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# Legal certainty for foreign investors in Brazil

November, 2019



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# Introduction

Brazil is a country of continental dimensions, with natural richness a diversified economy and a large consumer market. In the last years, the country has been making a huge effort of regulatory and legal improvements aiming to bring more legal certainty to current and future investors which represents an important asset in the attraction for those interested in investing in the country.

Despite the dynamics of political alternation and economic cycles, investments in Brazil are ruled by contracts that are respected and guaranteed in all instances and several initiatives by the Federal Government have been taken to create a more favorable business environment. This commitment to legal certainty provides a solid and promising foundation for establishing a more lasting and sustainable cycle of investment, prosperity and economic growth in the country.

# Requirements to invest in Brazil

Foreign or non-resident investors are recognized as the individuals or legal entities, funds or other collective investment institutions residing, based or domiciled abroad.

According to Resolution No. 4,373/2014 from the Brazilian Central Bank, before initiating the operations in our territory, a non-resident investor must:

- Retain a representative body in Brazil;
- Submit their credentials to the Central Bank of Brazil;
- Initiate the registration process at the Brazilian Securities Commission

In addition, to invest in Brazil, it is required that the natural or legal person is registered at the general taxpayers' register from the Brazilian Internal Revenue Service.

# Ensuring Federal Government investments

To ensure that Federal Government's planned investments are made, besides legal reforms and better planning studies, the country counts on the Attorney General's Office (AGU), composed of eight thousand extremely trained and dedicated public attorneys, committed to the mission of providing legal certainty to investments made in the country.

The role of the Attorney General's Office in this process ranges from giving legal advice to public managers who are in charge of planning and carrying out investor contracts to, if necessary, defending these contracts before the country's courts – as well as contributing to the improvement of the regulatory framework and through mediation in search of faster and friendlier solutions to eventual conflicts.

The institution is present in all ministries, regulatory agencies and federal authorities, where it is its role to ensure the legality of the government's acts and thus reduce the risks of future judicial challenges. Should they still occur, a task force is prepared to act immediately, providing the necessary clarification to the judges who will review the cases before they can render a decision.

It was in this careful and proactive manner that Attorney General's Office managed to enable investments in the order of R\$ 57.45 billion (around US\$ 14 billion) only in 2019, considering auctions for the concession of oil and gas blocks, airports, railways, ports and highways held by the Federal Government without judicial obstacles.

# Fostering new investments and the Investments Partnerships Program

Legal framework of principles, institutions and measures for coordinating privatization policies in Brazil:

## *Constitution*

Economic Guidelines such as private property, free competition and free enterprise are enshrined in the Constitution. It ensures the economic-financial balance in contracts signed by the Brazilian Government with private stakeholders and provides for essential rules for certain public services and economic activities.

The basic principles of the economic order such as respect for private property and free competition are guaranteed by the Constitution, the largest law of the Brazilian State.

Likewise, the various normative diplomas ratify legal certainty as the absolute and fundamental value in the realization of these constitutional principles. This is how Brazil is committed to promote legal certainty to investments made in the country by defining clear rules and, above all, respecting contracts, creating a favorable environment for investments in the country.

## *Law Nº 13.334/2016*

It establishes the Council of the Investment Partnerships Program of the Presidency of the Republic and the Special Secretariat for the Investment Partnerships Program. It determines that assets and development policies qualified in the PPI as a decision from the Council and through a Presidential Decree become national priorities.

### *Law N° 13.874/2019*

Declaration on Economic Freedom Rights. Establishes rules for the protection of free enterprise and the free exercise of economic activity, institutes the declaration of economic freedom rights, facilitating and reducing bureaucracy in private investment in Brazil.

## **Privatizations and partial-sale of State-owned Companies (SoC)**

Measures to ease shareholding and assets transfer from SoC to the private sector.

### *Law N° 9.491/1997 and Decree N° 2.594/1998*

It creates the Destatization National Program, currently coordinated by the Council of the Investment Partnerships Program of the Presidency of the Republic. It provides for different models to ease shareholding and public services transfer to the private sector.

### *Decree N° 9.188/2017*

It sets forth the special regime for easing assets transfer of partially state-owned companies.

## *Supreme Court Decision - Divestment in State-owned Companies*

The Supreme Court, the highest court of the Brazilian Judiciary, authorized the sale of subsidiaries and controlled state-owned companies without the requirement of prior authorization from the National Congress for the operation.

# Delegation of formal remit to provide public services

Regime and transfer models to delegate the formal remit to provide public services to the private sector.

## *Law N° 8.987/1995, Law N° 9.074/1995 and Law N° 11.079/2004*

It sets forth the general regime for concessions and permits for the public services, with exclusively private resources (“ordinary concession”) or resorting to public funds (“public-private partnerships”, under the models of “sponsored concession” or “administrative concession”). It provides for procedures to engage private partners. It puts forward requirements for those delegation contracts, such as benchmarking for proper service, tariffs policy, obligations on each side, guarantees, step-in rights, arbitration and contract cease.

