Doing Business in Brazil 2018
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Importing into Brazil

Import Licensing

Imports into Brazil are subject to government control from at least three levels of authority: the Secretary of Foreign Trade (“SECEX”), which supervises registration and licensing; the Central Bank of Brazil (“BACEN”), which approves payments for financed imports; and the Federal Revenue Department (“RFB”), which supervises valuation for customs purposes. Control is exercised through an electronic control system named SISCOMEX, which includes a network linking RFB, BACEN and SECEX. The first step for the would-be importer in the importation process is registration with SISCOMEX.

There are three kinds of imports:

1. those not subject to any kind of licensing,
2. those automatically licensed, and
3. those not automatically licensed.

To confirm the licensing requirement applicable to a specific product, the Brazilian importer must consult SISCOMEX, which will advise, based on the tariff classification of the product, whether or not the product is subject to licensing.

The import of certain goods not subject to licensing does not require any authorization from the Brazilian authorities prior to shipment to Brazil or clearance through Customs. Products imported under the temporary admission regime and products entitled to import duty reductions through an “Ex-Tarifário” are not subject to licensing. In this case, the Brazilian importer must only register the Import Declaration when the products undergo customs clearance.

On the other hand, non-automatic licensed imports are subject to prior examination and special control by certain governmental agencies. Non-automatic licensing must occur before the goods are shipped.
from abroad. In special circumstances, such as importing goods under the bonded warehouse regime and upon automatic licensed imports, the import may be subject to prior examination and special control by certain government agencies after the goods are shipped but before these go through customs clearance procedures.

Certain products, such as herbicides, pesticides and beverages, narcotic substances, human blood, and food are subject to approval and special control by particular government agencies, such as the Ministry of Agriculture (“MAPA”) or the National Health Vigilance (“ANVISA”).

Registration with SISCOMEX

Imports into Brazil are subject to the control of Brazilian authorities through SISCOMEX. All import documents must be registered in the SISCOMEX system. In order to obtain access to SISCOMEX, the Brazilian importer must request an authorization from the RFB to operate in the system with a password. The importer may be entitled to a Limited or Unlimited Registration. The Limited Registration limits imports up to an amount of USD 150,000 within a 6-month period. The Unlimited Registration has no limit on the amount or frequency of imports. The RFB grants RADAR licenses on a discretionary basis. The decision on the type of registration to be granted considers the financial capacity of the company in a 6 month period, and an analysis based on the amount of taxes collected by the applicant company in the 5 years prior to the request. In the case of newly incorporated companies, the legislation allows the possibility of assessing an applicant company's financial capacity by reviewing sale invoices issued since the company was established. Legal entities acting as acquirers on indirect import transactions (i.e., import by order or import on account of third parties) must also be registered with SISCOMEX.

Customs Valuation

If the customs value declared by the Brazilian importer is too low, the government is deprived of its rightful share of duties and taxes; if
it is set too high, the result may be an excessive remittance of foreign currency, in violation of exchange controls. For these reasons, the RFB strictly monitors the prices of imported products.

The Brazilian customs authorities accept the World Trade Organization ("WTO") valuation methods, since Brazil is a member of the WTO and has adopted the WTO rules through Decree No. 1,355, of 30 December 1994. In fact, Decree No. 1,355/94 reproduces Article VII of the General Agreement on Tariffs and Trade ("GATT 1994") and the Agreement on the Implementation of the Article VII of GATT 1994 ("Customs Valuation Agreement"). Apart from the WTO regulations, Brazil has few provisions regulating customs valuation.

Therefore, from a formal standpoint, Brazil strictly follows the WTO rules. From a practical perspective, however, the customs value control of products imported into Brazil occurs on a selective basis through SISCOMEX - an electronic system which involves a network among the RFB, the BACEN and the SECEX and contains all registrations related to imports (e.g., Import Declarations). The products are usually submitted to customs valuation control procedures based on SISCOMEX parameters. These parameters correspond to minimum and maximum ranges of prices acceptable for each tariff classification. It should be noted that these ranges are confidential and, therefore, we do not have access to such information.

If the price of importing a specific product falls outside SISCOMEX parameters, the customs official may request the importer to submit a declaration of customs value and documents to attest to the adequacy of the value declared by the Brazilian importer (e.g., distribution agreement, export documents, official price list, packing list, purchase order, exchange contracts, description of the negotiation process and determination of price, etc.). The Brazilian importer may demonstrate differences in commercial levels, quantity levels, and other relevant elements and costs incurred by the exporter in sales to non-related parties.
Agents

Commission agents may be paid either in Brazil in the national currency, or abroad as part of the import price. No minimum or maximum percentage is set on commissions, although the percentage seldom exceeds 10% of the import value.

Local Similarity Test

To qualify for special tax or financial benefits or incentives, an import must meet the “local similarity test” (teste de similaridade nacional). This test is conducted when SECEX confirms that a similar product is not available in Brazil.

Imports of Used Products

Although used products may be imported, SECEX subjects them to strict scrutiny to avoid fraud in connection with obsolete products. Moreover, used products may be imported only if the same or similar products are not available from Brazilian producers, and if their importation is in the interest of the national economy. The importation of used products is subject to non-automatic licensing, and the import license must be obtained before shipping the products from abroad.

Temporary Admission Regime

Under Law No. 9,430 of 30 December 1996, equipment imported under temporary admittance for economic use in Brazil will be subject to taxes levied on importation, based on the period the goods remain in the country. This provision is regulated by Article 353 of the Brazilian Customs Regulations, approved by Decree No.6,759 of 5 February 2009.

According to Normative Ruling Nº 1600/2015, the temporary admission regime may be carried out under two alternatives:

(i) The temporary importation of products without payment of taxes (i.e., the Import Duty ["II"], Federal Excise Tax ["IPI"] and Social
Commission agents may be paid either in Brazil in the national currency, or abroad as part of the import price. No minimum or maximum percentage is set on commissions, although the percentage seldom exceeds 10% of the import value.

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According to Normative Ruling Nº 1600/2015, the temporary admission regime may be carried out under two alternatives:

(i) The temporary importation of products without payment of taxes (i.e., the II, IPI and PIS/COFINS-Import), based on a loan, rental or service agreement between the foreign exporter and the Brazilian importer. The proportional taxes will correspond to 1% of the total amount of the taxes due per month in which the equipment will remain in Brazil. For example, if the goods will remain in Brazil for one year, the importer will pay upfront 12% of the total amount of taxes that would be levied in a definitive importation.

(ii) The temporary import of products with proportional payment of taxes (i.e., the II, IPI and PIS/COFINS-Import), based on a loan, rental or service agreement between the foreign exporter and the Brazilian importer. The proportional taxes will correspond to 1% of the total amount of the taxes due per month in which the equipment will remain in Brazil. For example, if the goods will remain in Brazil for one year, the importer will pay upfront 1% of the total amount of taxes due per month in which the equipment will remain in Brazil.

The procedure for calculating the State Value-added Tax on Sales ("ICMS") on imports under the temporary admission regime may vary from State to State. In the State of São Paulo the ICMS is due on the total value of the equipment on imports carried out under the temporary admission regime with proportional payment of taxes, similar to the federal taxes.

Bonded Warehouse

Importers may also deposit imported goods in public bonded warehouses. The products will remain in the custody of Customs officials. The importer will pay no customs duties (storage fees only) until the products leave the bonded warehouses for domestic consumption. The importer will pay no customs duties if the product is re-exported. Note that certain manufacturing activities are allowed within the premises of these warehouses. Products deposited in the bonded warehouse regime may be subject to assembly or repackaging process.

Leasing

International leasing is acceptable to SECEX under special financial conditions approved by the BACEN.
Exchange

Pursuant to Brazilian import regulations, imports into Brazil must be carried out with exchange coverage (i.e., with payment by the Brazilian resident to the foreign exporter). There are few exceptions under which an importation may be carried out without exchange coverage (i.e., without payment to the foreign exporter), such as in case of donation, capital contribution and temporary admission regime.

For imports with exchange coverage, once the SECEX's approved products are effectively imported, the Brazilian importer will be allowed to exchange local currency for the currency agreed upon with the exporter and to pay the import price through regular banking channels. Imports payable within a period greater than 360 days are subject to registration by the Central Bank of Brazil, through the Registro de Operações Financeiras (“ROF”).

Taxes on Imports

Taxes or duties on imports include the II, due on the CIF import price at selective rates; IPI, due on the import price grossed up by the II and based on selective rates; ICMS, due on the CIF import price grossed up by the II, IPI, PIS/COFINS-Import (explained below) and ICMS (rates of ICMS are 18% in most States); PIS/COFINS-Import, due on the import price grossed up by PIS/COFINS-Import itself at a combined rate of 11.75%; and maritime transport fee (AFRMM), due on the value of freight (usually at the rate of 25%).

Taxes are based on the customs value of the imported product. Based on customs valuation rules, insurance and freight must be added to determine the customs value of the imported products. Customs agents may question the tax basis, demand a higher basis for tax purposes, and impose penalties on the importer, depending on the circumstances. Under- and over-invoicing are subject to a penalty of 100% of the under- or over-invoiced difference.
Latin American Integration Agreement (LAIA or ALADI)

Brazil is a member of the Latin American Integration Association (LAIA or ALADI), instituted by the Treaty of Montevideo on 12 August 1980. ALADI members grant preferential duty treatment to one another. The ALADI community includes Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Panamá, Paraguay, Peru, Uruguay, Chile, Cuba and Venezuela.

Southern Cone Common Market (MERCOSUL)

Brazil is also a member of the Southern Cone Common Market, or Mercado Comum do Sul (MERCOSUL). MERCOSUL currently functions as a free trade zone and a customs union, except for some products that are still subject to quotas (e.g., vehicles). MERCOSUL now allows most goods and services to circulate among its members exempt from tariff and non-tariff barriers, and provides for a common external tariff (tarifa externa comum, or TEC) for most products that the member countries import from non-MERCOSUL countries. MERCOSUL has executed treaties providing for duty preferences with Bolivia (ACE 36); Chile (ACE 35); Mexico (ACE 54); Peru (ACE 58); Venezuela, Ecuador and Colombia (ACE 59); Cuba (ACE 62), Southern Africa Customs Union (“SACU”). Treaty for fixed tariff preferences with India, effective in Brazil as of 1 June 2009 and the treaty for fixed tariff preferences with Israel, effective in Brazil as of 28 April 2010, and is negotiating treaties with the European Community and Jordan, among others. The treaties signed with the Egypt, Palestine and Peru are pending approval to become effective in Brazil.

Manaus Free Trade Zone

The free trade zone of Manaus is designed to encourage manufacturing for export and local sales. Raw materials, parts and components imported into the Manaus free trade zone enjoy deferment and reduction of customs duties and IPI exemption. These benefits apply only to merchandise entering the free trade zone by the Manaus Airport or the Manaus Harbor. They do not apply to the
import of weapons and ammunition, perfumes, tobacco products, beverages or automotive vehicles. Constitutional Amendment No. 83/14 extended the applicability of these benefits until 2073.

[Revised as of April, 2017 ]
Exporting from Brazil

Export License

Exports from Brazil are supervised by the Secretary of Foreign Trade ("SECEX") and by the Central Bank of Brazil ("BACEN"). SECEX is simplifying the legal requirements regarding the exportation of goods. Currently, exporters must be registered with SISCOMEX.

Export Incentives

The Program for the Financing of Exports ("PROEX") provides financing to exporters. Exporters may also benefit from exemption from the Federal Excise Tax ("IPI"), immunity from the State Value-added Tax on Sales ("ICMS"), and exemption from Social Welfare Taxes ("PIS/COFINS"). (See Taxes on Exports.)

Drawback Incentive

Another export incentive is available under the Drawback System (Ordinance SECEX No. 23/11). This benefit takes the form of a deferral or exemption from taxes on the importation of raw materials, semi-finished and finished products, parts and components utilized in the manufacturing of products for export.

RECOF

The RECOF is a special customs regime called the industrial bonded warehouse regime under an electronic control system regulated by Normative Ruling No. 1,291/12. Under this regime, the importer is entitled to a suspension of the federal taxes levied on the importation of goods (i.e., the Import Duty ["II"], IPI, and Social Welfare Taxes on Imports ["PIS/COFINS-Import"]) to be used in the manufacturing process of products to be exported. This regime applies only to products expressly listed in the applicable regulation, such as electronic and telecommunication products, automotive products, aeronautical products and semiconductors.
To be entitled to the RECOF, the Brazilian company must have a minimum net equity of BRL 10.000.000,00 and assure minimum exports of 50% of the total amount of the goods imported under the RECOF regime. The RECOF regulations allow the beneficiary to sell a portion of the imported goods in the local market. After the goods are sold in the local market, the beneficiary must pay the taxes levied upon the importation of such goods.

**Exchange**

Pursuant to Brazilian export and exchange control regulations, exports must be carried out with exchange coverage (i.e., actual payment which ensures inflow of funds to Brazil). However, there are very few exceptions in which the export may be carried out without exchange coverage (i.e., without payment to the Brazilian exporter), such as capital contribution and temporary export regime.

In the past, exchange control regulations obliged Brazilian exporters to bring their export funds back to Brazil. Law No. 11,371/06, however, allows exporters to maintain abroad foreign funds related to payments for Brazilian exports of goods and services. According to the Ruling of the National Monetary Council (“CMN”) No. 3,568/08, Brazilian exporters may maintain 100% of the export payments abroad. Such percentage may be amended any time by the CMN.

**Taxes on Exports**

The Brazilian Constitution provides that Brazilian export products are entitled to tax immunity with respect to the IPI, ICMS and PIS/COFINS, regardless of whether these products are manufactured in Brazil.

Moreover, Brazilian government tax policy tends to reduce the tax burden on exports from Brazil. Thus, most export operations from Brazil are not subject to taxes, except for certain export products (such as leather) which are subject to Export Tax (“IEx”). This tax applies on an ad valorem basis at rates that vary depending on the type of product exported.
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[Revised as of April 2017]
Intellectual Property – Protection, Enforcement and Licensing

The Industrial Property Law (“the IP Law”) is the primary law in the area of patents, trademarks, industrial designs and geographical indications, and governs their registration with the Brazilian Patent and Trademark Office (“INPI”).

The IP Law is a modern statute that meets the requirements of the World Trade Organization (“WTO”) legislation related to industrial property rights (commonly referred to as TRIPS). In addition to its affiliation with the WTO, Brazil is a member of several international conventions and agreements, such as the Paris Convention and the Patent Cooperation Treaty for the protection of industrial property rights.

Patents

1. Patent Categories

The IP Law provides for two types of patents: (i) inventions and (ii) utility models. An invention is an original concept that represents a solution for a specific technical problem and may be industrially manufactured or used. A utility model represents a known product with a practical purpose that is given a new form or presentation, improving its use or its manufacturing.

2. Non-patentable Inventions and Utility Models

Inventions and utility models that are contrary to morals and good practices or to public safety, order and health are not patentable. Likewise, substances or products of any kind resulting from the transformation of the atomic nucleus are not patentable. Living beings, in whole or in part, are not subject to patent protection either, except for transgenic microorganisms that present the prerequisites of patentability and provided that they are not mere discoveries.

3. Prerequisites
There are three prerequisites for the patentability of a creation: (i) novelty; (ii) inventive activity; and (iii) industrial applicability. For an invention to be patented, it must be considered new, which means it is not included in the state of the art.

The state of the art comprises everything that has been made available to the public, either by written or oral description, by usage or any other means, in Brazil or abroad, before the filing date of the application. The requirement of an inventive activity will be complied with whenever, according to a person skilled in the art, the invention does not result from the state of the art in an evident or obvious manner. As a third prerequisite for patentability, the invention must be capable of being applied (i.e., used or produced) in an industrial scale.

4. Priority

A right of priority shall be granted to the application filed in a country that has entered into a treaty with Brazil or is a member of an international organization of which Brazil is also a member, such as the Paris Convention, during the terms provided for therein. According to the Paris Convention, the priority-claiming term is one (1) year for an invention patent and six (6) months for a utility model.

5. Validity

An invention patent is valid for twenty (20) years and a utility model, for fifteen (15) years, counted as of the date of filing of their respective applications. It should be noted, however, that such validity terms will never be less than ten (10) years for an invention patent and seven (7) years for a utility patent, as from the grant date, except if the INPI has been prevented from rendering a decision by reason of force majeure or court order.

