulations enacted by CONAMA establish liability of the manufacturers of certain products (batteries, tires and agrochemicals) for the final disposal after the end of the life cycle of the respective products. There are indications that such type of liability will be imposed on a regulatory level on other industries and activities - in accordance with some bills of law in process of approval before Brazilian Congress.

International Law

Finally, it should be mentioned that Brazil is a party to numerous multilateral environmental agreements such as the Climate Change Convention, the Biodiversity Convention, the Basel Convention on the Movement of Hazardous Waste, the Montreal Protocol, and UNCLOS, among many others. Rules reflecting such agreements are being enacted at the national level so as to comply with relevant international obligations.

XV. Consumer Protection

Consumer protection is one of the principles of Brazilian economic order (article 170, V, of the Federal Constitution). Law No. 8.078/90, i.e. the Consumer Protection Code (CDC), was enacted in order to make this constitutional principle effective.

The key objective of the CDC is to counterbalance the unequal relationship between parties in a consumer relationship, protecting consumers from potential abuses and difficulties in upholding their rights be it in or out of court, and facilitating access to information, etc.

The protection provided by the CDC, just as in labor law, is based on the principle of equality: "to provide differentiated treatment to unequal parties, to the extent of their differences".

Consumer relations and legal consequences

The CDC defines the consumer relation; it any individual or legal entity that purchases or uses a product or service as an end user is qualified as a consumer.

Consumers' basic rights, as determined in the CDC, are: the right to protection of life, health and safety against risks arising from the supply of products or services; right to information and disclosure regarding appropriate use of products and services; right to appropriate and clear information regarding the different products and services available, including accurate specification of quantity, characteristics, composition, quality and price, as well as potential risks ; right to defense of their rights, and in this case the burden of proof lies with the supplier, etc.

The CDC determines that the following clauses will be considered null and void if they: eliminate, discharge or diminish the supplier's responsibility for vices in products or services or imply waiver or assignment of rights; transfer responsibilities to third parties; establish obligations deemed to be unfair and abusive, which place the consumer at a major disadvantage, or that are incompatible with good faith or equity; authorize the supplier to unilaterally cancel the agreement, without granting the consumer the same right; oblige the consumers to refund the provider for collection

costs of their obligation, without granting them the same right vis-à-vis providers; and do not comply with consumer protection law, etc.

The CDC also establishes that contractual clauses much provide clear information regarding the quality and quantity of products or services, as well as their potential risks. Any provision limiting the consumer's right must be highlighted and written in a manner that is easy to understand.

Additionally, consumer protection legislation sets forth a legally-established warranty period, allowing consumers to have defective products or services duly repaired, exchanged (redone, in the case of services) or respective amount refunded within 90 days (durable goods), or 30 days (nondurable goods).

The responsibility attributed to the product supplier or service provider is objective, and therefore the burden of proof is not required.

Class action suits to uphold consumer rights is allowed in Brazil.

Lastly, please note that rules related to consumer rights are in general mandatory, and thus they cannot be waived simply by an agreement entered between the parties.

XVI. e-Comerce

Overview

In Brazil, just as in most countries around the world, e-commerce has been gaining more ground, especially because of the convenience it offers in regard to the purchase of consumer goods.

Furthermore, many Brazilian politicians, concerned with promoting digital inclusion, support this type of transaction.

In fact, the incentives offered by the government so that an increasing number of users have access to computers is also an important stimulus for e-commerce, once a greater number of computers available in the market, for example, should result in more business being concluded online.

Business Establishment

The advent of e-commerce brought about "virtual stores", which have no physical facilities. Consumers are now able to carry out transactions simply by sending data online to the company, having no need to dislocate to its physical establishment.

That is why some uphold that one is unable to file a lease renewal claim in the case of virtual stores, even if it is classified as a commercial lease, given that termination of the respective real estate lease agreement and ensuing change of address of the physical facilities would not adversely affect the commercial activities carried out by the business, which, as previously mentioned, is in reality located at its electronic address, that is, virtually.

Domain name and industrial property

Núcleo de Informação e Coordenação do Ponto BR (nic.br) is the domain name and e-mail registrar in Brazil; established as a non-profit civil association it

has since 2005 been appointed as the entity responsible for the implementation of decisions and projects established by the Internet Management Committee in Brazil (*Comitê Gestor da Internet* - cgi.br).

The Committee was created by Interministerial Directive No. 147, dated May 31, 1995, and amended by Presidential Decree No. 4.829, dated September 3, 2003, to coordinate and consolidate all domestic internet service initiatives, promoting technical excellence, innovation and dissemination of the services being offered.

Given the above mentioned particularity of virtual stores, they are identified by their domain names with the following two key objectives: create a unique electronic "site" where consumers are able to purchase products or services, thus *qualifying* it as a *business establishment*; and provide a mechanism for potential clients and respective businesses to communicate, via an *electronic address* (e-mail).

Just as in other countries, domain names must comply with the International DNS (Domain Name System) protocol and must include a hostname in order to create a unique site for the virtual establishment, followed by two TLDs (Top Level Domains); the first one defines the nature of the site owner — for example, for ".com" business communities, and the second one identifies the country of origin (for Brazil it is ".br").

Please note that one may not use any expression registered as trademark by any other company as a hostname, as specified in Chapter XI, nor may they trick internet users to mistakenly access a site instead of another, which would qualify as unfair competition.

Lastly, it is worth mentioning that registration of a domain name with the Brazilian domain name registrar does not imply legal right to the registered expression, thus said registrar may indeed deny or cancel registration of any given domain name if, for example, it confirms that it violates third party rights protected by industrial property rights.

Consumer relations

Brazil does not have specific legislation dictating e-commerce. Not even the Consumer Protection Code provides regulation exclusively regarding agreements entered into with virtual establishments.

Thus, company must fulfill the same obligations vis-à-vis consumers that

purchase its products or services online as those it is required to comply with in the case of consumers of products or services who have entered an agreement, be it verbal or written. Please refer to Chapter XIV on consumer protection issues, in which we detail the main covenants that govern purchase agreements.

On the other hand, an important aspect regarding e-commerce consumer relations is the right of *withdrawal* established in article 49 of the mentioned Consumer Protection Code, that states: *"Consumers may cancel an agreement, within 7 days as from the execution thereof or delivery of the product or service, whenever the agreement for the purchase of the product and/or service is entered into outside the business establishment, especially if via telephone or at purchaser's site"*.

Although the provision above can be deemed to immediately apply to agreements arising from e-commerce transactions, understandings regarding this matter are not unanimous.

The current predominant understanding is that the provision above is solely applicable in cases when marketing is so persuasive that the consumer does not use customary judgment he/she would usually use before purchasing a certain product or service.

However, the company must have also employed aggressive marketing tactics in order for consumers to benefit from the right of withdrawal; this factor, i.e. aggressive marketing, will be analyzed on a case-by-case basis.

If a consumer purchases a specific product online without having been a victim of an aggressive marketing campaign that inhibits his/her better judgment, he/she may not claim the right of withdrawal, especially because in reality, the product was not purchased "outside the business establishment", as provided by law, but in fact within the business' *virtual* establishment, which should strictly comply with legal requirements regarding product information.

Tax Aspects

As previously mentioned, Brazil has no specific e-commerce legislation, including in regard to taxation. In general, the tendency of Brazilian policy in this regard is simply to levy taxes on e-commerce transactions, however not to create any new taxes.

What has been discussed to date at symposiums, seminars, conferences and a

number of other academic forums, is that there is an essential need to establish clear criteria to determine when existing taxes will be levied, especially in regard to the classic terms and definitions provided by Tax Law, such as: territoriality, jurisdiction, goods, services, direct or indirect taxation, business establishment, location where services are rendered, etc.