## *Law N° 13.848/2019*

General Law on Regulation Agencies. It provides for the minimum rules of governance, accountability and decision-making processes in the agencies.

### *Decree N° 8.428/2015*

It sets forth the formal procedure to express interest to draft projects to structure assets to be offered to the private market, to be absorbed by public bodies to set models for public services concessions.

### *Law N° 12.431/2011 and Law N° 11.478/2007*

It establishes the tax special regime for debentures (Brazilian bonds) issued by a company of specific purpose that manage concessions (“SPE”), the certificates for real state yields and the credit rights shares for investment. It provides for creating an investment fund on infrastructure shareholding and investment fund on R&DI shareholding.

## **Special regimes on public services and economic activities**

Sectorial rules which overrule the general regime.

### *Law N° 10.233/2001, Law N° 12.815/2013 and N° Decree 8.033/2013*

It provides for the policy for water and land transportation, as well as the economic exploitation of ports and port facilities. It establishes the Water Transportation National Agency (ANTAQ) and the Land Transportation National Agency (ANTT).

### ***Law N° 9.472/1997 and Law N° 13.879/2019***

General Law on Telecommunications. It establishes the Telecommunications National Agency (ANATEL). It provides for the model for economic exploitation of telecom services, through concession, permit or authorization.

### ***Law N° 9.478/1997***

National Energy Policy. It establishes the Oil, Natural Gas and Biofuels National Agency (ANP). It provides for the model for economic exploitation of Oil, Natural Gas, Hydrocarbons and Biofuels.

### ***Law N° 12.351/2010***

It establishes the regime for the exploitation of oil, natural gas, hydrocarbons and biofuels on a production sharing basis in which the Union will receive a fresh portion of the exploration product. This regime applies to pre-salt areas that are characterized by low exploratory risk and high oil production potential.

### ***Presidential Decree N° 227/1967 and Law N° 13.575/2017***

Mining Code. It establishes the Mining National Agency.

### ***Law N° 9.427/1996***

It provides for electric power public services. It establishes the Electric Power National Agency (ANEEL).

# Settling disputes between investors and the Brazilian Government

Appropriate framework for settling disputes concerning investments.

## *Law N° 9.307/1996 and Decree N° 10.025/2019*

General regime of arbitration. The decree specifically rules over arbitration regarding logistics assets in the fed-level. It enables setting forth arbitration clauses within concession contracts or arbitration commitments after the dispute has begun. The Federal Government has comprehensive expertise in arbitration within acknowledged chambers, whose decisions must be fulfilled by the Executive and Judicial Branches.

## *Chamber of Mediation within the Fed-level Government*

It allows settling disputes between the investor and the Brazilian government through mediation, carried out by a chamber from the Attorney General's Office dedicated to Public Law matters.

# Regulatory framework for combating corruption and promoting integrity and transparency

Compliance and corruption avoidance regimes and measures taken to foster a clear and fair business environment.

## *Law N° 13.303/2016*

The State-owned Enterprises Act requires companies controlled by the Brazilian State that operate in the market, in the production of goods or in the provision of services to adopt transparency rules and compliance programs, as a way to avoid, detect and punish corruption practices.

## *Legal Ordinance N° 57/2019 of the Controller General's Office*

Inspired by the United Nations Convention Against Corruption (UNCAC) and the Inter-American Convention Against Corruption, this Legal Ordinance requires the organs and entities of the Federal Public Administration of Brazil to adopt compliance programs as a way to prevent, detect and punish corruption practices.

## *Law N° 12.846/2013 and Decree N° 8.420/2015*

Regulation of Leniency Agreements. Through these agreements the company commits itself to collaborate with the investigations, pay the amounts due to the government and adopt an integrity program. In return, it guarantees its regular performance in the Brazilian market. It is an important tool for preventing corruption and fostering business ethics and integrity.

The company interested in entering into a leniency agreement should contact the Controller General's Office:  
<http://www.cgu.gov.br/assuntos/responsabilizacao-de-empresas/lei-anticorrupcao/acordo-leniencia>

# Converging the Brazilian legal framework to the OECD standards

Brazil is fully entitled to set the OECD accession process in motion. The relationship between Brazil and the OECD dates back to 1994. Since then, Brazil has adhered to 82 OECD legal instruments, which are rules, best practices and policies guidelines set forth by the OECD committees.

Brazil has formally requested the adhesion to 66 additional instruments, out of which the Codes for Liberalization of Capital Movements and Current Invisible Operations, several instruments on Digital Economy, the Recommendations on Statistical Best Practices, among others. When engaging in the OECD Liberalization Codes and committing to transparency and responsibility in its policies on capital movement, Brazil shall improve its reputation as a responsible global player, while enjoying a better access to OECD markets and protection against potential discriminatory treatments by other members.



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