6. Scope of Protection

The patent provides its owner with protection against unauthorized manufacturing, use, marketing, sale or importation of the patented product, or of the process or product directly obtained from a patented
process, by third parties, except when the unauthorized use is for noncommercial or experimental purposes that do not harm the patent owner’s economic interests.

7. Compulsory Licenses

According to the IP Law, patents may be subject to compulsory licensing to be granted by the INPI or by the Federal Government in any of the following circumstances:

(i) If the patent holder exercises his/her rights in an abusive manner or exercises, through the patent, abuse of economic power, which must be evidenced by an administrative or court decision

(ii) In case the patent is not fully exploited in Brazil within three (3) years after the granting of the patent, for reasons other than lack of economic feasibility

(iii) If the sale of the patented product or the product obtained through a patented process does not meet market needs

(iv) In case of a dependent patent that represents substantial technical progress vis-à-vis the original patent

(v) In case of national emergency or public interest, including interests related to public health and environmental protection, declared by the Federal Government, if the patent holder or licensee does not fulfill such needs

Such compulsory licenses may be requested by any interested third party, provided that such third party is technically and economically qualified to carry out the efficient exploitation of the patent. The products resulting therefrom must be earmarked mostly for the Brazilian domestic market. Compulsory licenses will be granted only on a non-exclusive basis and shall not be sub-licensed.

With the exception of compulsory licenses under national emergency or public interest situations, which are declared by the Federal
Government, the other types of compulsory licenses must be requested from the INPI, which will analyze conditions such as compensation and term.

8. Certificate of Addition

The IP Law also provides protection for an improvement or development introduced into the subject matter of an invention by granting a Certificate of Addition, which is added to the patent. The protection term of the Certificate of Addition shall be the same as that of the corresponding patent.


In addition to the extinction of the patent protection due to the expiration of its validity term, the waiver, lack of payment of any annual fee, forfeiture for failure to cure the abuse or misuse of the patent, or the lack of appointment of an attorney in Brazil to receive summons will cause the extinction of the patent.

Industrial Designs

1. Creations Valid for Registration

An industrial design is a two-dimensional representation (ornamental assembly of lines and colors) or three-dimensional object (ornamental plastic form) that may be applied to a product, affording a new and original look to its external configuration and may be used for industrial production.

2. Prerequisites

The prerequisites for the registration of an industrial design are novelty and originality. The definition of novelty is the same as that applied to patents. The prerequisite of originality shall be met if the industrial design has an original and distinctive visual configuration when compared with other previously known objects. A common or ordinary form of an object, or those determined by technical or
functional considerations, are not considered industrial designs. Immoral designs, as well as purely artistic works, do not qualify for registration.

3. Validity

The registration is valid for ten (10) years and may be renewed for three (3) successive periods of five (5) years each. A renewal fee must be paid every five (5) years.

Trademarks

1. Signs Qualified for Registration as Trademarks

Any visually perceptible, distinctive sign not prohibited by law qualifies for registration as a trademark. The IP Law has permitted registration of three-dimensional trademarks, but audio or olfactory trademarks do not qualify for trademark protection in Brazil.

2. Signs not Qualified for Registration as Trademarks

The following, among other things, cannot be registered as trademarks: (i) any expression or sign that is immoral, offensive or discriminatory; (ii) signs commonly used to describe the nature of a product or service; (iii) advertisement slogans and colors; (iv) false indications of geographical origin; (v) civil names or signatures, except upon consent of the holder of the right; (vi) technical terms used in connection with the product or service; (vii) reproductions or imitations of a mark belonging to a third party for identical, similar or related products; (viii) common or necessary forms or packaging of the product; and (ix) the reproductions or imitations of a mark that cannot be ignored by those that work in the field of activity in which the trademark is used.

3. Trademark Categories

Trademarks are divided into three categories:
(i) Product or service marks used to distinguish between two products or services

(ii) Certification marks used to assert the compliance of the product or service with certain standards of quality or technical specifications

(iii) Collective marks used to identify products or services from members of a certain group

4. Validity

Trademarks are registered for a ten (10)-year period and are renewable for identical and successive terms.

5. Prerequisites

Any individual or private or public entity may apply for the registration of a trademark in Brazil, provided that the applicant may claim only the classes related to the business activity in which an individual or entity is engaged, directly or through controlled companies. The applicant for a collective mark must be a legal entity that represents the collectivity, and the applicant for a certification mark may include a person without commercial or industrial interest in the certified product or service.

6. Priority

A right of priority will be granted to the application filed in a country that has entered into a treaty with Brazil or is a member of an international organization of which Brazil is also a member, during the terms provided therein. The priority term provided in the Paris Convention for trademarks is six (6) months.

7. Highly Renowned and Well-Known Marks

Special protection shall be afforded to a registered trademark deemed highly renowned in Brazil, covering all classes of products and
services. The request for the highly renowned status is made through an autonomous and independent proceeding. It may be requested at any moment of the trademark’s validity, by submitting the necessary evidence of such status (which includes, without limitation, market and trademark image surveys of national coverage) and upon payment of the special official fee. The highly renowned status is valid for a 10-year term as of the publication of INPI’s decision in the Official Gazette. By the end of such term, the trademark owner may request its renewal by filing a new request.

The trademark considered well-known in the field of activity in which it is used, pursuant to the Paris Convention, is also afforded special protection, regardless of whether it has been previously filed or registered in Brazil. This also applies to service marks.

**Geographical Indications**

According to the IP Law, the following qualify for protection as geographical indications and may be registered with the INPI:

1. Geographical names of countries, cities or regions that have become known as centers for the extraction, production or manufacture of a certain product or for the rendering of a certain service

2. Geographical names used to designate the qualities and features of products or services due exclusively or essentially to the geographical environment

The name of a geographical region commonly used to designate a product or service will not be considered a geographical indication. Only those manufacturers or service providers that are actually established in the geographical area shall be allowed the use of the corresponding geographical indication.
Copyrights

1. Scope of Protection and Requirements

The Brazilian Copyright Law provides for the protection of intellectual and creative works (expressed in any physical media) such as: (i) literary, artistic, scientific or photographic works; (ii) architectural projects; and (iii) designs and paintings, among many others. The protection of copyrights in Brazil does not depend on the registration of the work with any government authority. Nevertheless, the author may register the work to indicate, among other things, the date of creation of the work.

Depending on the nature of the work, the competent entities for registration are: (i) the National Library (“Biblioteca Nacional”); (ii) the School of Music of the Federal University of Rio de Janeiro (“Escola de Música da Universidade Federal do Rio de Janeiro”); (iii) the School of Fine Arts of the Federal University of Rio de Janeiro (“Escola de Belas Artes da Universidade Federal do Rio de Janeiro”); (iv) the National Institute of Cinema (“Instituto Nacional do Cinema”); (v) the National Council of Engineering and Agronomy (“Conselho Nacional de Engenharia, e Agronomia”); and (vi) the Council of Architecture and Urban Planning of Brazil (“Conselho de Arquitetura e Urbanismo do Brasil”).

Copyrights in Brazil comprise the economic rights of the author and the author’s moral rights. Such moral rights cannot be licensed, transferred or waived. As to the author’s economic rights, the protection of copyright lasts for seventy (70) years as of 1 January of the year following the author’s death or as of the work’s first publication, in case of anonymous or pseudonymous works, audiovisual and photographic works.

2. Limitations to the Author’s Rights

According to the Copyright Law, the following actions, among others, do not represent copyright infringement:
(i) Reproduction in daily newspapers and other publications of news or articles previously published, provided that the author’s name (if signed) and the original publication are mentioned

(ii) Reproduction, in only one sample, of small parts of the work for private use by the person who has made the copy, with no profit purposes

(iii) Use of literary, artistic or scientific works, phonograms and television and radio transmission in commercial establishments, exclusively for the purpose of demonstrating the equipment or media that allow the use of the works

Software

1. Scope of Protection and Requirements

The Software Law grants software copyright protection and defines a computer program as “the expression of an organized set of instructions in natural or codified language, contained in a physical media of any kind, and necessarily applied in automatic machines for information processing, devices, peripheral instruments or equipment, operated under digital or analogue techniques which make them work in a certain way and for a certain purpose.” In spite of the same protection regime applied to copyright, the Software Law provides that the moral rights of the author do not apply to computer programs, except for the right of the software creator to assert its authorship and to oppose unauthorized alterations of the software that may damage the author’s honor and reputation. The protection of software does not depend on the registration of the program and lasts for fifty (50) years as of 1 January of the year following the publication or creation of the software. The author may, however, register the software and, in this case, the application for registration must be filed with the INPI. In case of any transfer of technology of software, registration of the related agreement with the INPI is then required, and the delivery of the complete documentation, source code and additional information by the supplier to the technology recipient is mandatory under the law.
2. Limitations to Software Copyrights

According to the Software Law, the following actions do not represent infringement of software copyrights and do not depend on the prior authorization of the copyright holder:

(i) Reproduction of one copy of the software by the licensee for backup or electronic storage

(ii) Citation of part of the software for educational purposes, provided that the protected work and its author are indicated in the citation

(iii) Similarities between computer programs resulting from the functional characteristics of their applications or from the compliance with legal and technical requirements or from limited alternatives for their expression

(iv) Integration of the software with an application or operational system that is technically essential for the user’s needs, provided that the basic characteristics of the software are maintained, and the integration is for the sole use of the person who has carried it out

Enforcement of Intellectual Property Rights in Brazil

The intellectual property laws also include provisions pertaining to crimes and violations of rights, and provide for remedies in case of infringement of intellectual property rights. Below are examples of the most useful remedies available:

1. Extrajudicial cease-and-desist letter

The purpose of the extrajudicial cease-and-desist letter is to make the infringing party aware of the corresponding violation. It may also constitute an effective means of obtaining a settlement between the parties.
2. Judicial cease-and-desist letter

The purpose of the judicial cease-and-desist letter is also to make the infringing party aware of the violation. However, the judicial cease-and-desist letter may be a more effective tool for obtaining a settlement with the infringing party due to its official and judicial character.

3. Administrative Remedies

Administrative remedies are used during the period of examination of applications for registration of industrial property rights with the INPI, or immediately after such rights are granted. The competent agency to receive and decide on the said remedies is the INPI.

At the administrative level, a patent, trademark or industrial design may be declared null and void in the event of any formal flaw in the registration proceedings. The INPI may initiate the nullity proceeding itself or upon the request of any third party having a legitimate interest, within a term of six (6) months as from the date of grant for patents and trademarks, and five (5) years as from the date of grant for industrial designs. The industrial property owner may reply to such declaration and the president of the INPI shall decide the appeal, closing the administrative level.

In addition to such nullity proceedings, a legal nullity action may be pursued before a federal court.

4. Preliminary Search and Seizure procedures

The owner of an intellectual property right (either copyright and software, or industrial property rights such as trademarks, patents and industrial designs) has two different avenues to obtain a search-and-seizure order on infringing products: (i) the criminal procedure, in which: (a) the seizure will be limited to a number of samples of the counterfeit product sufficient to allow a technical examination in crimes against intellectual property rights and unfair competition or (b) the seizure will involve all products illegally produced or
reproduced in crimes against copyright and trademark (when the imitation of the trademark is obvious) and (ii) the civil procedure, in which the seizure will include all the counterfeit materials, related manufacturing equipment, molds, and packaging and advertising materials.

For this order to be granted, proof of counterfeiting must be unequivocal, and the risk of financial losses and irreparable damages to the intellectual property right owner must be accurately evidenced.

5. Injunctions

It is possible for intellectual property right owners to obtain injunctions against infringers so that infringers are forced to cease the manufacturing, launching, use, reproduction, offering for sale, sale or import of the infringing products in the market. Injunctions may be obtained either: (i) to prevent irreparable harm caused by the infringement and the delay in having a final court decision or (ii) to anticipate the effects of the final decision in view of strong evidence that the plaintiff’s claim is well-grounded. In both cases, strong evidence of the alleged infringement and of the potential irreparable harm to the plaintiff must be submitted to the judge.

6. Ordinary Civil Lawsuit

An ordinary civil lawsuit is usually filed against the infringing party for three purposes: (i) discontinuance of any unauthorized use of the corresponding intellectual property right; (ii) imposition of a fine for non-compliance with the discontinuance of the use thereof; and (iii) compensation for losses and damages caused by counterfeiting.

With regard to the collection of losses and damages, the IP Law establishes that the loss of profits is determined by the following criteria, as is most favorable to the industrial property right owner: (i) the profits that would have been obtained by the industrial property right owner if the infringement had not taken place; (ii) the profits obtained by the infringing party; or (iii) the compensation that the infringing party would have paid to the industrial property right owner.
for a license that would have allowed it to lawfully exploit the object of the rights.

7. Crimes against Industrial Property and Unfair Competition

The IP Law provides for the following criminal penalties in case of violation of industrial property rights:

(i) Imprisonment of three (3) months to one (1) year, or a fine, in case of the following:

1. Unauthorized use or manufacture of products whose application for a patent is pending

2. Reproduction or alteration of a trademark

3. Manufacture of products whose application for industrial design has been approved

(ii) Imprisonment of one (1) to three (3) months for other cases such as use of trademark or advertisement expression to indicate false origin of a product, or use of false geographical indication - Such penalties may be increased when the violating party is a sales representative/agent or an authorized individual, company, partner or employee of the industrial property owner or its licensee, and also if the violated trademark is a famous, certified or collective mark.

The IP Law also treats as crimes certain unfair competition practices, such as the employment of fraudulent means or false statements for the purpose of obtaining an advantage vis-à-vis a competitor, diversion of clientele, deliberate misleading of consumers, unauthorized use of a third party’s corporate name or confidential information and other fraudulent acts. The IP Law provides for a penalty of imprisonment of three (3) months to one (1) year, or a fine. These actions, as well as other unfair competition practices not defined as crimes, are subject to civil lawsuits and may entitle any competitor harmed by such practices to losses and damages.
In such crimes, the prosecution of the infringer depends on the request of the holder whose rights have been violated.

8. Crimes against Copyrights

The Criminal Code establishes that the partial or total reproduction of a copyrighted work for economic purpose, without the author’s express authorization, constitutes a crime and subjects the agent to a penalty of two (2) to four (4) years of imprisonment. The same penalty applies to the one who distributes, sells, offers for sale, rents, introduces in the country, acquires or keeps in storage the original or a copy of a copyrighted work reproduced in violation of the author’s rights. In both cases, a public attorney may initiate the criminal claim, taking into account the relevant public interest involved in the issue, regardless of the initiative of the victim.

A penalty of two (2) to four (4) years of imprisonment is applied to the party who offers to the public, without the author’s or performer’s express authorization, any copyrighted work by means of cable, optical fiber, satellite, waves or any other system.

The Software Law also establishes that the violation of software copyrights is a crime and shall subject the infringer to imprisonment of six (6) months to two (2) years, or a fine. In case such violation consists of the unauthorized reproduction of the software (or part thereof) for purposes of resale, the penalty shall include imprisonment of one (1) to four (4) years and a penalty.

9. Parallel Imports into Brazil

“Parallel import” is the unauthorized importation of an original product covered by a patent and/or trademark by a third party other than the legitimate holder or authorized licensees or distributors of such patent and/or trademark.

The Brazilian IP Law has adopted the national exhaustion of rights – that is, the owner of a Brazilian patent cannot prevent the sale or use of a patented product or a product manufactured under a patented
process if such product was placed in the Brazilian market by the patent owner or with his/her consent.

The same principle applies to trademarks. The IP Law sets forth that the trademark owner cannot prevent the free circulation of a product bearing its trademark if such product was introduced in the Brazilian market by the trademark owner or by a third party with the trademark owner’s consent (except for specific situations concerning patented products subject to compulsory license or for which manufacturing in Brazil is not economically feasible).

Therefore, in case of parallel import - that is if the owner of the patent or trademark has not imported a legitimate product into Brazil or consented thereto, or manufactured under his/her patent or bearing his/her trademarks - the patent or trademark owner or authorized licensee may prevent the importation, seize the imported products and/or claim damages, depending on the factual verification.

10. Customs’ Control

The IP Law establishes that products bearing false, modified or imitated trademarks or false indications of origin may be seized by customs officers at the time of clearance or upon the request of an interested party.

A different situation encompasses “gray market” products resulting from parallel import. As these products are not counterfeit, their import into Brazil does not constitute a crime and, consequently, the customs officers cannot seize these products without a specific judicial order for this purpose.