Given the inflexibility of the Brazilian Tax System, which does not allow broader interpretation regarding tax laws and tax assessment events, both government authorities and taxpayers have many questions in regard to tax matters, and they also acknowledge the need to update current laws and existing taxes so as to adjust them to the new business reality created by the Internet.

XVII. Dispute Resolution In Brazil

Overview of Brazilian Law

The Brazilian legal system applies the principle of legality, whereby no individual may be required to do or refrain from doing something, unless determined by law. In conformity with this fundamental principle, no individual may request to be excused from complying with the law by claiming ignorance thereof.

In addition to written statute, the Brazilian legal system uses precedent, doctrine and jurisprudence as basis for the Law.

The Brazilian legal system also observes the perfect legal judgment, the vested right and *res judicata*. The perfect legal judgment is any act that is in compliance with all legal requirements in effect at the time it is practiced. Vested right is a right that is exercised or may be exercised, and may not be changed at a third party's will. Lastly, *res judicata* is an unappealable court decision, which produces effects that may not be modified by any change in the legal system.

It is important to make a distinction between the legal system adopted in Brazil, i.e. the Roman-Germanic or "Civil Law" system, and the "Common Law" legal system.

As mentioned above, in the Roman-Germanic system, which is in effect in Brazil, the written code is the predominant source of the Law. Written doctrine and jurisprudence works are mainly concerned with the interpretation of the Law.

In general, the main principles of the legal system are set forth in the Civil Code, which dictates private relations, and also plays an important role in individual relations with the Public Administration.

The Legislation is supreme, and must be interpreted and applied by Justices, regardless of previous interpretations rendered by other Justices on the same matter. In view of the above, prior decisions (case law) are also taken into account, however judges are not required to follow a case law decision, but indeed, to comply with the Law.

In the *Common Law* system, the judge renders a decision based on the analysis of past rulings on similar cases, from which the judge extracts the premises for his/her decision. This is the *stare decisis* principle, according to which Common Law courts tend to follow precedent rulings.

Thus it is understood that in Common Law a judge extracts principles from prior decisions to apply the Law, while in Civil Law, principles used to reach a decision are obtained directly from Statute itself, to then be applied in actual cases, evidently making the necessary adjustments.

And that is why the principle of legality, as acquaintance and understanding of the Law, is so important in the Brazilian legal system.

Having made these key distinctions, we may delve into the subject matter of this chapter, that is, analysis of the different mechanisms for dispute resolution available in Brazil.

In general, companies in Brazil opt for one of the following four methods of dispute resolution:

- *impartial third party assessment:* a process whereby the parties appoint a third party, specialized in the field of the dispute to be settled, so that he/she may prepare a report identifying the real situation of the parties and the dispute resolution alternatives, including suggestions as how to reach a settlement. The assessment is confidential and non-binding.
- *Mediation:* an extrajudicial dispute resolution technique where one or more individuals are appointed (mediators), who will facilitate dialog between the parties, seeking to settle the respective dispute.
- *Arbitration:* is another extrajudicial dispute resolution technique. In arbitration proceedings one or more individuals (arbitrators) are appointed to settle a dispute involving property rights available, which is carried out according to procedure which abides by due legal process, and the decision is final and binding and has the same effect as a court ruling, which may be enforced, if so applicable, by a court.
- *Legal proceeding:* is the customary dispute resolution technique whereby the parties resolve disputes by submitting it to be ruled upon by a Judge, through the due legal process, to render a final court decision.

The last two alternatives, arbitration and legal proceedings, are certainly the most commonly used in Brazil, and thus further detailed below.

The Judiciary

The most commonly adopted dispute resolution method in Brazil is through the Judiciary, whereby courts render decisions after going through the due legal process.

The Brazilian Judiciary is composed of a number of bodies, at different spheres, which may review their decisions at three different levels, as follows:

BODIES WITHIN THE BRAZILIAN JUDICIAL BRANCH (article 92 of the Federal Constitution)	
Special Courts	- The key function of the *Federal Supreme Court* (STF), the highest level court within the Brazilian judiciary, is to uphold the Federal Constitution. - *Superior Court of Justice* (STJ): court responsible for ensuring legality of judicial decisions rendered in other courts (decisions rendered by the Court of Justice may only be reviewed by the STF). - *National Council of Justice* (CNJ): an administrative body responsible for determining organizational and structural guidelines for the Brazilian Judicial Branch. - *Superior Labor Court* (TST): highest level appellate court for labor-related issues (rulings rendered by the Superior Labor Court may only be reviewed by the STF). - *Superior Electoral Court* (TSE): the highest level appellate court for electoral-related issues (rulings rendered by the Superior Electoral Court may only be reviewed by the STF and STJ). - *Superior Military Court* (STM): the highest level appellate court for military-related issues (rulings rendered by the Superior Military Court may only be reviewed by the STF and STJ).

Second level courts	- *Federal Regional Courts* (TRF): body which decides on the Federal Government-related issues, and also second level appellate court responsible for the review of initial decisions rendered by Federal Justices. - *Court of Appeals* (TJ): competent body to rule on cases involving disputes with the Federal Government, not related to Labor, Electoral or Military Issues, second level appellate court responsible for the review of initial decisions rendered by State Judges. - *Regional Labor Courts* (TRT): competent body to rule on cases involving Labor-related disputes, second level appellate court responsible for the review of initial decisions rendered by Labor Judges. - *Regional Electoral Courts* (TRE): competent body to rule on cases involving Electoral-related disputes, second level appellate court responsible for the review of initial decisions rendered by Electoral Judges. - *Military Courts* (TJM): competent body to rule on cases involving Military-related disputes, second level appellate court responsible for the review of initial decisions rendered by Military Judges.
First Level Courts	- *State Judges:* first level court to rule on cases involving non-federal disputes, not related to Labor, Electoral or Military issues. - *Federal Judges:* first level court to rule on Federal Government-related disputes. - *Labor Courts:* first level court to rule on cases involving Labor-related disputes. - *Electoral Courts:* first level court to rule on cases involving Electoral-related disputes. - *Federal Military Court:* competent body to rule on cases involving military personnel of the Armed Forces (Army, Marine and Air Force). - *Military State Courts:* court to rule on cases involving personnel from Complementary Forces (State Police Department and Military Fire Department).

Roughly speaking, legal proceedings may be divided in two main groups, prejudgment phase and enforcement proceedings[51].

The Judiciary (i.e. Courts) is the only body that has the right to constrain one's assets in order to settle a debt incurred with another party. Trials/hearings seek to establish judicial execution orders to constrict assets to pay an outstanding debt.

[51] The Brazilian Code of Civil Procedure also uses Provisional Proceedings and Special Procedures that, given their specifities and reduced use, will not be covered in this chapter.

Execution proceedings initiate once orders are passed (be it judicial or extrajudicial) so that specific dispossession measures provided by law are carried out, seeking to resolve the dispute between the parties filed at court.

The main matters that give rise to litigation brought to the Brazilian courts include: (i) breach of contract, (ii) claim for damages (indemnification), (iii) debt collection and (iv) protection of property and/or ownership rights (assets).

In most cases proceedings related to breach of contract arise from some defect in the structure and/or requirements necessary for an agreement to be valid, including: (i) having a qualified agent, (ii) having a legal, viable, specific and quantifiable object, and (iii) as provided for in, or not be prohibited by, law[52], and that is why one should always seek local legal counsel when executing any agreement to be enforced in Brazil.

In general, litigation proceedings involve complete relations and must follow complex and rigid procedure, which the attorney must be well-versed in.

Thus, please note that solely attorneys who have passed and enrolled with the Brazilian Bar Association are licensed to exercise the profession. Furthermore, according to the Brazilian Federal Constitution, with exception in very few cases, parties may only submit their arguments to the court through an attorney.

Judicial proceedings are the most common dispute resolution method used in Brazil. This reality, along with other aggravating causes, has resulted in an excessive number of claims. The Judiciary structure, which allows parties to appeal decisions at all three levels, is yet another reason which accounts for the current slowness of the Brazilian legal system.

This has provoked some very important debates within Brazilian society, reforms in legislation and adoption of practices seeking to improve court activities. The use of cutting-edge technology seeking to expedite the work has been an important tool; IT tools have been implemented for the management of processes and procedures.

However, continued slowness has been decisive factor leading to the increased number of parties who have adopted alternative dispute resolution methods. Arbitration has been a preferred alternative of all the mechanisms available; the time

[52] Article 166 of the Brazilian Civil Code establishes:
Article 166. A legal transaction is null when:
I - it is entered into with an individual who is absolutely unfit;
II - it's object is illegal, unfeasible or unquantifiable;
III - the key objective, between both parties, is illegal;
IV - does not comply with provisions established in law;
V – any formality that legislation deems to be fundamental for it to be valid is passed over;
VI - the purpose thereof is to fraud law;
VII - law expressly declares it to be null, or prohibits its practice, without imposing a penalty.

it generally takes to reach a final resolution is significantly lower in comparison to the time a process takes via the Judiciary.

Therefore, a more detailed analysis of arbitration, its evolution and adoption in Brazil is appropriate.

Arbitration

Arbitration, as a dispute resolution mechanism, in Brazil is not new. In reality, the 1824 Brazilian Constitution already provided the framework for arbitration.

However, some legal flaws were detrimental to its development, once parties encountered a number of challenges when attempting to enter an arbitration agreement, to set up an arbitration court and, lastly, registration of arbitration awards themselves, which had to be previously ratified by the Judiciary in order to be enforced.

With the enactment of Law No. 9.307/96, "Arbitration Law", this scenario changed considerably in Brazil.

One of the noteworthy developments of this Law included elevating the status of arbitration awards thus making them analogous to court decisions (article 475-N, IV, of the Brazilian Code of Civil Procedure[51]).

Article 18 of the Arbitration Law also sets forth that *"an arbitrator is an actual and legal judge, and his/her decision is not subject to appeal or ratification by court."* Thus, it is no longer necessary to ratify an arbitration award in Court. However please note that, an international arbitration decision, just as international court decisions, must be ratified with the Superior Court of Justice (STJ), in order for it to be enforceable in Brazil.

Additionally, the mere inclusion of an arbitration clause in an agreement is binding upon the parties; and, therefore, they are no longer required to sign a separate document to enter an arbitration commitment.

The Federal Supreme Court recognized the constitutionality of the Arbitration Law late 2001, which increased the legal stability of the doctrine.

The increase in Brazilian trade, greater number of disputes and disagreement, legal developments in regard to arbitration, and the slowness of the Brazilian Judicial system are reasons explaining why there has been an increased adoption of arbitration as an effective dispute resolution mechanism.

The speed and informality of arbitration proceedings help in quickly and efficiently resolving disputes. In arbitration proceedings, decisions regarding the dispute

[51] "Article 475-N. "The following are judicial execution orders:
(...) "IV- an arbitration decision."

must be rendered within six months, according with article 23 of Law No. 9.307/96.

Parties may freely choose the applicable law, language and location where arbitration will take place, in addition to rules and procedures to be adopted in the sequence thereof, particularly in relation to the appointment and number of arbitrators (one or three).

Important arbitration chambers, comparable to leading international chambers, have been established in Brazil in the past few years. These chambers are qualified to carefully and quickly conduct all arbitration procedures, ranging from simple to the most complex procedures. All these chambers have excellent regulations that may be adopted from the onset and inserted in arbitration clauses of a variety of agreements to be executed.

Moreover, the number of Brazilian arbitrators participating in international arbitration proceedings has increased, especially in the International Chamber of Commerce (ICC).

Thus, it is important that foreign investors who intend to include this type of arbitration clause or covenant in any agreement to be enforced in Brazil consult a Brazilian attorney who is familiar with this type of dispute resolution mechanism and the regulations of the leading chambers in Brazil.

Article 1 of Law No. 9.307/96 sets forth that any party that seeks to resolve a dispute involving ownership rights may use arbitration. The mentioned legal provision has allowed the resolution of disputes arising from distinct areas of law, including matters concerning corporate law, commercial law, intellectual property rights, administrative proceedings, family law, and labor law, among others. It is worth mentioning that criminal actions cannot be submitted to arbitration.

Of all the practice areas, it is important to note that arbitration clauses are extensively used in different corporate by-laws to resolve many different types of corporate disputes, which, given their nature, require quick and efficient solution. Article 109, Paragraph 3 of Corporate Law (Law No. 6.404/76) endorses arbitration as a legitimate mechanism.

The use of arbitration proceedings has become a prerequisite for publicly traded companies on the São Paulo Stock Exchange (Bovespa) New Market listing.

In summary, the use of arbitration has increased, and the maturity and legal framework of the mechanism has improved in Brazil. Brazilian participation in international arbitrations is also important, given that this is one of the most effective dispute resolution mechanisms available in the country.

XVIII. Insolvency in Brazil

Introduction

Insolvency was, for quite some time, governed by Decree No. 7.661, which was passed in the 40s. It now is governed by Law No. 11.101/2005, i.e. Corporate Reorganization and Liquidation Law (*Lei de Recuperação de Empresas e Falências*).

Brazilian legislation provides three alternatives for companies facing difficulties: extrajudicial reorganization, judicial reorganization and liquidation.

This important provision in Brazilian law determines the crucial role creditors play in the process, especially in regard to extrajudicial reorganization and judicial reorganization proceedings which seek to restore the operational and commercial capacity of troubled companies. By playing an active role in the recovery of a company, creditors increase their chances of receiving outstanding debts by keeping the company in operation and generating "new capital", as to liquidate the company's obligations.

The Corporate Reorganization and Liquidation Law determines procedural and legal requisites in order for a company to fall in any one of the categories, seeking to overcome insolvency (default).

Government-owned companies, mixed-capital companies, financial institutions, credit unions, consortiums, private pension funds, health care companies, insurance companies, among other similar companies, may not use these resources.

On the other hand, the Law provides that a debtor who fulfills all the following requisites may file for extrajudicial reorganization or be decreed to conduct judicial reorganization:

- has regularly conducted activities for more than two years;
- is not bankrupt (and in case it was, it has been granted final and unappealable court ruling acknowledging liquidation discharge);
- has not entered judicial reorganization for at least five years (in the case of micro companies and/or small-sized companies this requirement increases to eight years); and,

- has not been convicted nor has as administrator or controlling shareholder anyone who has been convicted of any crime specified in Brazilian Law, such as, violation of trade secrets, dissemination of false information, inducing individuals or organizations into error, favoring creditors, misappropriation, concealment or appropriation of assets, embezzlement or illegal receipt or use of assets, filing illegal creditor's claim, illegally conducting activities, breach of estoppel, or omission of required accounting documents.

We further detail some particularities of each of the above mentioned processes.

Extrajudicial reorganization

Extrajudicial reorganization allows the company to prepare a reorganization plan between the debtor and creditors (or at least the majority of them) to be ratified by a court.

The evident advantage is that once negotiations are carried out in the private sphere, the costs involved are smaller, and the process is faster and more efficient. Articles 162 and 163 of Law No. 11.101/05 provide for two types of extrajudicial reorganization mechanisms:

- reorganization approved by all creditors who abide by the reorganization plan; and,
- reorganization approved by at least 3/5 of each type of creditor. Since all creditors covered by that type of plan are subject to it, this second modality contains more requirements to be fulfilled in order for the company's reorganization plan to be ratified.