The purpose of the Directory is to bring trademark owners and governmental authorities to work jointly toward the protection of trademark rights by allowing: (i) the appointment of the trademark owner’s legal representatives/attorneys for anti-counterfeit purposes
(which can differ from the IP agent responsible for the IP portfolio management) and (ii) the insertion of additional strategic information and documentation relating to the products covered by the owner’s trademark.

Trademark owners may insert any information or documentation that they consider relevant for combating anti-counterfeiting in Brazil. All such information must be provided in the Portuguese language and is deemed non-confidential.

Although the Directory is still in test phase (with no deadline for completion), the database is already available for Brazilian governmental authorities. Until now, no official fees are being charged by INPI to include and control the records within the Directory.

**Intellectual Property Licenses and Transfer of Technology**

Types of agreements subject to registration with the INPI

1. Supply of Technology Agreements

Agreements involving the transfer of technology must be registered with the INPI to be effective vis-à-vis third parties. The INPI does not accept technology licenses and understands that the technology is permanently transferred to the Brazilian recipient. Thus, the INPI usually imposes certain restrictions in connection with the confidentiality and terms of the agreements, among others.

Brazilian laws limit the tax deduction of payments remitted in consideration for the supply of technology. This limit varies according to the industry involved, reaching a maximum of 5 percent, calculated upon net sales of the products manufactured or the services rendered under the agreement, and includes payments in consideration for the transfer of technology, rendering of technical assistance and licensing of patents and trademarks in aggregate. In case of an agreement entered into with a foreign related company, the same percentage applies as a limit for remittance of payments.
2. Specialized Technical Services and Technical Assistance Agreements

This category includes agreements regarding services that involve technology transfer (i.e., technical assistance agreements for the incorporation/absorption of the technology by the recipient company) or services related to the main industrial activity of the recipient company (i.e., specialized technical services in connection with the engineering project for a manufacturing facility, start-up of a production or assembly line and installation of industrial equipment, among others). They are also subject to registration with the INPI. Specialized technical service agreements entered into with a related company with headquarters abroad are subject to the Brazilian transfer pricing rules.

3. Patent License Agreements

Agreements for the license of patents applied for or granted in Brazil must be registered with the INPI to be effective vis-à-vis third parties. The deduction and remittance caps mentioned above for the supply of technology agreements also apply to the remittance of payments abroad in consideration for patent licenses.

4. Trademark License Agreements

Agreements for the license of trademarks registered or applied for in Brazil are subject to registration with the INPI. The tax deduction of royalty payments for trademark licenses is capped at 1 percent of the licensee’s net sales. In case of trademark license agreements entered into with a foreign related company, the INPI will allow only the remittance of royalties in consideration for the trademark license as long as the use of the trademark is not directly connected with products or services manufactured and/or rendered under a supply of technology, technical assistance, and/or patent license agreements (in force) between the parties.
5. Franchise Agreements

Franchise has been legally defined as the system through which a franchisor grants to a franchisee the right to use the franchisor’s trademarks or patents, along with the exclusive or semi-exclusive right to distribute products or services and, in some cases, also with the right to use the technology for the implementation and management of specific businesses or operating systems developed by the franchisor.

Franchise Agreements are subject to registration with the INPI to be effective vis-à-vis third parties. The Franchise Law sets forth the franchisor’s obligation to convey to the potential franchisee the corresponding franchise offering letters with certain information on the franchise, which must be delivered to the franchisee at least 10 days before the execution of the contract (or letter of intent) or before any payments from franchisee to franchisor are made.

In case of an agreement with a foreign licensor or supplier of technology, the registration with the INPI is also a condition precedent for the remittance of payments abroad and deduction of payments by the Brazilian licensee or recipient. After its registration with the INPI, such agreements must also be registered with the Central Bank of Brazil, as they call for payments in foreign currency.

Types of agreements not subject to registration with the INPI

1. Professional Services Agreements

Agreements for the rendering of professional, consulting, administrative, financial or managerial services are not subject to registration with any Brazilian governmental authority. Payments thereunder may be remitted abroad through any commercial bank authorized to perform exchange operations upon presentation of the agreement, its translation into Portuguese and the corresponding invoice. In order to qualify as professional services, these services cannot involve any licensing of intellectual property, transfer of technology or production of intellectual (scientific) knowledge. Professional services contracted abroad between related companies
are subject to the deductibility limits established by the Brazilian transfer pricing rules.

2. Copyright Agreements

Except for certain specific cases, copyright agreements (such as editing agreements, agreements for assignment of rights, production agreements, agreements for future works of art, representation and execution agreements) are not subject to registration with any Brazilian government authority, and the applicable copyright fees may be remitted abroad without any registration. The regulation for such remittance is less strict than the rules covering the remittance of royalties and technical assistance fees, although the amount of the remittances may be reviewed by the tax authorities and the Central Bank of Brazil as part of foreign exchange controls. Certain types of copyright fees must be approved by government agencies, such as those related to audiovisual works. Copyright agreements contracted abroad between related companies are subject to the Brazilian transfer pricing rules.

3. Software Agreements

**Software may be licensed in Brazil in either of the following manner:**

1. Directly by the holder of the rights to the software or the authorized licensor to end users

2. Through a reseller, distributor or other similar vendor

In both cases, registration of the relevant agreement is not required, unless the software license involves the transfer of technology, and in which case, the applicable agreement will be subject to the restrictions set out in item (a) (Supply of Technology Agreements) above.

In August 2009, the Brazilian Patent and Trademark Office published in its website a new list of software related agreements that are not subject to registration. Among several services, the list includes
support, maintenance, installation, implementation and integration services, the fees for which may be remitted abroad without any specific approval.

There is no limit to the fees that may be remitted abroad under software agreements. However, if such agreements are entered into between related companies, Brazilian transfer pricing rules shall apply.

Other Intellectual Property Rights

1. Brazilian Biodiversity and Traditional Knowledge

The Brazilian Constitution promotes the protection of biodiversity among its fundamental environmental principles. In this sense, a federal decree ratified the “International Convention on Biodiversity Protection,” signed during the United Nations Environmental Convention held in Rio de Janeiro in 1992. The convention is aimed at the protection and preservation of biodiversity, the sustainable use of its resources and the fair sharing of the benefits resulting from the use of genetic resources. In addition to the convention, there are other relevant legal documents enacted to obligate individuals and legal entities, such as the Provisional Act that incorporates the principles and purposes of the convention and governs the access to genetic resources and traditional knowledge and creates mechanisms for benefit-sharing.

The Provisional Act establishes that the access to any genetic resource existent in Brazil and to any traditional knowledge associated thereto for purposes of scientific research, technological development or biodiversity prospecting is subject to the prior authorization of the Brazilian Genetic Resource Management Council (Conselho de Gestão do Patrimônio Genético – “CGEN”).

Only Brazilian public or private institutions that perform research and development activities in the biological and related fields shall be authorized to have access thereto. The participation of foreign companies in expeditions to collect samples of any component of
Brazilian genetic resources and to access any traditional knowledge associated thereto shall be authorized only if it occurs jointly with a public national institution that must coordinate the activities.

Additionally, if there is any perspective of commercial use of the genetic resources and/or the traditional knowledge associated thereto, it is also necessary to execute an “Agreement for Use of Genetic Resource and Benefit-Sharing,” which must establish, among other things, a fair and equitable share among the parties of benefits arising out of the economic exploitation of the product or process resulting from the access. The benefit-sharing may be made by the sharing of profits, the payment of royalties, the access and transfer of technology or the licensing, free of charge, of products and processes, among other means. In cases where the Brazilian government is not a party to the agreement, it shall nonetheless be entitled to a part of the benefits. In order to be effective, the Agreement for Use of Genetic Resources and Benefit-Sharing must be submitted to the CGEN for approval and registration purposes.

The economic exploitation of products or processes developed from samples of any component of the Brazilian genetic resources or associated traditional knowledge accessed in violation of the provisions of the Provisional Act shall subject the infringer to the payment of damages corresponding to, at least, 20 percent of the gross revenues obtained in the commercialization of the relevant product or of the royalties obtained from third parties due to the licensing of the relevant product, process or use of the technology, in addition to the applicable administrative fines (the fine may reach BRL50 million) and penalties.

Brazilian House of Representatives recently proposed Bill of Law No. 2/2015 (“Bill of Law”), also known as the Biodiversity Legal Framework. The Bill of Law aims to facilitate the research of native plants and animals and regulates the benefit-sharing from the commercial use of such genetic resources, as well as of traditional knowledge. The Bill of Law still has to be approved by the Brazilian Congress and sanctioned by the President to become a law and may suffer changes during such process.
2. Domain Names

Domain names at the top level “.br” are granted by the Center of Information and Coordination (“NIC”), by delegation of the Managing Committee for Internet of the Ministries of Communication and Science and Technology (“CGI”).

There are several top-level domains corresponding to certain types of activity, such as “.com.br” for commercial purposes, “.ind.br” for industries and “.org.br” for nonprofit organizations, among others. The registration of “.br” domain names is conducted electronically.

Brazil adopts the “first-to-file” system. Therefore, apart from: (i) official names; (ii) offensive names; and (iii) any other names prohibited under the Brazilian Industrial Property Law or as further defined by CGI, any combination of at most 26 words and numbers may be registered at the top-level “.br” domain name. Domain names may contain accent marks or hyphens. Only Brazilian individuals or entities may register domain names in Brazil. The number of domain names that may be registered at the same top-level domain is unlimited. For foreign individuals or entities, the NIC sets forth additional requirements, such as the obligation of a foreign entity to initiate its activities and establish a local presence in Brazil within one year as of the registration of the domain name.

Finally, CGI has recently implemented an informal dispute resolution proceeding (SACI-Adm), which provides for specific rules applicable to an out-of-court proceeding for the resolution of conflicts involving trademark’s rights of domain name’s holders and third parties. Those proceedings are conducted through accredited arbitration chambers, which must register with CGI. Each chamber must develop its own rules pertaining to the dispute resolution proceeding. The decisions are limited to maintaining, determining assignment or cancellation of the domain name. Currently, the SACI-Adm is limited to new domain names. Therefore, any conflicts associated with domain names registered or renewed before the enactment of such regulation must be solved in courts.
3. Plant Varieties

The protection of intellectual property rights related to plant varieties is accomplished by the granting of a Plant Variety Protection ("PVP") Certificate. For purposes of legal protection, the plant variety must be a superior vegetable variety of any type or species and clearly distinguishable from other known plant varieties by a minimum number of features. It must also have a distinguishing denomination and must be homogeneous and stable with regard to its features throughout successive generations.

In order for a plant variety to be granted legal protection, it must be new or essentially derived from another variety.

The government agency responsible for the protection of plant varieties is the National Service for Plant Varieties Protection ("SNPC") of the Ministry of Agriculture and Supply, which regularly publishes the names of vegetable species and the minimum features necessary for an application for plant variety protection. The three requisites with regard to applications for plant variety protection are as follows:

(i) The plant variety has not been commercialized abroad in the last four years.

(ii) The plant variety has not been commercialized in Brazil in the previous year.

(iii) The plant variety is distinctive, homogeneous and stable.

The PVP Certificate is valid for 15 years, counted as of the date of granting of a provisional certificate of protection by the SNPC, except for vines, fruit trees and forest and ornamental trees whose term of protection shall be 18 years. After the expiration of the certificate’s validity term, the variety’s ownership will become public. The PVP Certificate provides protection against the unauthorized growing of the material, propagation of the variety for commercial purposes, as well as against marketing or offers for sale without the owner’s
authorization. However, such exclusive rights of the owner of the protected plant variety shall not be deemed infringed under the following circumstances:

(i) Stocking or cultivating of the seeds for one’s own use

(ii) Using or selling the product obtained from a variety as food or raw material (except for reproduction purposes)

(iii) Using the variety as basis for variation in genetic improvements or scientific research studies

(iv) A small rural producer multiplies the seeds for donation or exchange, exclusively to other small rural producers, within the scope of financing or supporting programs for the benefit of small rural producers, conducted by public entities or non-governmental agencies authorized by the Public Administration.

4. Trade Secrets

In Brazil, the protection of trade secrets does not grant the owner proprietary rights over information involving the protection of trade secrets and the prevention of the same from being disclosed, exploited or used without authorization. This conduct may be characterized under Brazilian law as unfair competition. The IP Law characterizes the unauthorized disclosure, exploitation or use of a trade secret as an unfair competition crime that entitles its legitimate holder to claim losses and damages arising therefrom. Nevertheless, if a third party, by its own independent means, develops the same trade secret, it will also be its legitimate holder.

The nature of the information constituting a trade secret is not relevant for legal protection in Brazil, as the term “trade secret” is not defined by law. The information can be of technological, commercial, administrative, economic, fiscal or any other nature, provided that it has economic value. Certain kinds of information cannot qualify as trade secrets, such as information obtained illegally by the owner,
information of an unlawful nature or information that is obvious to a person skilled in the art or which is already public knowledge.

Trade secret protection is granted by the Brazilian Courts on a case-by-case basis. The central issue is usually the characterization of the disclosed information as a trade secret. For that purpose, the value of the information derives from its secrecy. Thus, the company’s internal policies on the handling and confidentiality of its relevant information are of utmost importance.

5. Genetically Modified Organisms

Brazil’s Biosafety Law establishes a set of rules aimed at controlling the use of genetic engineering techniques for the development, breeding, handling, transportation, marketing, consumption, release and discharge of Genetically Modified Organisms (“GMOs”) into the environment. The law aims to protect human, animal and plant life and health, as well as the environment. A GMO is any organism whose genetic material has been modified by any technique of genetic engineering.

The Biosafety Law says that the release of any GMO into the environment shall be subject to prior authorization from the Brazilian National Technical Biosafety Commission (“CTNBio”). In addition to the authorization, any company willing to develop activities in connection with biotechnology in Brazil, including research, development of technology and industrial production, must: (i) obtain a Certificate on Biosafety Quality and (ii) establish an Internal Committee for Biosafety.

The importation of GMOs or products containing GMOs into Brazil is subject to the authorization of the Ministry of Agriculture, which, in turn, depends on a technical opinion to be issued by the CTNBio. In order to import genetically modified vegetables or plants, the importer must also: (i) obtain from the CTNBio a Certificate on Biosafety Quality and (ii) submit an import request to the Vegetal Inspection and Protection Department of the Ministry of Agriculture, detailing the exact quantity of GMOs to be imported and the place where the
research will take place. As soon as GMOs enter the country, they must be sent to the National Center of Genetic Resources and Biosafety for laboratory tests prior to its release by the importer.

Additionally, some environmental licenses may be required, such as operation license. Such requirements depend on CTNBio’s expert opinion, which shall establish whether a GMO presents risks to the environment and, therefore, will be subject to environmental licensing.

6. Integrated Circuits Topography

Even though legal protection regarding layout-designs (topographies) of integrated circuits has been internationally ruled by the TRIPS agreement since 1994, it was only in 2007, that Brazil enacted an internal legislation protecting topographies as an intellectual property right.

The protection, which is granted to the topography’s creator, is subject to registration with the INPI, being valid for a 10-year period counted as from the date of filing the application or from the first commercial exploitation, whichever occurs first.

To obtain protection under Brazilian laws, the topography must be original in the sense that it results from the creator’s own intellectual effort and cannot be commonplace among technicians and manufacturers in the specific field at the time of its creation. Nevertheless, these requirements will not be examined by the INPI for the registration of topography. The INPI will conduct a formal analysis of the required documents and paperwork and will not review their content. Any dispute concerning these two requirements or any issue arising from the registration of topographies must be judicially discussed and decided by the courts.

The registration grants to its owner the right to authorize or prohibit the importation, sale or distribution in Brazil of the protected topography for commercial purposes. The exclusive rights do not apply to the reproduction for the purpose of analyzing or teaching the
concepts, processes, systems or techniques resulting from the topography.

Additionally, the violation of topography rights by the reproduction, manufacturing, importation, sale or distribution of a protected topography or a product that embodies a protected topography is considered a crime, and the violator is subject to a fine or imprisonment.

With the enactment of the law, the INPI has issued Resolution No. 187/2008, which governs the procedures for filling new applications for the registration of topographies of integrated circuits and the internal procedures for processing applications.