Judicial reorganization

The judicial reorganization process, as the name suggests, is entirely determined by the judiciary branch, whereby the sequence, adoption of procedures and deadlines to be met by the debtor and creditor are determined in legislation.

All credits, whether or not they are outstanding on the date in which judicial reorganization is requested, are subject to the judicial reorganization process. This legislation does not apply to creditors who classify as lessors, trust owners or signatories to conditional sale agreements, who, because of such special conditions,

uphold contractual rights and conditions.

Moreover, during the stay period, the sale or withdrawal of capital goods, essential for its core activities, from the debtor's establishment is strictly prohibited. Tax credits are not subject to a judicial reorganization process.

Once the debtor is granted judicial reorganization status, pursuant to article 6 of the Law, all claims and executions/foreclosures against the debtor are deferred for a period of 180 (one hundred and eighty) days. It is what is referred to as the stay period.

Please note that, once the judicial reorganization is granted, the court will appoint a receiver whose key function is to supervise activities of the company undergoing reorganization as to make sure it conforms to the judicial reorganization plan.

Some legal measures that may be adopted to restructure a company, as exemplified in article 50 of the Law, include granting special deadlines and conditions for the payment of outstanding obligations and debts coming due, potential spin-off, merger, incorporation or change of corporate structure, organization of a fully-owned subsidiary, or assignment of quotas or shares, in compliance with shareholders' rights, as well as execution of collective bargaining agreements.

The sole paragraph of article 60 of the Law establishes that potential disposal of part of the debtor's company, branches or independent production units, if approved in the judicial reorganization plan, will be transferred free of any lien, and there will be no succession from the company under recovery to the buyer of the object of disposal, even in regard to labor, social security and tax credits.

This legal provision was an important step, once it benefits both the debtor and the buyer. The debtor thus receives funds from this disposal and is then able to proceed with the reorganization process and pay creditors. The buyer in turn, has legal security to purchase operations that are important for its business (be it a branch or production unit under reorganization), without having the fear of being required to be liable for debts of the debtor which, if transferred, would definitely make this type of operation unfeasible.

Understandings concerning this provision are not unanimous under Brazilian Law, but precedents established to date are aligned with article 60 of the Law, determining complete independence and no succession between the debtor (under reorganization) and the buyer.

The reorganization plan must be submitted by the debtor within 60 days after the sentence granting reorganization, detailing the measures to be adopted for the

reorganization of the company (article 50 of the Law), as well as order and conditions of payment to creditors, otherwise the company will be subject to being declared bankrupt.

Documentation to be submitted must also include a statement of economic feasibility of the debtor, and a report detailing its economic-financial situation.

The plan will be approved provided that none of the creditors object to it.

If it is challenged, the Court presiding over the reorganization will call a general creditors' meeting for them to suggest changes to the reorganization plan, which they must subsequently approve.

All creditors subject to the reorganization plan must attend the general creditors' meeting. Creditors are classified in three groups according to the type of outstanding credits: (i) labor-related debts, (ii) creditors entitled to in rem rights or beneficial interests and (iii) other creditors.

Proposal that is accepted by representatives of more than half of the total outstanding debt of each creditor class and, additionally, the simple majority of the creditors attending the meeting, will be approved.

If the proposed plan is rejected in the general creditors' meeting, the court will then declare the debtor bankrupt.

Liquidation

Liquidation is based on debtor's default situation, in general arising from its insolvency, that is, debtor's inability to pay just debts. Liquidation is a collective execution process, whereby the debtor's assets are used to settle debts to the benefit of creditors; the company may resume its operations once this process has been concluded.

All creditors will be subject to the liquidation process, as well as all of the (bankrupt) debtor's tangible and intangible assets. It is important to note that solely Brazilian limited liability companies may be subject to liquidation under Law No. 11.101/05. Non-merchant companies (*sociedade civil*) are governed by specific rules established in the Brazilian Civil Code and Code of Civil Procedure.

A receiver is also appointed by court in liquidation proceedings. In liquidation proceedings, unlike in the judicial reorganization, the debtor is removed from the company's business activities, the duties incumbent upon the court-appointed receiver are more extensive; it must protect the company's assets, referred to as "bankrupt estate" or "*universita iuris*".

The general creditors' meeting, responsible for establishing the creditors committee and deciding in which manner the bankrupt estate will be disposed, must be organized with the same classes of creditors as the judicial reorganization meeting, including labor-related creditors, creditors entitled to in rem rights, and other creditors.

The order of debts to be settled by the bankrupt estate is set forth in article 83 of the Law, and is as follows:

- labor debts, to a cap of 150 minimum salaries per creditor and debts arising from occupational accidents;
- in rem debts, to a cap of the encumbered asset;
- tax debts, regardless of their nature and when they were levied, with the exception of tax fines;
- special lien credits, as so defined in other civil codes and commercial laws, and credits whose holders are granted by law rights in collateral;
- credits with general privileges, such as those set forth in the sole paragraph of article 67 of this Law and so defined in other civil codes and commercial laws;
- unsecured credits, which include credit balances uncovered by the disposal of the assets tied to payment thereof and debts arising from labor legislation that exceed 150 minimum salaries;
- contractual fines and monetary penalties for violation of criminal or administrative laws, including tax fines; and,
- subordinated debts such as credits owed to shareholders and administrators who have no formal employment tie.

Legislation does not define term for liquidation proceedings, provided however that, in accordance with general rule, it should comply with the principles of procedural swiftness and economy.

Lastly, in regard to the sale of the assets of the bankrupt estate, as to realize the assets, the law defines the following order of preference: disposal of the company, with the sale of all establishments as a whole; disposal of the company, with the sale of subsidiaries or production units independently; disposal of all assets that compose each one of the debtor's facilities; disposal of individual assets.

Conclusion

Unquestionably recently enacted Brazilian Liquidation legislation has been a significant step forward both for lawyers and the domestic economy, by making new and important mechanisms available to guarantee effective application of the law. By providing for extrajudicial reorganization and judicial reorganization processes, legislators have demonstrated their concern in safeguarding the corporate structure of companies and the social role companies play, by continuing activities, seeking to overcome momentary financial crisis.

In the past long-lasting liquidation proceedings were quite common, given that the bankrupt estate was unable to amass sufficient assets to settle all of the company's debts.

The new legal mechanisms seek to remedy this problem. However, it is worth noting that the creditors approach is also decisive, not only in liquidation proceedings, but especially in regard to the approval, supervision and execution of the reorganization plan of the company.

Undoubtedly the preservation of the commercial relationship between the debtor and creditor, in the liquidation process, will be more advantageous in comparison to a simple proof of claim via a collective execution..

This legislation is relatively new (enacted in 2005) and thus there is much room for improvement. That is why it is important for foreign investors to consult with legal experts, who have vast knowledge regarding this Law.

Brazilian legal counsel not only will help analyze the feasibility of corporate reorganization plans, but will also identify the best alternatives and mechanisms to be adopted, be it by the debtor or creditors, additionally helping identify excellent business opportunities that may arise from these processes, such as the disposal of assets of the company undergoing reorganization, for example.

Preventative measures taken by the creditor, are also important in order to avoid surprises in the future, during negotiations with financially troubled companies.

XIX. Mining and Energy Law

Overview

The Federal Constitution establishes that untapped hydro power and mineral resources found in Brazilian soil and subsoil belong to the Federal Government, who may either exploit said resources directly or transfer its exploration or utilization rights to third parties by granting an authorization or concession. They include: geology, mineral and energy resources; exploitation of hydro power; mining and metallurgy; oil, fuel and electrical energy, including nuclear power.