Internet Law and Privacy

The Brazilian Internet Legal Framework establishes general principles, warranties, rights and duties that shall govern the Internet in Brazil. According to the Internet Legal Framework, the use of the Internet shall be based on the principles of freedom of expression, privacy and data protection, and network neutrality, among others.

1. Network Neutrality

In regard to net neutrality principle, the Internet Legal Framework establishes that “the party responsible for data transmission, commutation or routing has the duty to treat equally all data packages, without any distinction based on content, origin and destination, service, terminal or application.”

The exceptions to this general rule shall only be allowed: (i) if they result from an imperative technical requirement for the adequate provision of services and applications to users or (ii) in order to give priority to emergency services. In addition, exceptions are subject to regulation by decree issued by the President, with the opinion of the Managing Committee for Internet of the Ministries of Communication and Science and Technology (“CGI”) and the Brazilian Telecommunications Agency (ANATEL).
2. Liability for user generated content

As a general rule, under the Internet Legal Framework, websites may be liable for user-generated content if they fail to comply with court orders determining the removal of content. Websites may also be liable on a secondary basis for violations of intimacy resulting from the unauthorized disclosure of material containing nudity or private sexual acts, provided that the website fails to diligently take down such content after notice from any person appearing in the content or his/her legal representative.

The Internet Legal Framework expressly excludes copyright infringement cases from the rules above. Instead, it provides that such cases shall be contingent to the enactment of a specific statute, subject to the constitutional guarantee of freedom of expression and other fundamental guarantees in the Brazilian Constitution.

3. Privacy and Data Protection

Under the Internet Legal Framework, websites must obtain consent from users for the collection, use, storage and processing of personal data, and such consent needs to stand out from other contractual conditions. Also, personal data may only be transferred to third parties upon the free, express and informed consent of the data subject.

Furthermore, information stored by websites and the contents of private communications may only be disclosed upon a relevant court order.

It should be noted that the Brazilian Ministry of Justice is currently discussing a Draft Bill of Law for the Protection of Personal Data (“Draft Bill”). As of March 2015, the Draft Bill has been subject to public consultation. After which a new, revised draft will be prepared and sent to the Brazilian Congress for discussions and voting.

[Revised as of March 2015]
Forms of Doing Business

As a general rule, Brazilian law does not prohibit or restrict the participation of foreign investment in business activities. Except for certain limitations, foreign investors are free to establish any business in Brazil.

Those few areas in which foreign investment is either totally prohibited or limited to a certain minority interest include some telecommunications services and media segments. In these restricted areas, foreign investors are required to enter into joint venture types of arrangements with Brazilian companies or individuals or organize a subsidiary company under Brazilian laws, depending on the specific case.

Notwithstanding the above, foreign investors sometimes also adopt joint venture arrangements even in situations that are not restricted – for instance, when they seek the experience and expertise of locals in the Brazilian market.

A business presence in Brazil may, at least in principle, take the form of either

1. a branch, representative office or agency of a foreign business entity, or
2. a company organized under the laws of Brazil.

Branch, Representative Office or Agency of a Foreign Business Entity

Though permits to establish branches of companies organized under the Brazilian laws are in most cases freely granted, the prior authorization of the President of Brazil is required to establish a branch of a foreign company. The granting process is entirely discretionary and lengthy, lasting more than six (6) months. In addition, adverse liability and tax consequences render this choice inappropriate in most cases.
Local Business Entity

The establishment of a business entity in Brazil generally does not require any prior government approval. Most nonresident investors find advisable to organize a business by setting up any of the following:

1. corporation - *sociedade anônima* ("S.A.") in which liability is limited to the amount of the capital invested by each shareholder;

2. *sociedade limitada* ("limitada") which may be a more flexible form of a limited liability company. The liability is also limited to the amount of the capital invested by each quotaholder, however if the capital is not fully paid-in, the liability relates to the total amount of the company’s capital; or

3. *Empresa Individual de Responsabilidade Limitada* ("EIRELI") which is a limited liability entity owned by a sole owner.

Corporations

The general basic requirements of the S.A. are as follows:

1. **Shareholders**

   There must be at least two (2). There are no residency or nationality requirements.

   The shareholder that is not a Brazilian resident must appoint an attorney-in-fact resident in Brazil vested with powers to receive services of process on its behalf.

2. **Capital**

   At least ten percent (10%) of the stated capital must be paid-in in cash at the time of incorporation. No minimum capital is required, except
to carry out certain regulated activities, e.g., banking, insurance, and trading companies. The capital of the S.A. is divided into shares. According to the rights attributed to their holders, the shares may also be qualified as common or preferred.

According to the law, holders of preferred shares may have full voting rights, no voting rights or voting rights restricted. The number of preferred shares without the right to vote or with restrictions on the exercise of such a right cannot exceed fifty percent (50%) of the total number of shares issued by the S.A. The holders of preferred shares with no voting rights or with restricted voting rights must be entitled to certain financial rights, such as the priority:

(i) to receive dividends, fixed or minimum;

(ii) to receive the reimbursement of capital, with or without bonus; or

(iii) the accumulation of these advantages.

For a publicly held S.A. (Sociedade Anônima de Capital Aberto), the corporate legislation provides more protective rules for the minority shareholders of preferred shares.

3. Management

The S.A. must be managed by a board of officers composed by at least two officers (diretores) who must be resident in Brazil. A board of directors (conselho de administração) is not compulsory, unless the S.A.:

(i) trades its shares on the stock exchange or in the over-the-counter markets;

(ii) issues debentures in the market; or

(iii) has authorized capital.
Brazilian residency is not a requirement to assume the position of a member of the board of directors, provided that an attorney-in-fact resident in Brazil is appointed and vested with powers to receive services of process on behalf of the nonresident director. According to the law, the board of directors must have at least three (3) members.

4. **Internal Audit Committee**

The bylaws of the S.A. must provide for an Internal Audit Committee (*Conselho Fiscal*), which may be installed at a shareholders’ meeting. The Internal Audit Committee is not mandatory, however if it is installed, its annual report to the shareholders must be published together with the financial statements of the S.A., except if the conditions mentioned in the following item are complied with as well as in other specific cases.

5. **Meetings and publications**

At least one shareholders’ meeting must be held annually to decide on the financial statements of the S.A. Such meeting must be held within the first four (4) months after the end of the company’s corporate year. Calls for meetings must be published unless all shareholders attend or are represented at the meeting. The minutes of the meetings shall also be published. Extraordinary shareholders meetings (such as those that are called to amend the bylaws) shall follow the same call procedure.

Balance sheets and financial statements must be published. Closely held S.A.’s (*Sociedade Anônima de Capital Fechado*) with less than twenty (20) shareholders and with a net worth of up to R$1,000,000.00 (one million Reais) are not required to publish financial statements, balance sheets, Internal Audit Committee annual reports, and certain other information, provided that certified copies thereof are filed with the competent Commercial Registry together with the minutes of the annual meeting containing the decisions thereon. This exception, however, does not eliminate the mandatory publication of the minutes of the annual meeting.
Law No. 11.638 of December 28, 2007 introduced in the Brazilian Corporation Law, among other issues, the need of preparation and auditing of the financials of Large Size Companies. A company will be considered a "Large Size Company" if it (or a group of companies under common control) had, in the previous fiscal year, assets in an amount exceeding R$ 240 million, or gross revenues exceeding R$ 300 million. A S.A. that falls under the category of a Large Size Company should be audited by an independent auditor registered with the Brazilian Securities and Exchange Commission (CVM).

Limited Liability Companies

The Brazilian Civil Code grants to minority quotaholders several rights, including a high quorum requirement to amend the articles of organization (i.e. ¾ of the corporate capital) and to appoint officers, with rules stricter than those provided for the S.A.

The basic characteristics of a limitada are as follows:

1. Quotaholders

There must be at least two (2), and no residency or nationality requirements apply.

Thequotaholder that is not a Brazilian resident must appoint an attorney-in-fact resident in Brazil vested with powers to receive services of process on its behalf.

2. Capital

No minimum capital is required either upon incorporation or to carry out the business, except for specific activities. The limitada is not qualified to carry out certain regulated activities such as banking and insurance. The capital of a limitada is divided into quotas that are represented in the articles of organization of the limitada. The capital may be increased only after the existing one has been totally paid in.
3. **Management**

The *limitada* may be managed by one or more individuals resident in Brazil (“Officers”). The Officers may be quotaholders or not. The appointment of non quotaholder Officers is subject to the approval of:

(i) all quotaholders, if the quotas are not fully paid-in, or

(ii) quotaholders representing two thirds (2/3) of the corporate capital if the quotas are fully paid-in.

If the Officer is a quotaholder his/her appointment in a separate document will require the approval of quotaholders representing more than half of the company’s capital.

The Officer’s appointment (being quotaholder or not) within the articles of organization is subject to the approval of quotaholders representing at least three fourths (3/4) of the company’s capital.

For information regarding the appointment of expatriates for managing positions, please refer to the immigration chapter.

4. **Internal Audit Committee**

Internal Audit Committee is not required. The Civil Code, however, authorizes the installation of an Internal Audit Committee (*Conselho Fiscal*) composed of at least three (3) members.

5. **Meetings and publications**

The Civil Code sets forth that the quotaholders’ decision shall be taken in a meeting or assembly, as provided in the articles of organization. The quotaholders’ assembly is required if the company has more than ten (10) quotaholders, and a quotaholders’ meeting is required for companies with up to ten (10) quotaholders.
In accordance with the Law No. 11.638 of December 28, 2007, a limitada that falls into the Large Size Company concept (a) should be audited by an independent auditor registered with the Brazilian Securities and Exchange Commission (CVM) and (b) is subject to the provisions of the Brazilian Corporation Law (applicable to S.A.) regarding accounting records and preparation of financial statements. Of note, the Brazilian Supreme Court is still deciding about the need of publication of the annual financial statements by the limitadas that fall into the "Large Size Companies" concept.

**EIRELI**

On January 9, 2012, law 12.441 of 11 July 2011 was enacted. Such law introduced the possibility of organizing a solely owned limited liability entity (Empresa Individual de Responsabilidade Limitada), commonly known as EIRELI

The EIRELI resembles a limitada, with the difference that it is incorporated by only one person (national or foreigner), who will be the sole-owner of the totality of the entity’s corporate capital. This new type of entity was created, among other things, to allow some professionals to render services through a legal entity.

1. **Ownership**

It must have one single owner. No residency or nationality requirements apply.

2. **Capital**

A minimum fully paid in capital equal to 100 (one hundred) times the highest minimum wage in force is required upon incorporation. Any subsequent capital increases must be fully paid in upon approval.

3. **Management**

It may be managed by one or more individuals resident in Brazil.
ENROLLMENT WITH THE GENERAL TAXPAYERS REGISTRY

Pursuant to Normative Rulings No. 1,548 of February 13, 2015 and No. 1,634 of May 6, 2016 issued by the Brazilian Federal Revenue Department, legal entities and individuals domiciled outside Brazil must be enrolled with the Ministry of Finance’s General Taxpayers Registry (“CNPJ”) and Individuals Taxpayers Registry (“CPF”), respectively. This requirement is applicable to all legal entities and individuals holding assets and rights subject to public registration in Brazil, including real estate, vehicles, vessels, aircraft, equity interest in Brazilian companies, bank accounts, investments in the financial market, investments in the capital market, loans (“financings”), import finance transactions, financial lease, operational lease, lease/renting out of equipment and boat charter, import of assets into Brazil (without currency exchange coverage) for equity investment in Brazilian companies, currency loans granted to Brazilian residents, investments and other activities set forth and governed by the rules issued by the Federal Revenue Department.

Following an international effort to create an efficient anti-money laundering / compliance regulation aiming at transparency and identification of entities' beneficial owners, the Normative Rule 1,634 brought the obligation to certain entities to provide specific information of their legal representatives and their group structure to identify the persons or entities representing their ultimate beneficial owner.

Ultimate beneficial owner is defined as the individual who, ultimately, holds, controls or "significantly influences" the entity. A significant influence is presumed by RFB if the individual: (a) holds more than 25% of the entity's capital, directly or indirectly; or (b) has preponderant authority, directly or indirectly, over the company's decisions or the election of the majority of the board members.

All companies domiciled in Brazil, as well as foreign entities domiciled abroad which have rights or investments in the Brazilian
capital markets or own equity interest in Brazilian private companies are required to enroll with CNPJ and abide by the aforementioned obligation.

Audit

Historically, the obligation of external audit of the financial statements by an independent auditing firm was only applicable to Brazilian publicly-held corporations (*sociedade anônimas de capital aberto*). Nonetheless, after 2007, with the enactment of Law No. 11.638/07, the external audit of the financial statements by an auditor registered before the CVM (Brazilian Securities Exchange Commission) also became mandatory for Large Size Companies.

The law does not make any distinction between corporations (*Sociedades Anônimas*) and limited liability companies (*limitadas*) when it refers to Large Size Companies. Therefore, one must understand that the term Large Size Companies includes both types of companies.

[Revised on November, 2017]
Exchange Controls

Since the unification of the free rate and the floating rate exchange markets in March 2005, the Brazilian Government, through the Brazilian Monetary Council (“CMN”) and the Central Bank of Brazil (“BACEN”), introduced new rules aimed at making the currency exchange market simpler and the controls over such market more flexible. Such changes included rules related to import and export transactions, and inflows and outflows of funds of small amounts.

As of 2 February 2014, new Rulings came to force to make the regulations clearer and more user-friendly, eliminating redundant or unnecessary provisions and harmonizing the rules applicable to similar situations.

Foreign Capital in Brazil

Law No. 4,131/1962, as amended, regulates foreign capital in Brazil. This law requires that foreign investments be registered with BACEN to enable the remittance of profits and/or interest on equity (juros sobre capital próprio) to foreign investors, as well as the repatriation of foreign capital invested in Brazil and the reinvestment of profits and/or interest on equity. This law also establishes general rules governing the payment of royalties and technical assistance fees.

Investments

Foreign direct equity investments under Brazilian law include:

1. items imported by entities with headquarters in Brazil as capital contributions (e.g., machinery, equipment);

2. capitalization of foreign credits which are remittable by Brazilian companies abroad; and

3. the inflow of foreign funds to Brazil as capital contribution.
As a general rule, a foreign investor may organize a subsidiary in Brazil to carry out any kind of business permitted by law, except for some activities in which foreign ownership is limited.

Registration of Foreign Direct Equity Investments

Foreign direct equity investment registration is carried out through BACEN’s electronic system (“SISBACEN”) by means of the declaratory electronic registration (Registro Declaratório Eletrônico de Investimentos Externos Diretos – “RDE-IED”). Foreign investment registration through SISBACEN must be made by the Brazilian company representative that receives the investment, observing the provisions of the CMN’s Resolution 3,844 of 23 March 2010, as amended, and other applicable rules. This registration allows the remittance of dividends and interest on equity to the foreign investor and the repatriation of foreign capital invested in Brazil, as well as additional registration of foreign investment upon the reinvestment of profits.

Conversion of Credits

Foreign capital registration is also required upon the conversion of credits held by the foreign stockholder against its Brazilian subsidiary. Credits remittable abroad, such as those related to principal or interest of loans, service fees, and royalties, among others, can be converted into equity of the Brazilian company. For this purpose, a conversion process will be carried out, involving the implementation of symbolic/simultaneous foreign exchange operations representing the payment of the debt and the inflow of the corresponding funds to Brazil as capital contribution. In case of conversion of amounts subject to taxation, such as interest accrued on loans, the company must present the tax payment evidence to the commercial bank carrying out the symbolic/simultaneous foreign exchange operation. The symbolic payment of the debt may be subject to Tax on Financial Transactions (IOF), due to the foreign currency exchange transaction necessary to implement such symbolic payment. Once the conversion
is finalized, the resulting foreign investment must be registered as foreign investment with BACEN within thirty (30) days.

Reinvestments

After profits are taxed and if they are not remitted abroad to the foreign investor, they may be reinvested in the same company that generated the profits or in any other Brazilian company chosen by the foreign investor. Also proceeds related to capital reductions, sale of equity interest to Brazilian residents and liquidation of the invested company may be reinvested in another Brazilian company. The reinvestment is also subject to registration with BACEN.

The amount of foreign currency registered as reinvestment is determined by the exchange rate in force at the date of the relevant reinvestment, as reflected in the corresponding corporate document.

Remittance of Dividends

Law No. 4,131/1962, as amended, does not constrain a Brazilian company from remitting dividends abroad to its foreign investors. Notwithstanding, under Brazilian law, the Brazilian company may only remit dividends to a nonresident if (i) the Brazilian company has after-tax profits from the current year or accumulated profits (note that only the profits shown in the balance sheets can be remitted abroad), and (ii) the foreign investment made by the foreign parent company has been previously and duly registered with BACEN.

According to Law 9,249/1995, the remittance of dividends generated as of 1 January 1996, is not subject to withholding income tax, even when distributed to nonresident parent companies. On the other hand, the amount paid as profit distribution cannot be deducted as an expense of the Brazilian company for tax purposes. Additionally, the Tax on Financial Transactions (IOF) levied on the remittance of profits abroad is currently reduced to a rate of 0%.
The remittance of dividends is no longer subject to registration with SISBACEN (only the relevant reinvestment or payment directly from a bank account maintained abroad are subject to registration).

Also, it is worth noting that the Brazilian company may distribute dividends based on an interim balance sheet during the fiscal year. However, in such case, the company must register profits in its accounting at year-end, under penalty of repatriation of the remitted amount, applied by BACEN, in addition to possible tax consequences.

**Interest on Equity (Juros sobre Capital Próprio)**

Pursuant to current legislation, a Brazilian legal entity can pay interest on equity to its nonresident stockholders, provided that (i) it has retained or current-year earnings and (ii) the foreign investments are duly registered with BACEN. The amount declared by the Brazilian company as interest on equity is deductible, but the total amount of interest that can be paid or credited must not exceed 50% of the company’s retained or current-year earnings. If this is the case, the amount in excess will not be considered deductible in the calculation of corporate income taxes. The withholding income tax at the rate of 15% is levied on the interest on equity declared by such company. If the beneficiary is located in a low-tax jurisdiction, the withholding income tax shall apply at a rate of 25%.

With respect to net worth accounts, the tax legislation provides that the accounts which may be considered for calculation purposes include reserves (in addition to contributed capital), but excludes fixed assets revaluation, special monetary correction of fixed assets, and real estate and intangible revaluation reserves.

The remittance of interest on equity is no longer subject to registration with SISBACEN (only the relevant reinvestment or payment directly from a bank account maintained abroad are subject to registration).
Repatriation of Capital

As long as the foreign investment is duly registered with BACEN, when the foreign investor sells shares or quotas in the Brazilian venture or when the Brazilian company reduces its capital or is liquidated, such foreign investment can be repatriated in the relevant foreign currency. Such repatriation will be free of taxes up to the amount of the relevant investment cost.

The amount to be repatriated exceeding the investment cost observing the proportionality rule, represents capital gain and is taxed by the withholding income tax at the rate of 15%, or 25% if the beneficiary is located in a low-tax jurisdiction. Nevertheless, the exceeding amount may be remitted abroad.

Investments in the capital market

Resolution No. 4,373/2014 by the CMN, as amended (“Resolution 4,373”), Instruction No. 560/2015 by the Brazilian Securities and Exchange Commission (“CVM”), as amended, and related rules provide for the legal framework applicable to investments in the financial and capital markets carried by foreign/nonresident investors.

According to the rules, before investing in the Brazilian financial and capital markets, a foreign investor must appoint one or more representatives in Brazil, which must be a financial institution or other institution authorized by BACEN. Such representative(s) will be responsible for providing information and complying with the registration requirements of the Brazilian authorities (e.g., BACEN, CVM and the Federal Revenue Department).

Indeed, the funds brought into Brazil under the terms of Resolution 4,373 are subject to registration with BACEN via an electronic declaratory form. Furthermore, nonresident investors must, through their Brazilian representatives, register with the CVM and keep it updated.
Additionally, the nonresident investor must retain a custodian duly licensed by CVM, who can also act as its representative for the aforesaid purposes.

Law No. 8,981/1995, as amended, together with Provisory Measure No. 2189-49/2001, provides for a Special Tax Regime for nonresident investors that invest in the Brazilian financial and/or capital markets. As a general rule, this Special Tax Regime grants to nonresident investors a beneficial tax regime (when compared with the tax treatment applicable to Brazilian investors) for investments in the Brazilian financial and/or capital market, provided that the investment is made in compliance with the applicable rules (mainly Resolution 4,373).\(^1\)

The IOF rate levied on the exchange transaction necessary to bring the foreign investments to Brazil is currently zero according to Decree No. 8,325 of 7 October 2014. The return of the funds abroad resulting from such investments remains subject to a 0% rate of IOF-Exchange.

**Loans**

Foreign loans, either in foreign or Brazilian currency, are subject to registration with BACEN. Registration must be obtained through a declaratory electronic registration system, the Registration of Financial Operations (“ROF” - Registro de Operações Financeiras), which must be carried out in the SISBACEN. The ROF sets forth the main financial terms and conditions of the loan, and interest charged on the loan may not be deemed excessive according to BACEN’s policies in force at the time. Registration in the ROF must be supported by a loan agreement or a statement of the foreign creditor attesting to such terms and conditions. Once the ROF is issued, the foreign lender is authorized to wire the funds to the borrower.

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\(^1\) It is important to emphasize that the Special Tax Regime does not apply in case the nonresident investor is domiciled in a low tax jurisdiction.
Currently, the remittance of the principal amount of the loan to Brazil is subject to the Tax on Financial Transactions (IOF) reduced to zero. However, if the loan has an average minimum term equal to or shorter than 180 days or is for any other reason settled within such average minimum term, the IOF will apply at a 6% rate. The payment of interest accrued on such loans is subject to withholding income tax at the standard rate of 15%. In the case of beneficiaries located in a low tax jurisdiction, the tax rate is 25%. Either the Brazilian borrower or the creditor domiciled abroad may bear the tax burden. If the Brazilian company bears the burden of the tax that would otherwise be due by the foreign beneficiary, the tax basis is increased to 17.65%, for the 15% taxation, and 33.33% for low tax jurisdictions. A preferential treatment is generally given to foreign governmental entities.

**Loans in Brazilian Currency**

Loans may be denominated in Brazilian currency even if the relevant funds are remitted in foreign currency. If the funds are to be disbursed and the relevant payments are to be made in Brazilian currency, these transactions will be carried out by means of International Transfer of Reais (“ITR”), through a nonresident bank account in Brazilian currency held by the foreign creditor with a Brazilian bank. These loans are also subject to registration with BACEN, though the ROF.

Currently, loans and other obligations denominated in Brazilian currency may be paid in any foreign currency.

**Loans extended by Brazilian entities to foreign entities**

Brazilian individuals or legal entities are allowed to extend loans to foreign individuals/legal entities without requiring BACEN’s prior approval or registration. To implement this transaction, the lender and borrower must execute an agreement setting forth the terms and conditions of the loan, and comply with the applicable tax rules, including but not limited to potential transfer pricing issues.
Export Financing

As a way to develop and increase Brazilian exports, the Brazilian Government grants favorable treatment for credit facilities obtained abroad by Brazilian exporters. Interest, fees and expenses associated with export credit facilities are subject to a withholding income tax of 0% as opposed to the standard rate of 15% levied on regular loans. To be eligible for this tax benefit, the principal amount of the credit facility must be repaid with export revenues.

The registration of export financing (required only when their repayment term exceeds 360 days) is similar to the registration of loans in foreign currency described above. It should be noted, however, that if the funds are not repaid with export revenues, the withholding income tax levied over the interest, fees and expenses associated with the export financing will be subject to a 25% rate, instead of 0%.

Import of products

Currently, import transactions, financial lease, and equipment lease (rental) with payment terms exceeding three hundred sixty (360) days must be registered with BACEN through the ROF system.

Exports of products and services

As a general rule, exports must be carried out with exchange coverage (i.e., with the actual payment to the Brazilian exporter, which can be made in Brazilian Reais or foreign currency). The applicable regulations list very few exceptions in which the export may be carried out without exchange coverage, such as capital contribution and temporary export regime.

However, the legislation which used to charge exporters with foreign exchange violations for failure to receive export payments is no longer in force. Further, Law No. 11,371/2006 introduced an important flexibility with regard to the exchange coverage requirements, authorizing Brazilian exporters to maintain abroad foreign funds
received as payments for products and services exported by them. Such funds may be used by the Brazilian exporter only for investments, financial investments, or payments of its own obligations abroad. The exporter is expressly prevented from lending such funds.

Pursuant to BACEN Ruling No. 3,691/13, Brazilian exporters may maintain abroad all of the revenues related to the payments of their exports.

The destination of the funds held abroad by Brazilian exporters must be reported to the Federal Revenue Department (“SRF”) by means of the statement established by SRF’s Ruling (Instrução Normativa) No. 726/2007. Exporters that fail to comply with such Ruling or with the applicable legislation, as well as those who fail to inform the SRF about the existence of such funds abroad, will be subject to a pecuniary fine applied by the SRF.

Declaration of assets maintained outside of Brazil

CMN’s Resolution 3,854/2010 provides that individuals and legal entities resident, domiciled or headquartered in Brazil must annually prepare and submit to BACEN a declaration that lists the assets and amounts held outside of Brazil, which total amount is equal to or greater than USD 100,000.00 or its equivalent in other currencies. This declaration must be submitted electronically to BACEN on an annual basis. The following assets held abroad must be reported to BACEN:

1. commercial credits;
2. bank deposits;
3. loans;
4. financing transactions;
5. leasing;
6. direct investments;
7. portfolio investments;
8. financial derivatives investments; and
9. other investments, including real estate and other assets.

Furthermore, if the total sum of the assets mentioned above is equal to or greater than USD 100,000,000.00 or its equivalent in other currencies, such individuals and legal entities must also submit the same declaration on a quarterly basis.

These declarations are mandatory and the individual or legal entity subject to the above-mentioned regulation must retain the documentation related to the declared information for a term of five years from the declaration’s date.

A delay or non-compliance with delivering the declaration, as well as providing incorrect, incomplete or false information, will be subject to penalties applied by BACEN.

Census of Foreign Capital in Brazil

Pursuant to BACEN’s Ruling No. 3,795/2016, presenting a declaration of the Census of Foreign Capital in Brazil is mandatory:

I. Annually for:
I.1. Companies headquartered in Brazil that, on 31 December of the preceding year had direct investment from nonresidents and had net equity equal to or exceeding USD 100,000,000.00;
I.2. Companies headquartered in Brazil that were debtors of short term commercial credits (payable in up to 360 days), which outstanding balance on 31 December of the preceding year was equal to or greater than USD 10,000,000.00; and
I.3. Investment funds with participation of foreign investors with net equity equal to or greater than USD 100,000,000.00.

II. Every five years, with respect to all years ending with zero or five, for:

II.1. Companies headquartered in Brazil that, on 31 December, of the reference year, had direct investment from nonresidents, regardless of the amount of their net equity;
II.2. Investment funds with investment from foreign investors, regardless of the amount of their net equity or each foreign investors’ interest in such funds. The Census must be declared by the administrators of funds; and
II.3. Companies headquartered in Brazil that were debtors of short term commercial credits (payable in up to 360 days), which outstanding balance on 31 December was equal to or greater than USD 1,000,000.00.

[Revised as of November 2017]
Taxes

Tax Treaties

Brazil is a party to many treaties aimed at preventing dual taxation in international transactions. To date Brazil has already entered into treaties with Argentina, Austria, Belgium, Canada, Chile, China, the Czech Republic, Slovakia, Denmark, Ecuador, Finland, France, Hungary, India, Israel, Italy, Japan, Luxembourg, Holland, Mexico, Norway, Peru, the Philippines, Portugal, Spain, South Africa, South Korea, Sweden, Trinidad and Tobago, Turkey, Ukraine and Venezuela.

In April 2005, the Government of Germany terminated the tax treaty signed with Brazil, which has not been in effect since 1 January 2006, pursuant to Decree No. 5,654/05.

Additionally, new treaties have been signed with Paraguay and Russia that are still pending approval. With respect to the treaties with Paraguay and Russia, the President must issue a presidential decree introducing the treaties in the Brazilian legal system for the treaties to become effective in Brazil.

Local Taxation

Historically, Brazilian tax regulations have remained complex. Although the government is engaged in reducing and simplifying the Brazilian taxation system, an extensive body of tax regulations still applies at this time. This section summarizes the most significant taxes that affect businesses in Brazil, as well as the major aspects of Brazilian taxation of personal income, which affect nonresidents, particularly expatriates.

Corporate Income Taxes

Most business entities are required to pay corporate income taxes (IRPJ). There are basically two main methods that may be chosen by the taxpayers to calculate corporate income taxes. The first method is the actual profits method. In such a case, the IRPJ is computed at a
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15 percent rate on adjusted net income. Annual net income in excess of BRL 240,000 is also subject to a surtax of 10 percent.

According to Law No. 9,430/96, taxpayers may opt to calculate the IRPJ under the actual profits method either on a quarterly or annual basis. If the IRPJ is calculated quarterly, it is also payable on a quarterly basis. Over the quarterly net income, a 15 percent rate is applied, plus a 10-percent surtax on net income exceeding BRL 60,000 per quarter. If the IRPJ is calculated annually, taxpayers are required to anticipate monthly payments of IRPJ, calculated over estimated income. For most companies, the monthly estimated income corresponds to 8 percent of the total monthly gross revenues plus capital gains and other revenues and positive results incurred by the company. Such percentage ranges from 8 percent to 32 percent, depending on the activity performed by the taxpayer. Over this tax basis, the 15 percent rate applies, plus the 10 percent surtax on estimated income exceeding approximately BRL 20,000 per month. When the annual method of calculation is adopted, with payment of monthly anticipations, the entities at the end of the year must either pay or request reimbursement for the difference between the amount paid monthly and that calculated on the annual income.

Under the actual profits method, net operating losses (NOLs) generated in a given period can offset the taxable income of the subsequent period, limited to 30 percent of the taxable income (i.e., for each BRL 1 of income, BRL 0.70 must be subject to taxation, regardless of the existing amount of NOL). Tax losses may be carried forward, without statute of limitations.

Another method used for calculating income tax is the presumed method. In this method, income tax is calculated on a quarterly basis, and the tax basis for most activities corresponds to 8 percent of gross revenues. There are other applicable rates to calculate presumed income related to certain specific activities, such as 32 percent for most service activities. Over the presumed income, income tax rates of 15 percent and 10 percent surtax levied on presumed income exceeding BRL 60,000 per quarter are applied. If the presumed method
of taxation is adopted, the taxpayer is not subject to any adjustment based on the actual annual income.

Some requirements for eligibility to adopt the presumed method are the following:

1. Revenues earned in the previous taxable year must not exceed BRL78 million.

2. Profits, capital gains or other earnings cannot originate abroad.

3. Companies that cannot have tax benefits under Brazilian tax laws (e.g., tax exemption or income tax reduction)

4. Companies that could not have paid the income tax calculated on a monthly and estimated basis

5. Companies whose activity comprises securitization of agribusiness, finance and real estate credits

6. Companies that were incorporated as companies with specific purposes (SPE) to carry out transactions with legal entities under the SIMPLES tax regime

Financial institutions or equivalent entities as well as factoring companies are not eligible to adopt the presumed method of taxation as provided in Brazilian law.

**Profits Distribution - Tax Aspects**

Prior to 1996, any dividends and profits distributed to nonresidents were subject to a 15 percent withholding income tax (IRRF), except for distribution to residents of Japan, in which a Brazilian tax treaty provides for a 12.5 percent rate.

According to Law No. 9,249/95, profits realized after 1 January 1996, are no longer subject to the IRRF when distributed. Profits and dividends realized prior to 1 January 1996, are still subject to the IRRF at the rates prevailing within the year the profits are generated.
Please note that, recently, prior to the enactment of
Provisional Measure No. 627/13 and its conversion into
Law No. 12,973/14, there has been an intense debate on whether
Brazilian companies should distribute profits pursuant to the new
accounting standards (corporate profits) or should the profits be
calculated under the rules that were in place for calculation of taxable
profits (which were based on the accounting standards that were in
place on December 31, 2007 - the so called fiscal profits).

Law No. 11,638/07 and, later, Law No. 11,941/09 brought significant
changes to Law No. 6,404/76 (the “Corporations Law”), aiming at
aligning the Brazilian GAAP to IFRS standards. Nevertheless, Law
No. 11.941/09 established a special tax regime called “Transitory Tax
Regime” (RTT) in order to regulate the tax effects arising from the
alignment of the Brazilian GAAP to the IFRS standards.