The Ministry of Mining and Energy (MME) is the government body that oversees mining and energy matters; the Brazilian Energy Regulatory Agency (*Agência Nacional de Energia Elétrica* - ANEEL) and the Brazilian Geological Survey (*Departamento Nacional de Produção Mineral* - DNPM) work within the framework of the MME.

ANEEL regulates and oversees activities related to the production and distribution of electrical energy, while DNPM is responsible for planning and developing mineral exploration, as well as controlling and overseeing mining activities throughout Brazilian territory.

Mining

Brazil's vast territory allied with its rich geological formation offers enormous potential in terms of different minerals, allowing one to produce huge quantities of raw materials, which attracts much international attention.

Currently, Brazil has one of the largest untapped ore potential worldwide, representing approximately 100 explored ore substances, and according to a study conducted by the Brazilian Mining Institute (IBRAM), the investment forecast for the industry between 2007 and 2011 is approximately US$28 billion, i.e. an average of US$5.6 billion per year.

The exploration of mineral resources by the private sector is allowed pursuant to the Code of Mining and Energy (Decree Law No. 227/1967). The main method in order for parties to be able to exploit ores is through concessions, which are obtained according to ministerial directive published by Ministry of Mining and Energy, as detailed Chapter X.

To initiate surveys to identify potential of ore deposits, the interested party must obtain a "Geological Survey Permit" granted by the DNPM General Manager, for a three-year period, which may be extended for another three-year term. Permits are granted on a first-come, first-serve basis.

If a permit-holder identifies the feasibility of exploring the ore deposit and meets legal requirements to be granted a mining concession, the Ministry of Mining and Energy will be required to grant said concession. The concession-holder must obtain an "Operating License" prior to initiating its activities. In order for the concession-holder to obtain said License it must submit both the Environmental Impact Study and Environmental Impact Report.

In consideration for the economic exploration or extraction from an ore deposit by the private initiative, the concession-holder must pay to the states, Federal District, municipalities, and federal government bodies, a Government Mining Royalty Fee (CFEM), as established in article 20, paragraph 1 of the Federal Constitution. Said fee is calculated based on the net revenue obtained from the sale of the product. The rate applied varies depending on the ore.

According to information contained in the DNPM website (www.dnpm-pe.gov.br), the main rates currently applied are:

- 3% for aluminum ore, manganese, rock salt and potassium;
- 2% for iron ore, fertilizer, coal and other substances;
- 0.2% for precious stones, lapidary colored stones, carbonates and noble metals; and,
- 1% for gold.

(a) Bills proposed to change the Brazilian Mining Code

The Federal Government, through the Ministry of Mining and Energy, is studying the possibility of carrying out a profound change to the mining regulatory framework in order to foster its development. Some Mining Code amendments proposed include:

- creating a regulatory agency; authorities are analyzing potentially transforming the Brazilian Geological Survey (DNPM) into a regulatory agency;
- allowing parties to use the survey permit or mining concession grant as a collateral to raise funds with banks; the financial institution would have access to information regarding the volume and characteristics of the ore deposits that are registered with the DNPM;
- changing the method used to grant survey permits and mining concession grants; authorities are analyzing establishing a selection process for the prospecting phase and a bidding tender process for mining activities, as to restrict the preference given to parties that initially conducted the survey; and,
- increasing taxes levied on the industry by charging royalties from mining companies.

The process to obtain the mining license is currently set forth in the Code of Mines (or Mining Code) in effect, which establishes that the Brazilian Geological Survey (DNPM) has the authority to approve surveys and of the Ministry of Mining and Energy (MME) to grant the mining concession.

Energy

Brazil's vast national territory, together with its population and industrial growth, results in an ever-increasing demand on energy for domestic consumption.

Even during the acute global financial crisis that burst in the second half of 2008, the electrical energy consumption forecast for the 2009-2013 period made by the Brazilian Power Research Institute (EPE), predict a 6% hike in power consumption in Brazil in 2010 and 5% in 2011.

To increase in energy demand the Brazilian government has continually invested in programs to foster the development of the sector, providing incentives for the private sector to produce power.

(a) Government Incentives

The Wind Energy Emergency Program (PROEÓLICA) and the Program for Incentive of Alternative Energy Sources (PROINFA) are examples of incentives granted by the Brazilian government for exploitation of energy resources in Brazil.

PROEÓLICA was established by Resolution No. 24/2001, passed by the Energy Crisis Management Chamber (GCE), and its objective was to promote the generation of wind power integrating it into the Brazilian energy grid, by committing to purchase up to 1050 MW of wind energy for a 15-year period and grant of tax incentives. For example in the state of Ceará, the local authorities granted the deferral of ICMS (State VAT) for 120 months to companies participating in the PROEÓLICA program.

PROINFA, in turn, was established by Law No. 10.438/2002 and its objective was to promote *"the inclusion of electrical energy from Independent Small-Scale Producers, generated from wind, small hydroelectric power plants and biomass, into the into the Brazilian energy grid"* (article 3), by committing to purchase up to 3,300 MW of renewable energy, divided as follows: wind energy (1,423MW), biomass energy (685MW) and small hydroelectric power plants (1.192MW). This program enabled a number of producers to enter the market and install power plants throughout Brazil, especially off the Northeast and Southern Coast.

(b) Wind Energy

Brazil has the highest wind power production capacity in Latin America. According to the National Wind Atlas (1998), Brazilian wind power generation potential totals 143 Gigawatts (GW), that is only taking into account facilities on land. However, only 359 MW are used currently produced by the 16 wind parks installed in Brazil.

A study carried out by the Weather Forecast and Climate Study Center (CPTEC), based on the Brazilian Wind Potential Atlas, concluded that wind speed required for energy generation (i.e. approximately 7 meters per second) is found in more than 71,000 Km^2 of the Brazilian territory.

Adequate wind speed allied with the demand for clean and renewable energy has led the Federal Government to begin investing in the generation of wind power.

The National Energy Plan (PNE 2030) drafted by the Ministry of Mining and Energy, the Energy Development and Planning Secretariat and the Brazilian Power Research Institute (EPE) highlights Brazil's commitment to having a large portion of renewable energy in its energy grid, as to diversify the electrical energy sources.

Aligned with the terms established in PNE 2030, the Federal Government will hold the first wind energy auction, in response to the lobby organized by entrepreneurs in this sector. The auction will be conducted by the Brazilian Energy

Regulatory Agency (Aneel) in November 2009 (MME Ministerial Directive No. 147/2009) and the Energy Reserve Contracts will be executed based on the quantity of electrical energy.

The energy price will be determined by the winning bid price and established in R$/MW (MME Ministerial Directive No. 52/2009). This same guideline may be adopted in the subsequent auctions.

(c) Small-scale Hydroelectric Plants

Small-scale Hydroelectric Plants (PCH) are defined as conventional hydroelectric plants producing more than 1 megawatt and less than 30 megawatt, with total reservoir area equal to or less than 3 km^2 (article 2, Resolution No. 394/1998).

PCHs have been identified as the alternative energy source that will most expand in Brazil given the advantages afforded by this type of energy:

- PCH implementation is fast, investment and maintenance cost is low;
- Investors do not have to go through bidding tender process and only ANEEL authorization is required for implementation;
- environmental licenses are granted much faster given that they cause a low environmental impact;
- investors are not required to pay royalty fee for the use of water resources; and,
- tax incentive whereby tariffs for the use of electrical transmission and distribution systems are reduced by at least 50%.

According to data published by the National Development Center for Small-Scale Hydroelectric Plants (CndPCH), 253 of these hydroelectric plants have already been set up in Brazil; a total production of 1,276,924KW. Only 5 of the 26 Brazilian states do not have any PHC in operation or awaiting authorization.