According to the RTT, the new accounting standards should not have
tax effects in Brazil. Thus, taxpayers should apply the accounting
methods in force on 31 December 2007, to determine the basis for
calculating the IRPJ/CSLL through the reversal of the tax effects
determined due to the differences between the tax and accounting
treatments.

In this context, the Brazilian Federal Revenue (RFB) issued
Treasury Ruling No. 1,397/13 (IN 1397/13), providing that the
distribution of dividends would have to observe and be limited to the
“fiscal profits” of a given company.

According to IN 1397/13 in its original wording, if the distributed
dividends have not been previously taxed at the level of the legal
entity as a result of the RTT adjustments (i.e., if the amount of
distributed profits exceed the fiscal profits of the company), then it
shall be subject to withholding income tax, corporate income tax, or
personal income tax, depending on the beneficiary.

However, the Brazilian Executive Branch enacted the abovementioned
Provisional Measure No. 627/13, converted into Law No. 12,973/14,
which, among other provisions, revoked the RTT and regulated the tax
impacts arising from the accounting adjustments derived from Law No. 11,638/07. Such new rules are in force as of 1 January 2015, but they could be applied in calendar year 2014 for the taxpayers who elected to do so.

The new legislation makes clear that for the future, the profits that should be used for calculating dividends should be the one calculated according to Law No. 6,404/76 as amended (the new Corporations Law). Law No. 12,973/14 has also provided that, for calendar years 2008 to 2013, the distributions of dividends calculated according to the new Corporations Law in excess to the amounts that would have been calculated under the accounting rules in force in 2007, will not be subject to the WHT upon distribution.

Please note, however, that Law No. 12,973/14 is silent with respect to dividends related to profits earned in 2014. In addition, Normative Ruling No. 1,492/14 amended Normative Ruling No. 1,397/13, including a provision expressly foreseeing that dividends related to profits calculated in 2014, and distributed in excess to the “fiscal profits” shall be levied WHT according to progressive rates applicable to individuals. Therefore, the discussion regarding the taxation of dividends remains unsettled with regard to dividends related to profits earned in 2014.

Interest on Equity

Law No. 9,249/95 provides that a Brazilian legal entity can pay or credit its equity holders interest on equity (IOE), provided that the company has retained or current-year earnings. The IOE is an alternative mechanism to transfer funds from a company to its equity holders and, simultaneously, generate a deductible expense at the company level. The total amount of interest that can be paid or credited must not exceed 50 percent of the company’s retained or current-year earnings. The basis for calculating the amount of interest on equity includes reserves in addition to contributed capital, but excludes fixed assets revaluation, special monetary correction of fixed assets and real estate and intangible revaluation reserves. Law 12,973/14 specifically provided the net equity accounts that will be
considered for the purposes of IOE payment and these are as follows: (i) corporate capital; (ii) capital reserve; (iii) profits reserve; (iv) treasury shares; and (v) accumulated losses.

The interest is based on the government-monitored long-term interest rate (Taxa de Juros de Longo Prazo - TJLP), calculated on a pro rata basis. The expenses with interest on capital are considered operational deductible expenses for income tax and for social contribution on net income. A 15 percent withholding income tax is levied on the amount of interest paid, accrued to the equity holders, or capitalized.

The controversy on the application of the RTT for the distribution of dividends was also applicable to the calculation of IOE to be distributed. According to IN 1397/13 in its original wording, the deductible amount of IOE for corporate income tax purposes should be calculated based on the criteria in force on 31 December 2007.

Nevertheless, Law No. 12,973/14 has also provided that, for calendar years 2008 to 2014, the distributions of IOE based on the net equity calculated according to the new Corporations Law would be deductible (provided that the other limitations provided in the legislation are complied with).

Please note that the legislation expressly allowed the payment of IOE based on the new accounting rules, free of WHT, including the year of 2014, differently from dividends.

**Withholding Income Tax on Payments Abroad**

In general, payments made to nonresidents are subject to withholding income tax in Brazil. As a general rule, payments to nonresidents for services rendered to Brazilian residents and payments to nonresident individuals for work remuneration are subject to the general withholding income tax rate of 25 percent.

The 25 percent rate for payment of services does not apply to interest on loans and other types of payments that are not classified as services
and are subject to specific legal provisions. For these types of payments, the lower withholding rate of 15 percent is still in place.

After the Contribution for the Intervention in the Economic Domain (CIDE) was created on 1 January 2002, Law No. 10,332/01 reduced the income tax rate applicable to technical services, administrative assistance and other similar services that did not involve transfer of technology to 15 percent. On the other hand, payments remitted abroad for these services will be subject to the 10 percent CIDE.

Article 8 of Law No. 9,779/99 has increased the previous withholding tax to 25 percent for all payments of income made to nonresidents located in a low-tax jurisdiction, with few exceptions.

As listed by the Brazilian Federal Revenue Department, the following locations are considered low-tax jurisdictions for Brazilian tax purposes (Treasure Ruling No. 1,037/10): American Samoa, American Virgin Islands, Andorra, Anguilla, Antigua and Barbuda, Aruba, Ascension Island, Bahamas, Bahrain, Barbados, Belize, Bermuda Islands, British Virgin Islands, Brunei, Campione D’Italia, Cayman Islands, Channel Islands (Alderney, Guernsey, Jersey and Sark), Dominica, Cook Islands, Costa Rica, Cyprus, Djibouti, Federation of Saint Christopher and Nevis, French Polynesia, Saint Kitts & Nevis, Gibraltar, Grenada, Hong Kong, Isle of Man, Kiribati, Labuan, Lebanon, Liberia, Liechtenstein, Macao, Madeira Islands, Maldives, Mauritius Islands, Marshall Islands, Monaco, Monserrat Islands, Nauru, Netherlands Antilles, Niue Islands, Norfolk Island, Occidental Samoa, Oman, Panama, Pitcairns Islands, Qeshm Islands, Santa Lucia, Saint Helena Islands, Saint Pierre et Miquelon Islands, Saint Vincent & Grenadines, San Marino, Seychelles, Singapore, Solomon Islands, Swaziland, Tonga, Tristan da Cunha, Turks & Caicos Islands, United Arab Emirates and Vanuatu. Thus, interest payable on loans to a low-tax jurisdiction is currently subject to the 25 percent withholding rate, unless there is legal provision regulating the withholding tax on the specific type of loan contracted.
Social Contribution Tax

Most entities are required to pay social contribution on net income (CSLL). This is a true corporate income tax surcharge, at the rate of 9 percent. The reason it is levied separately from the corporate income tax is that the CSLL has a different tax nature and it is destined to the social security system.

Law 13,169/15 introduced an increase of the CSLL, which are as follows:

1. Applicable to financial institutions - Increase to 20 percent on the period between 1 September 2015, and 31 December 2018, and 15 percent as from 1 January 2019

2. Applicable to stock exchange entities - Increase to 17 percent on the period between 1 October 2015, and 31 December 2018, and 15 percent as from 1 January 2019

The tax basis for the CSLL is net income specifically adjusted for CSLL purposes.

Similar to the IRPJ, there are basically two methods in calculating the taxable profits for CSLL purposes - the actual profits method and the presumed profits method. Under the actual profits method, taxpayers may opt to calculate CSLL on a quarterly or annual basis. In the latter case, monthly payments must be made on an estimated basis. Law No. 9,316/96 provides that the CSLL is no longer deductible from net income for purposes of calculating IRPJ.

In the actual profits method, the negative basis of CSLL (tax loss for CSLL purposes) can be used to offset taxable income from subsequent periods, although only limited to 30 percent of the taxable income of the period. Similar to tax losses for IRPJ purposes, the negative basis of CSLL may be used to offset future taxable income without statute of limitations.
Together with the maximum rate for IRPJ purposes, the combined corporate income tax rate (i.e., federal income tax plus social contribution on net income) for most companies is currently 34 percent.

Contribution for Intervention in the Economic Domain ("CIDE")

This is a contribution due from companies that: (i) own licenses for the use of rights; (ii) acquire technological knowledge or (iii) are parties to agreements that involve transfer of technology and are executed between residents and nonresidents. As of 1 January 2002, CIDE has also been levied on technical services, administrative assistance and other similar services that do not involve the transfer of technology. The CIDE is levied on the total amounts paid, credited, delivered, used or remitted in each month to nonresident beneficiaries as royalties of any kind and remuneration under the following agreements:

1. Supply of technology
2. Technical assistance (technical assistance services and specialized technical services)
3. Trademark license and assignment
4. Patent license and assignment
5. Agreements for the rendering of technical services, administrative assistance and other similar services that do not involve the transfer of technology

Specifically with respect to remittances abroad of software fees, Law No. 11,452/07 provided that CIDE is not levied over remittances to nonresident beneficiaries of payments of software license fees and software distribution rights as long as there is no transfer of the source code ("transfer of technology"). Although Law No. 11,452/07 was
enacted on 8 February 2007, the non-incidence of the CIDE has been granted with retroactive effect as from 1 January 2006.

The rate is 10 percent of the amount paid, credited, delivered, used or remitted monthly to nonresident beneficiaries of the items listed in the preceding paragraph. The contribution is due by the last business day of the fortnight following the month the royalty or fee is paid, credited, delivered, used or remitted abroad.

**Contribution for Intervention in the Economic Domain (“CIDE”) on Fuels**

This contribution is levied on the importation and commercialization of certain types of fuel (i.e., oil, diesel, aviation kerosene and other types of kerosene, fuel oil, liquefied petroleum gas, including those derived from natural gas and alcohol fuel) at fixed amounts in Reais.

The CIDE shall be paid by the producer, blender or importer of fuels. The taxpayer is allowed to deduct the CIDE from the PIS and COFINS contributions levied on the sale of fuels, subject to the limits of deduction provided for in the applicable legislation. This contribution shall not be levied on the income derived from the exportation of the products mentioned above.

**Contribution for the Development of the National Cinematography Industry (“CONDECINE”)**

This contribution is levied on the exhibition, production, licensing, and distribution of motion pictures and video phonographic works with commercial purposes (per market segments). It is calculated at fixed amounts based on the length of the work and it is due once every five years.

Law No. 12,485/11 provided for new triggering events for the CONDECINE contribution. According to the referred law, further to the abovementioned, the contribution is levied on: (i) the provision of services that might distribute, effectively or potentially, conditioned audiovisual contents and (ii) the placement or distribution of
advertising audiovisual material that is included in international programming and in which there is direct participation of a national advertising agency.

The CONDECINE is also levied at an 11 percent rate on amounts paid, credited, remitted, delivered or used by local agents to foreign producers as a result of the exploitation of audiovisual works in Brazil or their importation at a fixed price.

Federal Welfare Taxes

Two types of federal welfare taxes - PIS and COFINS - are due on monthly gross revenues of any kind, with a few exceptions established by tax legislation.

Laws No. 10,637/02 and 10,833/03 introduced the non-cumulative system for calculating the PIS and COFINS, which apply to most companies in Brazil. The main purpose of this legislation is to avoid the cascading effect of those contributions through the grant of tax credits. Therefore, currently, PIS and COFINS are levied on the company’s gross revenues on a non-cumulative basis at the combined rate of 9.25 percent with PIS at 1.65 percent and COFINS at 7.6 percent.

According to the non-cumulative system, the taxpayer is entitled to credits related to these contributions in the following operations:

1. Acquisition of goods for resale, except goods and services mentioned

2. Goods and services for use as input materials in the rendering of service and the manufacture of products, including fuel and lubricants

3. Consumption of electric and thermo power, also in steam form, by the facilities of companies
4. Payment of leases of buildings, machines and equipment to companies for the use thereof in the company’s operations

5. Lease expense derived from leasing transactions (“arrendamento mercantil”), except for companies under the SIMPLES regime

6. Acquisition or manufacture of machines and equipment acquired or manufactured to be leased to third parties or used in the manufacture of products intended for sale and of other goods incorporated to the fixed assets

7. Buildings and betterments in third-party real estate property to be used in the company’s operations

8. Return of goods

9. Storage of goods and freight in sales, in case it represents a cost supported by the seller

10. Meal coupons, transportation, uniforms provided to employees by a company that explores activities of cleaning, conservation and maintenance services; and

11. goods incorporated to the intangible assets, acquired for the utilization in the production of goods destined to sale or in the rendering of services;

These credits can be used by the company to reduce the PIS and COFINS levied on revenues derived from subsequent transactions.

This non-cumulative system does not apply to: (i) the cooperative organizations; (ii) immune or exempt companies; (iii) companies taxed by income tax based on the presumed profit method; (iv) corporate entities in the SIMPLES tax regime; and (v) revenues derived from telecommunications, call center, telemarketing and software related services and other specific activities. Pursuant to Law No. 10,865/04, the taxpayers that are subject to higher tax rates pursuant to the single-phase system of the PIS and COFINS, such as
the pharmaceutical and auto industries, are entitled to credits under the non-cumulative system.

Furthermore, there is an express provision determining that PIS and COFINS do not apply over: (i) the revenues resulting from the export of products, the export of services whose payment represents the inflow of foreign currency, and (ii) the revenues derived from domestic sales to trading companies (empresas comerciais exportadoras) with specific export purposes.

Since August 2004, financial revenues accrued by taxpayers subject to the non-cumulative system of PIS and COFINS were subject to a zero tax rate of these contributions (except those pursuing from interest on equity and hedge). However, Decree 8,426/15 increased the tax rate applicable to these specific revenues to 4.65 percent, with PIS at 0.65 percent and COFINS at 4 percent, as from 1 July 2015.

With respect to the tax basis of the PIS and COFINS under the cumulative system, paragraph 1 of Article 3 of Law No. 9,718/98, which enlarged the PIS and COFINS tax basis, was revoked by Law No. 11,941/09. Such revocation was triggered by the decisions rendered by the Federal Supreme Court, which determined that the enlarged tax basis of the PIS and COFINS was unconstitutional when it required the inclusion of “non-operational” revenues in the PIS/COFINS tax basis for companies under the cumulative regime.

Finally, it should be noted that Law No. 12,973/14 has changed the concept of “gross revenues” for the calculation of the PIS and COFINS under the cumulative system. Accordingly, the “gross revenues” for such purposes is now defined as: (i) the results of the sale of goods in the company’s own account; (ii) the price of the provisions of services in general; (iii) the result derived from operations on behalf of third parties; and (iv) revenues derived from the activity or main purposes of the company that are not comprised in items i to iii. This definition has broadened the previous definition of gross revenues by including items “iii” and “iv.”
PIS/COFINS - Import

Moreover, Law No. 10,865/04 introduced the taxation of PIS and COFINS on imported goods and services. This law determines that PIS and COFINS are due on imports of foreign goods into Brazil and on the payment, credit, delivery, use or remittance of amounts to nonresidents as payment for the services supplied.

The taxpayers thereof are all importers and companies or individuals that contract the services of nonresidents. The general tax rate of the PIS and COFINS contributions are as follows:

- **Importation of goods:**
  - Tax rate - 2.1 percent and 9.65 percent
  - Tax basis - Value for customs purposes adopted as the tax basis for the import tax

- **Importation of services:**
  - Tax rate - 1.65 percent and 7.6 percent
  - Tax basis - Amount paid, credited, delivered, used or remitted abroad, calculated before the withholding income tax, plus the municipal services tax (ISS), and the PIS and COFINS amounts

Import Duty

An import duty (II) is due upon customs clearance of imported products on an ad valorem basis. The rate varies, depending on the tariff classification of the product imported. Imports are also subject to the PIS/COFINS-Import (as described above) and to the IPI and ICMS (as described below). These taxes, along with II, are calculated as follows: the II is levied on the CIF value of the imported product, the IPI is levied on the CIF value plus II, and the ICMS is levied on the CIF value plus II, IPI and ICMS itself.
Export Tax

An export tax (IE) is due at the time of export. The tax applies on an ad valorem basis to a limited list of products. The tax rate varies, depending on the type of product exported.

Excise Tax

The federal excise tax (IPI) is a federal value-added tax levied on industrialized products as they leave the plant where they are manufactured. The IPI is also due on imported industrialized products upon importation and resale by the importer. IPI rates may vary depending on whether the type of product is regarded as essential or not.

The IPI is levied at each production stage of manufactured products and on the import of manufactured products. This tax is paid on the sale, transfer or importation of raw materials and intermediate products, parts, components and the like, and can offset the IPI due on subsequent transactions. The net effect is a tax on the value added at each stage of production.