The Program for Development and Sale of Electrical Energy produced by Small-scale Hydroelectric Plants (PCH-COM) was established by the Federal Government to make the implementation or overhaul of small-scale hydroelectric plants feasible. It is through these incentives than ELETROBRÁS ensures the purchase of energy produced by the small-scale hydroelectric producers, while the Brazilian Development Bank (BNDES) offers financing for the project.

(d) Nuclear Power

The Federal Constitution bars any exploration of nuclear activities in Brazilian territory, determining that Government holds the exclusive authority to operate in this sector (monopoly).

The Ministry of Science and Technology (MCT) is responsible for national Nuclear Energy policy, and thus it must promote research and development of nuclear technology, and coordinate the Protection System for the Brazilian Nuclear Program (SIPRON), among other things.

The Government's monopoly on nuclear activities is primarily exercised through the National Council for Nuclear Energy (CNEN), an independent federal government agency founded October 10, 1956, linked to the Ministry of Science and Technology, and through Empresas Nucleares Brasileiras Sociedade Anônima - NUCLEBRÁS and its subsidiaries.

A Federal Constitution Amendment bill (PEC 122/2007) is currently being analyzed by the House of Representatives to move forward with the Brazilian Nuclear Energy Program.

The Amendment Bill seeks to change the wording of articles 21 and 177 of the Federal Constitution, to ban the Government's monopoly on the construction and operation of nuclear reactors for the generation of power, thus allowing the private sector to build and operate said reactors through concessions.

The Amendment bill proposes that concessions be granted to private companies for construction of nuclear power plants exclusively for the generation of electrical energy.

Given the facility of extracting uranium in Brazil, the sixth largest reserve worldwide, opening the nuclear sector to the private initiative would definitely attract investments to the sector and allow Brazil to expand its energy grid.

XX. Aviation

Overview on foreign participation in the Brazilian aviation market

According to the constitution, only the Federal Government, through the Ministry of Defense, is allowed to exploit air and aerospace transport and airport infrastructure services in Brazil, upon concession or authorization.

These activities are essentially regulated by the Brazilian Aeronautical Code (CBA), established by Law No. 7,565/86 and by International Treaties, Conventions and Acts to which Brazil is signatory. These activities are subject to inspection by the National Civil Aviation Agency (ANAC), an independent federal government agency created by Law No. 11.182/2005.

In accordance with CBA, air transportation is divided into private and commercial transportation. Private transportation is that provided by the jet owner for his own benefit, i.e., without receiving any remuneration. Commercial aviation services, in turn, is that provided in return for compensation, either for transportation of cargo or passengers, be it domestic or international, scheduled or not.

In the case of exploration of commercial air services it is restricted to Brazil-based companies, managed by Brazilians in which at least 80% of voting capital stock belongs to Brazilian citizens. Express ANAC approval is also required (article 181 of CBA).

However, these restrictions in regard to the participation of foreign capital in Brazilian aviation companies are no longer justified, especially considering the increasing demand in this sector and the global trend of restraining the application of barriers to foreign or international capital.

Upon the passing of Constitutional Amendment No. 6/95, which expressly revoked article 171[54] of the Federal Constitution, there has been much debate in regard

[54] "Article 171. A company is deemed to be:
I – a Brazilian company if it is organized in accordance with Brazilian laws and whose head offices and management is located in Brazil;
II –a Brazilian capital company if its effective control is permanently in direct or indirect hands of individuals resident and domiciled in Brazil or legal entities. Effective control is deemed to be the ownership of the majority of the voting capital and the legal exercise of decision-making power to manage its activities.

to the application of the provisions contained in article 181 of the CBA, whereby parties argue that discrimination between a Brazilian company of national capital, and a Brazilian company of foreign capital was thereby prohibited.

This is why there are a number of Bills currently being discussed by the National Congress seeking to lift this restriction on the participation of foreigners in Brazilian airline companies, or at least, to reduce it.

Said restrictions evidently do not apply to international commercial aviation services, which may be legally operated by foreign companies, provided that they: (i) have been authorized by their country of origin, (ii) have authorization to operate in Brazil, and (iii) have authorization to provide air services.

Brazilian aviation sector structure

In addition to ANAC, the Department of Airspace Control (DECEA) and the Brazilian Airport Infrastructure Office (INFRAERO) are linked to the Ministry of Defense.

DECEA, under subordination of the Aeronautics Command, is exclusively responsible for the management, planning and coordination of air traffic control, cartography, flight instruction, flight navigation safety, aeronautic telecommunications, meteorology and correlated activities.

In turn INFRAERO is responsible for airport infrastructure, in strict compliance with rules established by ANAC and DECEA. This publicly-held company manages 67 airports throughout the country, which over 90% of the passengers in all Brazil travel through.

The Viracopos International Airport, in the city of Campinas, state of São Paulo, has the largest cargo terminal, in terms of volume, in Brazil and may possibly become one of the largest cargo distribution centers in the world.

Paragraph 1 Law may, in regard to Brazilian capital companies:
I – grant special, temporary protection and benefits to carry out activities considered to be strategic for national defense or vital for Brazil's development;
II – establish, whenever it considers an industry to be vital for the national technological development, among other conditions and requirements:
a) the requirement that the control referred to in item II of the main section be applicable to the company's technological activities, being understood to encompass the legal exercise of the decision-making in regard to developing or absorbing technology;
b) ownership interest percentages, in the capital, of individuals resident and domiciled in Brazil or legal entities.
Paragraph 2 In regard to the purchase of goods and services, the government will offer a preferential treatment, pursuant to the law, to Brazilian capital companies."

The largest and most modern live cargo warehouse in Brazil is located at the International Airport of Rio de Janeiro, with stalls that can house up to eight horses, as well as a laboratory.

The International Airport of São Paulo/Guarulhos is ranked in first place in terms of income, followed by the Airports of Viracopos/Campinas (São Paulo), Manaus (Amazon) and Galeão/Rio de Janeiro (Rio de Janeiro)[55].

Currently the Government has commissioned some studies to analyze the possibility of granting concessions, to the private sector, to operate certain airports and potentially taking INFRAERO public, including opening it to foreign capital investments.

Aircraft Registration

The Brazilian Aeronautical Registry (RAB) is incumbent upon ANAC. This registration is what conveys Brazilian nationality to an aircraft. Only Brazilians, foreigners domiciled in Brazil or legal entities operating in Brazil may obtain this registration.

Individual exploring, using, leasing or who has express consent to use the aircraft from the owner may obtain registration, however only on a temporary basis.

Aircraft leases

(a) Wet lease

Agreement whereby the registered operator (lessor) of the aircraft[56] provides an aircraft for one or more trips to a charterer (lessee - principal), for a pre-established period, during which it continues in charge of the crew and technical control of the aircraft, upon payment of a fee.

This charter agreement may be entered into through a public or private instrument and registration with RAB is optional. In Brazil, such lease may only be entered into in emergency cases.

[55] Source: INFRAERO

[56] "Article. 123. Aircraft operator or provider is deemed to be:
I – the legal entity which holds the concession to offer scheduled commercial transportation services or an authorization to provide general aviation services, specialized or air-taxi services;
II – the owner of a aircraft or one who uses it directly or through agents, in the case of private air services;
III – the charterer who has undertaken technical control, direction or authority over the crew;
IV – the lessee who acquired the technical control, direction or authority over the crew."

(b) Dry lease

Agreement through which the registered operator (lessor) of the aircraft provides an aircraft for one or more trips to a charterer (lessee - principal), for a pre-established period, having no obligation in regard to the crew and technical control of the aircraft, receiving payment therefore, also referred to as lease.

This dry lease agreement may be entered into by means of a public or private instrument, in the presence of two witnesses; however registration thereof with the RAB is mandatory.

Foreign aircrafts may temporarily granted permission enter Brazilian territory through dry leases; taxation levied thereon is proportional to the time the aircraft remains in Brazil. Such leases must be previously approved by ANAC, the Secretariat of Foreign Trade (ESSEX) and the Central Bank of Brazil.

(c) Finance leasing

An agreement that allows the party leasing the aircraft to buy it in the future (leasing). It may be entered into through a public or private instrument and it must mandatorily be registered with RAB. Such leases must be previously approved by ANAC, SECEX and the Central Bank of Brazil.

This type of international lease must meet certain requirements established by CBA, such as reasonable periodic payments; compatibility between the lease term and asset's useful life; compatibility between the international price of the aircraft and total lease value; and inexistence of coalition or interdependent relation between the foreign lessor and the Brazilian lessee.

Finally, it is worth mentioning that, although the purchase option is exercised only after the arrival of the aircraft in Brazil, financial leases are subject to all rules applicable to import of goods, including taxes, except for the state Value Added Tax (*Imposto sobre Circulação de Mercadorias* - ICMS[57].

Aircraft financing

(a) Legal mortgage

Mortgage taken out in favor of the Federal Government (Administration) whereby the purchase of the aircraft is guaranteed by the National Treasury and is automatically registered in RAB.

[57] A recent position of the Federal Supreme Court concluded for the non-levy of the State VAT (ICMS), under the grounds that lease does not imply transfer of title and the taxable event requires that the movement of the good involves the transfer of title to such good.

(b) Conventional Mortgage

It is taken out by the will of the parties. It may be formalized by a public deed or private instrument, in accordance with the rules of the country where the aircraft is registered.

Solely the owner of the aircraft is entitled to legally mortgage it. Should it belong to more than one owner, the express consent of all co-owners is required.

In Brazil, only the mortgages registered with RAB, duly based on instruments that include identification of the parties involved in the transaction, the debt amount guaranteed by the mortgage (including interest), the due date and place, detailed specification of the aircraft, as well as its insurance police, will be valid and effective.

(c) Overview in regard to the validity of mortgages

In accordance with CBA, aircraft mortgages are governed by the rules of the country where the aircraft is registered. However, the capacity of each party signatory to the mortgage will be governed by the laws of their respective domicile.

Foreign mortgages are acknowledged in Brazil once Brazil ratified the Geneva Convention. Thus said mortgages must be legally formalized and registered in the country of origin of the aircraft.

Air carrier's civil liability

With the enactment of Decree No. 5.910/2006, Brazil now complies with the rules established in the Convention for the Unification of Certain Rules for International Carriage by Air ("Montreal Convention").

However, air carrier's civil liability rules are regulated by the Consumer Code when it entails a consumer relationship – when the individual or legal entity purchases or uses the public air transportation service as the final consumer.

This is precisely because in Brazil the consumer (herein understood as both the passenger and the sender/receiver of cargo or postal package) is specifically protected by the government in view of its weaker position vis-à-vis airline companies.

Accordingly, provisions limiting indemnification for flight delays, passenger fatality and injury; destruction, loss or damages to luggage or cargo, as set forth in the "Montreal Convention" and the Brazilian Aeronautical Code (CBA), are not observed by Brazilian courts, which, in general, systematically apply the rules established in the

Consumer Protection Code (CDC) to guarantee effective and full compensation of the damages caused by the air carrier.

In turn, the CDC sets forth that the service provider (which includes the air carrier) will be strictly liable, based on the 'theory of risk', i.e. a company that exploits a given activity must assume the risks inherent with said activity.

Given the strict liability, in a case in which the service provided is inadequate, the service provider will be liable for the losses arising from said transportation regardless of its potential lack of culpability, and will only released of its liability to pay indemnification – material and moral damages – if it is able to prove the service provided had no defect or that the damaged incurred thereby is exclusively the fault of the consumer or that of third parties.

With the exception of air carrier's civil liability, which is governed by the Consumer Protection Code, other issues involving air transportation are governed by the "Montreal Convention", by the Brazilian Aeronautical Code and, on a complementary basis, by the Brazilian Civil Code.

XXI. Pharmaceutical Industry

Control and oversight of the pharmaceutical industry

Medication, in general, drugs, pharmaceutical raw materials and correlated materials/products are subject to oversight and control of health surveillance bodies linked to Ministry of Health.

According with article 1 of Law No. 6.360/76, solely companies which have obtained prior authorization from Ministry of Health may extract, produce, transform, synthesize, purify, divide, package, repackage, import, export, store or dispatch the abovementioned products.

The National Health Surveillance Agency (*Agência Nacional de Vigilância Sanitária* - ANVISA), established by Law No. 9.782/99, is Brazil's independent federal regulatory body linked to the Ministry of Health. ANVISA's primary mission is to protect citizen's health, through sanitation control procedures for the production and sale of health surveillance-related products and services, which include the environment, processes, feedstock and technology related thereto.

ANVISA is the body responsible for granting authorization for medication manufacturing, distribution and, import and export companies to operate, as well as granting and cancelling registration of products related to public health.

This agency may also, based on the Police Power inherent thereto, interdict sites where manufacturing, control, import, storage, distribution and sale of health-related products and services are carried out, in the event of infringement of any legal provision or potential health risk.

Furthermore, ANVISA is responsible for regulating, controlling and overseeing products and services related to public health, including medicine for human use, its substances and other processing materials, foods and cosmetics.

Any establishment that sells medication, such as, pharmacies (trade and/or manipulation of drugs and medication), drugstores, herb shops and health care centers are subject to ANVISA's inspection and control (Law No. 5.991/73[58]), and they are

all required to obtain an Operation Permit (*Autorização de Funcionamento* - AF). Without said permit they are not qualified and may not legally carry out activities.

In order for applicants to obtain the AF, they must:

- specify their respective industrial activity;
- submit their articles of incorporation, which must specify the activities to be carried out by the organization and identify its legal representative;
- specify the address of their registered headquarters, as well as industrial facilities, warehouse, resellers and representatives;
- provide product description and type;
- provide corroboration of their technical and operational capabilities; and,
- specify individual or individuals responsible for technical matters, their respective professional positions, as well as affiliation number with their respective class entities.

Once the company has obtained its AF (permit), it may carry out activities throughout Brazil. However, if the type of activity the company carries out, or the shareholder, officer or manager who is the company's legal representative changes, then the company must renew the AF. Please note that this permit is granted to the establishment, not the company, thus, each branch must obtain its own AF.

The documents required to obtain the operation permit (AF) depend on the type of company and the type of activity to be carried out:

- Documents required for **manufacturers and other companies** are specified in Ministerial Directive No. 114/94 and Normative Ruling No.01/94.

- Documents required for **Importers of Medication** are specified in SVS/MS Ministerial Directive No. 185/99, Ministerial Directive 114/94 and Normative Ruling No. 01/94, as the case may be.

- Documents required for **Pharmaceutical Product Distributors** are specified in SVS/MS Ministerial Directive No. 802/98 and Normative Ruling No. 01/94, as the case may be.

- Documents required for **Pharmaceutical Product Transporters** are

[58] **Pharmacy:** establishment that manipulates magistral and officinal formulae, sells drugs, medication, pharmaceutical processing materials and correlated products, including dispensation of medications;
Drugstore: establishment where drugs, medication, pharmaceutical processing materials and correlated are dispensed and sold in their original packaging;
Herb Shop: establishment that provides dispensation of medicinal plants;
Healthcare Center: establishment that provides dispensation and sale of drugs and medication.

specified in SVS/MS Ministerial Directive No. 1.052, dated December 29, 1998, and Normative Ruling No. 01/94, as the case may be.

The Operation Permit is valid for one year; the company must renew it after this period by submitting a request to ANVISA.