State Value-added Tax on Sales and Services (“ICMS”)

Similar to the IPI, the ICMS is another value-added tax on sales and services, payable upon the importation of a product into Brazil and the sale or transfer within Brazil, or as to certain communication and intrastate and interstate transportation services, at the time the service is rendered.

ICMS rates and tax benefits vary from state to state and depend on the type of transaction (e.g., intrastate or interstate sale of goods, communication or transportation services, etc.). Currently, the ordinary rates in the State of São Paulo are: (i) 12 percent on transportation services; (ii) 18 percent on products imported, sold or transferred; and (iii) 25 percent on communication services.

According to Constitutional Amendment No. 33/01, the ICMS shall be levied on importation carried out by legal entities as well as by
individuals, even if they are not considered taxpayers for ICMS purposes, at an 18 percent rate.

Other rates may also apply depending on the specific product or service.

Rates may also vary with respect to interstate transactions, normally 7 percent or 12 percent depending on the state of destiny of goods and services. Since January 2013, the interstate transactions shall be subject to the rate of 4 percent for transaction with imported goods that: (i) have not been subject to further manufacturing or to goods or (ii) after being subject to further manufacturing, have an Imported Content (“Conteúdo de Importação”) ratio of over 40 percent.

Similar to the IPI and to the VAT existing in most European jurisdictions, the ICMS system permits a given taxpayer to offset the ICMS paid in acquired goods and services against the ICMS due on subsequent taxable transactions (e.g., sale of goods and services subject to ICMS tax). The difference is the amount due to the state government.

Since 1 November 1996, importers/purchasers may take a credit for the ICMS paid on imports and local purchases of fixed assets (which were not permitted until 1 November 1996). Nevertheless, Complementary Law No. 102/00 has introduced a new system for the appropriation of the ICMS credits upon the acquisition of fixed assets, so that the taxpayer is allowed to register the mentioned credits at a monthly rate of 1/48.

For taxpayers with an excess of ICMS credits, some state regulations provide for alternatives that permit the taxpayer to transfer such credits. In the State of São Paulo, for example, state regulations provide some alternatives through which the taxpayer with an excess of ICMS credits can use the tax already paid (besides offsetting ICMS debits). A taxpayer can: (i) transfer ICMS credits to any of its branches or offices located within the State of São Paulo; (ii) transfer the credits to an interdependent company, as defined in the regulations; or (iii) use the credits to pay the purchases from a supplier
of raw material and/or certain fixed assets. Another option is to file a special regime asking for partial or full suspension of the ICMS levied on imports to mitigate the record of credits in excess. Other state regulations may provide for other alternatives to use excess ICMS credits.

**Financial Transactions Tax**

Decree No. 6,306/07, as amended, provides for the current IOF regulations.

The IOF applies on several types of transactions such as credit, exchange and insurance, as well as on transactions involving gold, financial asset or exchange instruments.

The IOF-Credit applies on credit transactions of any nature. With regard to credit transactions with determined principal amount of debt and term, the IOF-Credit applies at a tax rate of 0.0041 percent in case of credits granted to legal entities and 0.0082 percent) for individuals, applicable per day.

The rates for credit transactions granted to legal entity shall be subject to a maximum rate of 1.50 percent, plus an additional rate of 0.38 percent, which results in a maximum rate of 1.88 percent. For individuals, the maximum rate shall be 2.99 percent, plus the additional 0.38 percent, which results in a maximum rate of 3.37 percent.

In addition, for credit transactions where the term for repayment of the credit is not determined, the IOF-Credit applies at a tax rate of 0.0041 percent for entities or 0.0082 percent for individuals automatically multiplied by 365 days in case of credits granted to legal entities and individuals, plus an additional rate of 0.38 percent, which results in the 1.88 percent or 3.37 percent rate.

In case the principal amount of the credit transaction is not determined, the tax basis of the IOF-Credit is the sum of the daily debt balance calculated in the last day of each month. In such a case, the
IOF-Credit applies at a tax rate of 0.0041 percent for entities or 0.0082 percent for individuals, plus an additional rate of 0.38 percent, without any limitation as to a maximum rate according to the repayment term.

With respect to loans granted by nonresidents to Brazilian companies since 7 October 2014, when the repayment term is lower 180 days, the IOF levied on exchange transactions will apply at a 6 percent rate over the principal amount of the loan.

For exchange operations carried out by Brazilian credit card administration companies for the purpose of covering expenses of clients incurred abroad, the IOF rate is currently fixed at 6.38 percent.

For the payment of imports of services, as well as for most of the exchange transactions, the IOF-Exchange rate is 0.38 percent. One major exception is the exchange contract for the acquisition of foreign currency in cash, which is subject to the IOF-Exchange at a 1.10 percent rate. Payments for the import of goods are currently exempted from IOF-Exchange.

Decree No. 6,306/07, currently in force, establishes that the liquidation of exchange transactions related to general investments made by foreign investors in the financial and capital markets are subject to the IOF-Exchange calculated at a 0 percent rate. The simultaneous exchange transactions for the purposes of converting a foreign direct investment in a Brazilian company into investment in shares traded in stock-exchange markets are also subject to a 0 percent rate.

Finally, the IOF is also levied on financial operations involving: (i) insurance, with the majority applicable rate being 7.38 percent; (ii) securities, with the usually applicable rate of zero percent, 0.5 percent or 1 percent, limited to 1.5 percent; and (iii) transactions involving gold, financial assets or exchange instruments, subject to a 1 percent rate.
Provisional Tax on Banking Transfer (Contribuição Provisória sobre Movimentação ou Transmissão de Valores e de Créditos de Natureza Financeira – “CPMF”)

Law No. 9,311, of 24 October 1996 created the CPMF tax under temporary application. In 2003, the effects of the CPMF were extended only until December 2007. Therefore, as of 1 January 2008, the CPMF has been considered extinguished. The CPMF was applied at a 0.38 percent rate on all banking transfers and withdrawals of currency, such as the cashing of checks.

Tax on Transmission of Assets by Donation or Mortis Causa (“ITCMD”)

The ITCMD is a state tax that is levied on the transmission of movable or immovable assets as a result of donation or in the event of the death of the owner. Currently in the State of São Paulo, the ITCMD is levies at a 4 percent rate on the appraised value of the movable asset, real estate or transmitted rights.

Municipal Services Tax

Federal regulations list specific services to which a municipal services tax (ISS) applies. Rates vary from 2 percent to 5 percent, depending on the type of service and the particular municipality in which the party rendering the services is located.

Pursuant to the Complementary Law No. 116, the ISS Law, the ISS shall be levied not only on services rendered in Brazil, but also on “importation of services,” which refer to services originating overseas or those initiated abroad. In such cases, each municipality may set forth in the relevant municipal law that the recipients or agents of the services in Brazil are responsible for collecting the tax due.

Complementary Law No. 116 also sets forth that the export of services abroad shall not be subject to ISS, except for services developed in Brazil and whose results also occur in Brazil, even if the payer is a foreign resident.
Additionally, Complementary Law No. 116 lists several services that shall be subject to the ISS taxation, including: (i) the assignment of trademark use and propaganda signals; (ii) assignment or license of use of computer programs; (iii) franchising; (iv) improvement, reconditioning and congener now extended to objects intended for industrialization or commercialization; (v) maritime agency; and (vi) installation and assembly of products, parts and equipment related to the execution of civil construction works, among other things.

**Real Estate Property Tax**

The real estate property tax (IPTU) is a municipal tax levied annually at progressive rates according to the appraised value and use of the real estate (in the Municipality of São Paulo).

**Real Estate Transfer Tax**

The real estate transfer tax (ITBI) is a municipal tax on the transfer of real estate. The rates may vary according to the actual value of the transaction or the appraised value of the property, whichever is higher. In the Municipality of São Paulo, however, a fixed rate of 3 percent applies. There are exceptions to the general rule that must be analyzed on a case-by-case basis.

**Personal Income Taxation**

Brazilian tax law distinguishes individual residents from nonresidents. Generally speaking, a Brazilian national is automatically a resident while legally domiciled in Brazil or, if not domiciled in Brazil, upon his or her election to be treated as a resident for tax purposes.

As a general rule, payments for services from a Brazilian source to nonresident individuals may be subject to a 25 percent withholding tax rate.

**Visas**

Beginning 1 January 1999, temporary visa holders have been considered residents for tax purposes from the moment they enter the
country to work under an employment contract. Accordingly, they must deliver an annual tax return to include their worldwide income, and payments are subject to progressive income tax rates\(^2\) of 7.5 percent for income of BRL1,903.99 up to BRL2,826.65 per month, 15 percent for income of BRL2,826.66 up to BRL3,751.05 per month, 22.5 percent for income of BRL3,751.06 up to BRL4,664.68, and 27.5 percent for income exceeding BRL4,664.68. Nevertheless, under certain conditions and provided the expatriate’s country grants reciprocity, resident expatriates are allowed to offset their Brazilian tax liability with federal taxes paid abroad on foreign-sourced income.

The duration of the time period for this visa begins on the day the foreigner enters Brazil, independent of the calendar year. The days counted are only those days spent within the country, interrupted upon the moment of exit from the country and recommenced upon return.

In addition to the above, holders of temporary visas entering the country for reasons other than those indicated in an employment contract are considered residents for tax purposes after 183 days of stay.

Nonresident individuals who render services to a Brazilian party are subject to Brazilian income tax on income received from Brazilian sources - that is, from Brazilian residents, whether individuals or legal entities. Brazilian-sourced income from salaries and wages are subject to the standard 25 percent withholding income tax, while capital gains are subject to the 15 percent withholding income tax, provided that the beneficiary of such capital gain is domiciled in a regular-taxed jurisdiction. If the beneficiaries of the capital gains are located in low-tax jurisdictions, the tax rate is increased to 25 percent. This taxation may be reduced or creditable abroad if a tax treaty is applicable.

Law 13,259/16 establishes that, for sales occurring as of 1 January 2017, capital gains will be subject to progressive rates applicable to nonresidents and Brazilian individuals. The progressive rates are the following: (i) 15 percent over gains that do not exceed

\(^2\) As of April 2016.
BRL5 million; (ii) 17.5 percent over gains that exceed BRL5 million but do not exceed BRL10 million; (iii) 20 percent over gains that exceed BRL10 million but do not exceed BRL30 million; and (iv) 22.5 percent over gains that exceed BRL30 million.

In case of disposition in parts of the same asset or right, from the second operation on, as long as it is performed up to the end of the subsequent calendar year to the first operation, the capital gain must be added to the gains earned in the previous transactions for purposes of calculating the income tax based on the progressive rates described above. In this scenario, the tax paid with respect to the previous transactions must be deducted from the amount of the final tax due.

If a foreigner is awaiting the grant of a temporary or permanent visa or authorization of a work permit, he may enter the country under a business visa, but he may not be paid locally until the employment authorization and appropriate visa are issued. Technically, the foreigner is not working in Brazil, but is in the country on a business trip. The foreigner must then return to the country of origin to receive his/her temporary or permanent visa from the Brazilian Consulate with jurisdiction over the permanent place of residence - that is, where the foreigner has lived for at least 12 months prior to the application.

Transfer Pricing

Transfer pricing rules have applied in Brazil since 1 January 1997, when Law No. 9,430/96 came into force. The system adopted is one that determines the maximum amounts of deductible expenses and the minimum amount of taxable revenues for Brazilian entities engaged in transactions with related parties established outside of Brazil or cross-border transactions that are deemed “controlled” under Brazilian laws.

General Aspects

The Brazilian transfer pricing rules provide for four methods to determine maximum deductible expenses, costs and charges related to goods and services or rights imported from a related party. The methods are the following:
Comparable Uncontrolled Price - CUP
Resale Price Less Profits - RPM
Production Cost Plus Profits - COM
Exchange Import Price - PCI

Except for commodities that must necessarily be subject to the PCI, Brazilian taxpayers exporting to a related party are subject to transfer pricing scrutiny whenever the average sales price is lower than 90 percent of the average sales price carried with unrelated parties in the Brazilian market during the same period and according to similar payment conditions. If the average price with related parties is lower than 90 percent of that used in the Brazilian market, the taxpayer is subject to one of the five following methods:

Average Price of Export Sales - CUP
Wholesale Price in the Destination Country Less Profits - RPM
Retail Price in the Destination Country Less Profits - RPM
Acquisition or Production Cost Plus Taxes and Profits - CPM
Exchange Export Price- PECEX

Related Parties (Treasury Ruling No. 1,312/12, Article 2)

The following parties are deemed as related parties of the taxpayer for transfer pricing purposes:

Its parent company, domiciled abroad
Its branch or agency, domiciled abroad
The person or legal entity, resident or domiciled abroad, whose interest in the capital of the Brazilian taxpayer characterizes it as
controlling shareholder or affiliate party, as defined in the Corporate Law

- The legal entity domiciled abroad that is characterized as a controlled entity or an affiliate party of the Brazilian taxpayer, as defined in the Corporate Law

- The legal entity domiciled abroad when such an entity and the Brazilian taxpayer are under common corporate or administrative control or when at least 10 percent of the capital of each entity is owned by the same person or legal entity

- The person or legal entity resident or domiciled abroad that, together with the Brazilian taxpayer, holds interest in the capital of a third legal entity, whose sum characterizes them as the latter’s controlling shareholders or affiliate parties, as defined in the Corporate Law

- The person or legal entity, resident or domiciled abroad, that is associated in the form of a consortium or condominium, as defined by the Brazilian law, in any enterprise

- The person resident in Brazil who is a relative up to the third family degree (as defined in the Brazilian Civil Code) and the spouse or companion of the Brazilian company’s management or direct or indirect controlling shareholder

- The person or legal entity, resident or domiciled abroad, which has exclusive rights, as agent or distributor, to purchase and sell the goods, services and rights of the Brazilian entity

- The person or legal entity, resident or domiciled abroad, which has the Brazilian entity as exclusive agent or distributor to purchase or sell goods, services or rights
Interposed party (Treasury Ruling No. 1,312/12, Article 2, paragraph 5)

The transfer pricing rules also apply in case of transactions carried out by an entity domiciled in Brazil through an interposed party (“third party”) not considered a related party to the extent that such interposed party deals with another party abroad who is considered a related party of the referred Brazilian entity.

Low-tax jurisdictions and/or jurisdictions that prohibit disclosure of equity ownership (Treasury Ruling No. 1,312/12, Article 52)

The transfer pricing regulations also apply to international transactions carried out with a person or legal entity, whether related or not, located in a so-called low-tax jurisdiction. For transfer pricing purposes, a low-tax jurisdiction is deemed to be a country that taxes income at a maximum rate below 20 percent.\(^3\) The same list of countries considered to be low-tax jurisdictions for withholding income tax purposes is valid for transfer pricing purposes (Treasure Ruling No. 1,037/10).

Jurisdictions that prohibit disclosure of equity ownership (Treasury Ruling No. 1,312/12, Article 52)

Article 22 of Law No. 11,727/08 amended the provision related to low-tax jurisdictions, provided in Law No. 9,430/96. In this context, §4º was added in Article 24 of Law No. 9,430/96, setting forth that it is also considered a country or a location with favorable taxation where the legislation does not allow access to information related to the corporate structure of the legal entity, its ownership, or the identification of the actual beneficiary of the income attributed to nonresidents. This provision is effective as from 1 January 2009.

\(^3\) The Ministry of Finance reduced the percentage to 17% for the countries, dependencies and regimes that are aligned with the international standards of fiscal transparency, in the terms to be defined by the Brazilian Federal Revenue Department, notwithstanding the observance of the other conditions provided by Articles 24 and 24-A of Law No. 9,430/96.
Privileged Tax Regimes

Additionally, Article 23 of Law No. 11,727/08 introduced two new articles to Law No. 9,430/96. These articles aim to extend, as of 1 January 2009, the application of transfer pricing rules to the transactions performed under privileged tax regimes. In this context, Articles 24-A and 24-B were introduced to Law No. 9,430/96. Article 24-A, as amended by Law No. 11,941/09, defined in its sole paragraph the privileged tax regime as one where one or more of the following features are met: (i) where income is not taxed, or is taxed at a maximum rate lower than 20 percent\(^4\); (ii) where tax advantages are granted to nonresident individuals or legal entities: (a) without requiring any substantial economic activity carried out in the country or location and (b) contingent to the absence of substantial economic activity in the country or dependence; (iii) where the income earned outside its territory is not taxed, or is taxed at a maximum rate lower than 20 percent\(^5\); and (iv) where access to information related to the corporate structure, ownership of the goods/rights or the economic transactions performed is not allowed.