Government-controlled or run establishments are not required to have said permit. However, they are required to meet requirements regarding their facilities and equipment, as well as the services rendered and technical responsibilities.

Health Surveillance Fees

Any individual or legal entity that carries out any activity subject to Health Surveillance inspections must pay certain fees - collection thereof may be carried out by ANVISA, or at its discretion, be assigned to the states, Federal District and municipalities.

Pharmaceutical Product Registration

Manufacturing and sale of medication, drugs, pharmaceutical raw materials and correlated materials/products, as well as personal care products, cosmetics and perfumes, including imported ones, must be previously authorized by the Ministry of Health, through ANVISA.

Consequently, every new medication must be submitted to ANVISA registration. Resolution No. 136, dated May 29, 2003, established a *"Technical Regulation for New Medication"* for this process, applicable to every new medication, with exception of a certain few, which are subject to specific legislation.

The aforementioned regulation establishes the criteria and required documentation in order to obtain ANVISA medication registration. Evidently, any company that intends to obtain registration of a new medication must provide ANVISA with accurate information (in a structured report) regarding its composition, use, and clinical and therapeutic trial results obtained, in addition to documentation corroborating that the new product is beneficial to consumers' health and safe for use.

Product registration is valid for five years, with exception of diet products, whose registration is only valid for two years. Validity of both types of products may be successively extended for the same amount of time. Revalidation of the

registration must be requested in the first semester of the last year of the five-year validity period.

It is also worth mentioning that all changes made to the product already registered with ANVISA must be submitted to approval in its new version, so that, if approved, it is annotated in the previous registration, otherwise it may be canceled.

Lastly, foreign medications are also subject to ANVISA registration, but in this case, the applicant must prove that they were duly registered with the regulatory body of the country of origin.

Health: a fundamental right in Brazil, and free medication available to those in financial need.

In Brazil, health is a right upheld by the federal constitution, given that it relates to the protection of life itself. Since it is a natural right, i.e. inherent to every human being, it is safeguarded by the Federal Constitution (articles 5, 6 and 196)

The government's responsibility in regard to the supply of medication is also provided in articles 2, 6, item I, sub-item "d" and 7, item I and II, of Law No. 8.080/90, which founded the Government Managed Health System (*Sistema Único de Saúde* – SUS).

The SUS is composed of public health centers, outpatient clinics, labs, blood banks, the services of Health, Epidemiological, Environmental Surveillance, in addition to the foundations and research institutes, as to ensure the health of Brazilian citizens and every individual in Brazil.

Federal Government Incentives for the Pharmaceutical Industry

(a) State-run Pharmacies (*Farmácia Popular*)

June 2004 the Federal Government implemented the Popular Pharmacy Program (*Programa Farmácia Popular*), whose primary objective was to expand citizens' access to medication, deemed to be essential, by allowing them to purchase medicine at privately-owed pharmacies affiliated with the program.

This program seeks to meet the needs of public healthcare users, as well as individuals who use private healthcare services, but who do not have the financial means to purchase the medication they need.

The key objective of the Program is to allow people to purchase medication

that is required to treat ailments that are more prevalent among the population, thus reducing the cost for patients undergoing treatment.

When the Ministry of Health created the Popular Pharmacy Program it also designed a co-participation system, whereby the federal government and citizens share costs. In reality, the government subsidizes 90% (ninety percent) of the medication's reference value and the patient pays the rest.

That is how the Popular Pharmacy Program is able to provide the benefit of low-cost medication to the population.

There are a number of measures which reflect the alignment with the Program, such as, for example, Law No. 10.858/2004, which authorizes the Oswaldo Cruz Foundation to make medication available at cost.

(b) Generic Medicine

A generic medicine is a drug that has the same active ingredient as the reference medication it imitates. The reference medication, in turn, is a drug whose efficacy and quality have been corroborated through ANVISA registration. They are well-known brands or commercial names that have been in the market for long time.

Generics must mandatorily have the same efficacy as the reference drug (bioequivalence). In its capacity as the health oversight and controlling agency ANVISA is also responsible for confirming bioequivalence between generic drugs and its respective reference.

Law No. 9.787/99, which established generic medication, was an extremely important landmark for the health of Brazilian citizens, given that it provided them access to medication at a lower and fair cost, yet ensuring their quality and efficacy.

One is able to offer a low cost for generics essentially because the cost of research is not added to the cost of the final product. The development of a new drug costs approximately US$400 million. Additionally the generic medicine is not associated with a brand, and thus there is no need to invest in marketing which certainly would increase the cost of the end product.

In view of these factors, generic medication may be up to 40% lower in relation to reference drugs.

They are referred to as "generics" once they are sold by the name of their active ingredient. However, although they have a different name from the original medication, generics must be equivalent and have the same pharmacological characteristics as those sold by well-known and traditional brands.

ANVISA guarantees the quality of generic medicines and labs that intend to manufacture them must request respective authorization from the agency, as well as product registration, in order to offer it to the market.

Once it is confirmed that the "generic" product has the same efficacy and results as the original product, the Ministry of Health will duly authorize the sale thereof, provided that the packaging has the following: (i) phrase "Generic medication sold according with Law No. 9.787" and (ii) a yellow strip and "G" as in Generic, so that the consumer may buy the medication prescribed by his/her doctor at a lower price.

The generics have become so important, that Brazil's Government Managed Health System (SUS), responsible for public healthcare in Brazil, which accounts for approximately 25% of the medication consumed in the entire country, preferably acquires generic drugs. Currently, in Brazil there are generic equivalents for approximately 50% (fifty percent) of all branded drugs.

XXII. Defense Industry

In the past few decades, the Brazilian Defense Industry has lost market share as well as technological capacity, due to the lack of government planning in this field primarily as a result of the low internal demand.

Currently, Brazilian production essentially focuses on light military equipment; however, please note that the industry has a long-established aircraft, tank, rocket, multiple rocket launcher system, naval combat fleet, etc. manufacturing capacity. The country is definitely capable of developing this industry.

As a result of the above, the Federal Government, since 2004, has established rules to consolidate the National Defense. Recently enacting Decree No. 6.703/2008, which approved the first National Defense Strategy (EDN), as to systematically orient the restructuring of the Brazilian Armed Forces, as well as restructure the Brazilian private defense contractor sector.

The EDN sets forth general guidelines regarding national defense and establishes that the development of detailed rules on procedures required for effective operation be drafted by June 2009.

Restructuring of the Brazilian Defense Industry

The restructuring strategy is basically focused on providing investments for the development of technology used by the National Defense Industry, so as to make the manufacturing of high-technology defense equipment needed to carry out the Brazilian Armed Forces' activities feasible. Currently almost all equipment used is imported.

Thus, the Brazilian government established differentiated legal, regulatory and tax procedures to be applied to the Defense Industry. Additionally contractors in this industry are not subject to bidding tender requirements, but on the other hand, the State has special powers in regard to the Defense Industry through golden shares or regulatory licenses.

Moreover, the government encourages partnerships, in the form of an association, with other nations seeking to develop national defense product technology and manufacturing capacity (technology transfer).

Armed Forces and Defense Arsenal

The National Defense Strategy also reiterates the need to secure national air force superiority; it expressly provides that by 2025 Brazil's current air force fleet and aerospace defense equipment must be completely renewed.

This target is achievable either through (i) partnerships with other countries to design and manufacture such equipment in Brazil, or (ii) negotiation of the purchase of such equipment based on agreements that contemplate complete transfer of technology, including design and manufacturing process of the imported equipment.

Another goal of the EDN is to decentralize the Brazilian Air Force technological facilities, which for the most part is located in the city of São José dos Campos, in the state of São Paulo. The areas that represent the greatest risk for the National Defense are the North, West and South Atlantic regions, precisely where the government intends to promote the installation of the Defense Industry facilities.