In connection with the above, the Brazilian Federal Tax Authorities published Treasury Rulings 1,037/2010 and 1,045/2010, which list the jurisdictions or regimes that are considered privileged tax regimes for Brazilian tax purposes. According to Treasury Rulings No. 1,037/2010 and 1,045/2010 as amended by further regulations (Declaratory Act nº 22/2010), the regimes that are currently treated as privileged tax regimes are: (i) Uruguay (“Inversion Financial Entities”- Safis); (ii) Denmark (holdings that don’t perform substantive economic activity); (iii) Iceland (International Trading Companies - ITC); (iv) United States of America (state Limited Liability Companies – LLC, whose corporate ownership is composed by nonresidents, not subject to the federal income tax); (v) Malta (International Trading Companies – ITC and International Holding Companies – IHC); (vi) the Netherlands (holding companies that do

\(^{4}\) Please refer to footnote 3.

\(^{5}\) Please refer to footnote 3.
not perform substantive economic activity); and (vii) Switzerland (legal entities in the form of holding company, domiciliary company, auxiliary company, mixed company and administrative company subject to a combined corporate income tax rate lower than 20 percent or any other corporate legal forms which, by means of rulings issued by the Swiss tax authorities, are subject to a combined corporate income tax rate lower than 20 percent).

Methods Applicable to Imports of Goods, Services or Rights

Comparable Uncontrolled Price Method (Treasury Ruling No. 1,312/12, Articles 8, 9, 10 and 11)

This method is defined as the arithmetical average of sales price of the goods, services or rights, either identical or similar, prevailing in the Brazilian or foreign markets on transactions of purchases and sales under similar payment conditions. In other words, the taxpayer shall compare its costs, expenses and charges of goods, services or rights acquired from a related party, during a given period of time, with such arithmetical average.

For identical goods, services and rights, Treasury Ruling No. 1,312/12 permits adjustments related to the following:

- Payment conditions
- Quantities negotiated
- Obligations related to warranty for the goods, services or rights
- Obligations related to the promotion of goods, services or rights by means of marketing and advertising

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6 Executive Declaratory Act No. 10/10, which suspended on 25 June 2010, the inclusion of the Netherlands in the list of holding companies that do not perform substantive economic activity, was revoked by Executive Declaratory Act No. 3/15 on 21 December 2015.
• Obligations for quality control, standard of services and health conditions

• Agency costs in purchase and sale transactions carried out by unrelated parties

• Packaging

• Freight and insurance

For similar goods, services or rights, besides the adjustments listed above, the regulations allow adjustments resulting from physical differences or differences in content between the goods, services or rights considered similar. In addition, for purposes of transfer pricing regulations, two or more goods will be considered in similar conditions of use when, simultaneously, they: (i) have the same nature and function; (ii) are mutually replaceable; and (iii) have equivalent specifications. Still with respect to the arithmetical average, only transactions carried out between unrelated purchasers and sellers will be taken into consideration for purposes of calculating the average. In addition, it is important to note that neither Law No. 9,430/96 nor Treasury Ruling No. 1,312/12 elects a preferred jurisdiction, whether local, state or foreign, in which “uncontrolled prices” are adopted in transactions between unrelated parties. Thus, a taxpayer may take into account, for purposes of calculating the arithmetical average price of goods, services or rights, “uncontrolled prices” adopted in either local, state or foreign markets, or in import/export transactions, as well as in transactions carried outside the Brazilian territory.

Treasury Ruling No. 1,312/12 established that, as of 1 January 2013, the transactions used for calculating the CUP method must: (i) represent at least 5 percent of the value of the imports subject to transfer pricing control carried out by the Brazilian legal entity during the calculation period related to the type of good, right or service imported, in the event that the data used for the calculation is related to its own transactions and (ii) correspond to uncontrolled prices of the same calendar year of the respective import transactions subject to transfer pricing control.
In case the transactions of the calculation period do not represent 5 percent of the value of the imports subject to transfer pricing control, as mentioned in item “i” above, or in the event there is no uncontrolled prices related to the same calendar year of the import transactions, as mentioned in item “ii” above, it is possible to complement the percentage with the imports performed in the immediately preceding calendar year or prices related to transaction carried out during the immediately preceding calendar year. For this purpose, Treasury Ruling No. 1,312/12 provides for the formula to calculate the exchange rate adjustment of the period.

*Resale Price Less Profit Method (Treasury Ruling No. 1,312/12, Articles 12, 13 and 14)*

The resale price less profit method can be utilized in two scenarios: (i) when the imported goods, rights or services are consumed in further manufacturing or production process or (ii) when the imported goods, rights or services are re-sold exactly as imported. The resale price less profit method (RPM) is defined as the arithmetical average of resale prices of goods (in Brazil) less the following:

- Unconditional discounts granted
- Taxes and contributions imposed on sales
- Commissions and brokerage fees paid
- A profit margin based on the economic sector of the legal entity subject to transfer pricing control, calculated over the sale price after deducting the above three items and determined according to a proportional calculation - The margins are as follows:

I. 40 percent to the following sectors:

a) Pharmaceutical and pharmaceutical chemical products

b) Tobacco products
c) Optical, photographic and cinematographic equipment and instrument

d) Machinery, apparatus and equipment for dental medical and hospital use

e) Extraction of oil and natural gas

f) Products derived from petroleum

II. 30 percent to the following sectors:

a) Chemical products

b) Glass and glass products

c) Cellulose, paper and paper products

d) Metallurgy

III. 20 percent to other sectors

When establishing this method, Treasury Ruling No. 1,312/12 not only defines the calculation of “parameter price” (preço parâmetro), but also determines that this price should be calculated considering the percentage of the imported goods, services or rights in relation to the total cost of the manufactured product - the so-called proportional calculation.

The resale price to be considered for purposes of this method is the price adopted by the taxpayer in the wholesale or the retail markets with unrelated purchasers, either individuals or legal entities. Differences in payment conditions can be adjusted according to the interest rate adopted by the taxpayer in its regular sales. If no interest rate applies consistently, the adjustments in payment conditions should be made according to interest rates provided for in the regulations.
For purposes of calculating the proportional percentage of the imported products for calculating the parameter price under the RPM, the following shall not be included in the weighted average cost of the imported good, right or service: (i) the value of the freight and insurance incurred by the importer and paid to non-related parties (or parties located in regular jurisdiction); (ii) the taxes levied upon importation; and (iii) the expenses with customs clearance. On the other hand, such amounts shall be considered for the calculation of the total weighted average cost of the same product, which may result in a lower parameter price.

*Production Cost Plus Profits Method (Treasury Ruling No. 1,312/12, Article 15)*

This method is defined as: (i) the average production cost of goods, services or rights, either identical or similar, in the country where they have been originally produced, and (ii) the taxes levied on exports in such a country and a markup of 20 percent, calculated over the production cost. The following items can be computed in the (production) cost for purposes of this specific method:

- Acquisition costs of raw materials, intermediary products and packaging material used in the production of goods, services or rights
- The costs of other goods, services or rights used or consumed in the production of the relevant goods, services or rights
- The cost of the personnel used in the production of goods, services or rights, including those for production supervision, maintenance and security of production facilities and corresponding social charges
- Costs of rents, leases, maintenance and repair, and depreciation and amortization charges of the goods, services or rights used in the production of the relevant goods, services or rights
• Reasonable losses in the production process, since admitted by the tax legislation in the foreign country

*Exchange Import Price Method - PCI (Treasury Ruling No. 1,312/12, Articles 16 to 19)*

The Exchange Import Price Method may be defined as the prices of goods or rights subject to quotation in internationally recognized future and exchange markets, adjusted upwards or downwards of the average market premium, at the transaction date or at the date of registration of the import declaration, if this date is not identified.

Besides the premium, the variations in the quality, characteristic and substance content of the goods sold will also be considered. Moreover, the commodity value may suffer adjustments related to the differences of the value supported by the seller and the specifications of the template agreement established by the exchange market or sectorial research institutions, taking into account the specific business conditions, sales conditions (Incoterm), conditions of content and nature, and adjustments corresponding to the variables that are considered in the commodity’s specific quotation such as: (i) payment term; (ii) negotiated quantities; (iii) climatic influences in the imported good characteristics; (iv) intermediation costs in the purchase and sale transactions carried out by non-related companies; (v) packaging; (vi) insurance and freight; and (vii) costs of landing at the port, of internal transport, of storage and of customs clearance including the import taxes and duties, all in the destination country of the commodity.

This method must be applied in the hypothesis of commodities importation, subject to quotation in internationally recognized future and exchange markets performed as of 1 January 2013. The following shall be considered as commodities for purposes of applying the PCI:

• The products listed in Annex I and that, cumulatively, are subject to quotation in future and exchange markets listed in Annex II, or that are subject to public prices in internationally
recognized sectorial research institutions listed in Annex III, all Annexes of Treasury Ruling No. 1,312/12

- The products negotiated in exchange markets listed in Annex II of Treasury Ruling No. 1,312/12

Methods Applicable to Exports of Goods, Services or Rights

The methods described in this item and in the following items apply only when the average export price to related parties is lower than 90 percent of the average sales price in the Brazilian market with unrelated parties. In other words, in case the export price does not reach the 90 percent of the average sales price in the Brazilian market, the taxpayer is, in principle, subject to one of the four methods provided in the transfer pricing rules for export transactions. Note that commodities are obliged to adopt the PECEX method.

*Average Price of Export Sales Method (Treasury Ruling No. 1,312/12, Article 30)*

The average price of export sales method is defined as the arithmetical average of export prices adopted by the Brazilian taxpayer to unrelated parties or by other domestic exporters of goods, services or rights, either identical or similar, during the same period of calculation of the corporate income tax and under similar payment conditions.

If the taxpayer does not export goods, services or rights to unrelated parties, it is possible to compare the taxpayer’s export prices with those adopted by local third parties that export identical or similar goods, services or rights to unrelated parties.

*Wholesale Price in the Destination Country Less Profits Method (Treasury Ruling No. 1,312/12, Article 31)*

This is defined as the arithmetical average of sales of goods, either identical or similar, adopted in the wholesale market in the country of destination, with similar payment conditions, after deducting the following:

- The taxes computed on the sales price, charged in such a country
• A profit margin of 15 percent over the wholesale price

Retail Price in the Destination Country Less Profits Method (Treasury Ruling No. 1,312/12, Article 32)

This is defined as the arithmetical average price of goods, either identical or similar, adopted in the retail market in the country of destination, with similar payment conditions, after deducting the following:

• The taxes computed on the sales price, charged in such a country

• A profit margin of 30 percent over the wholesale price

Retail Price in the Destination Country Less Profits Method (Treasury Ruling No. 1,312/12, Article 32)

Production Cost Plus Profits Method (Treasury Ruling No. 1,312/02, Article 33)

This is defined as the arithmetical average acquisition or production costs, including freight and insurance, of goods, services or rights exported, including the taxes levied on exports in Brazil and a profit margin of 15 percent over the sum of costs and taxes.

Exchange Export Price - PECEX (Treasury Ruling No. 1,312/12, Articles 34, 35 and 36)

The Exchange Export Price Method may be defined as the prices of goods or rights subject to quotation in internationally recognized future and exchange markets, adjusted upwards or downwards of the average market premium, at the transaction date or at the date of the shipping of the good on the exportation, if this date is not identified.

Besides the premium, it shall consider the variations in the quality, characteristic and substance content of the goods sold. Moreover, the commodity value may suffer adjustments related to the differences of the value supported by the seller and the specifications of the template agreement established by the exchange market or sectorial research institutions, taking into account the specific business conditions, sales conditions (Incoterm), conditions of content and nature, and adjustments corresponding to the variables that are considered in the commodity’s specific quotation, which are as follows: (i) payment
term; (ii) negotiated quantities; (iii) climatic influences in the imported good characteristics; (iv) intermediation costs in the purchase and sale transactions carried out by non-related companies; (v) packaging; (vi) insurance and freight; and (vii) costs of landing at the port, of internal transport, of storage and of customs clearance including the import taxes and duties, all in the destination country of the commodity.

This method must be applied in the hypothesis of commodities importation, subject to quotation in internationally recognized future and exchange markets performed as of 1 January 2013. It shall consider as commodities for purposes of applying the PECEX the following:

- The products listed in Annex I and that, cumulatively, are subject to quotation in future and exchange markets listed in Annex II or that are subject to public prices in internationally recognized sectorial research institutions listed in Annex III, all Annexes of Treasury Ruling No. 1,312/12

- The products negotiated in exchange markets listed in Annex II of Treasury Ruling No. 1,312/12

**Application to use a different margin (Treasury Ruling No. 1,312/12 and Ordinance No. 222/08)**

It is possible to change the statutory profit margin set forth in the transfer pricing rules applicable to imports and exports. To use a different margin, the Brazilian taxpayer (or association representing a sector of the economy) must file an application, together with other documents, with the Ministry of Finance. After the application is filed, the Federal Revenue Department together with the Ministry of Finance will analyze the request, the term within the proposed margin is intended to apply and the documents presented by the taxpayer. Ordinance No. 222/08 provides detailed directives for filing a request to amend the statutory profit margins including, for each method, the documents and data that must be presented to the competent authorities.
Market penetration

Before the enactment of Treasury Ruling No. 1,312/12, transfer pricing rules provided for special treatment when a Brazilian exporter was starting to sell its products in a new marketplace. In this case, the regulations permitted an exporter to adopt a sales price lower than 90 percent of the average sales price in the Brazilian market, provided that certain legal conditions were met, such as the approval of a “exportation plan” presented to the Ministry of Finance.

However, the provisions mentioned above were excluded from the transfer pricing rules upon the enactment of Treasury Ruling No. 1,312/12. Therefore, such provisions no longer apply since 1 January 2013.

Intercompany loans and financial transactions (Treasury Ruling No. 1,312/12, Articles 38, 38-A and 39)

For agreements executed until 2012, the previous rules applicable to the deductibility of interest should continue to apply, provided that the taxpayer has not elected the application of the new transfer pricing rules in 2012 (as provided by Article 56 of Treasury Ruling No. 1,312/12).

In other words, for agreements executed until 2012, the interest paid or credited to related companies or under the other transactions subject to the transfer pricing rules should be deductible based on the interest rates registered before the Brazilian Central Bank. If such agreements were not registered, the interest should be deductible up to the amount not exceeding the value calculated based on the London Interbank Offered Rate (LIBOR) for deposits made in dollars from the United States of America for a six-month term, plus a 3 percent annual spread.

For agreements executed as of 2013, interest paid or credited to related companies or under the other transactions subject to the transfer pricing rules is only deductible up to the amount not exceeding the following interest rates, increased by a spread based on the market average to be defined by the Minister of Finance:
1. In case of transactions performed in US dollars with a prefixed rate, the sovereign bonds of the Federal Republic of Brazil issued in the foreign market in dollars from the US

2. In case of transactions performed abroad in Brazilian Reais with a prefixed rate, the sovereign bonds of the Federal Republic of Brazil issued in the foreign market in Brazilian Reais

3. For the remaining transactions, the LIBOR during a six-month term

The spreads over the parameter interest rates have been disclosed by the Ministry of Finance in Ordinance No. 427/2013. According to its Article 1, for the loan transactions in which the Brazilian company pays interests to a foreign-related party, a 3.5 percent spread over the parameter rates may be considered to determine the maximum amount of deductible interest expenses as of 1 January 2013.

For loan transactions in which the Brazilian company accrues interest revenues (and, thus, must determine the minimum amount of taxable revenue for transfer pricing purposes), Article 2 of Ordinance No. 427/13 has established that a 2.5 percent spread over the parameter interest rates should be added as of 2 August 2013. For operations that occurred between 1 January 2013, and 2 August 2013, the spread may be 0 percent, as determined by the sole paragraph of Article 2.

Safe Harbors of Exports (Treasury Ruling No. 1,312/12, Articles 48, 49 and 50)

In addition to the “Safe Harbor” for exports, when the average export price to related parties is lower than 90 percent of the average sales price in the Brazilian market with unrelated parties, the legislation provides for other “Safe Harbors.” However, these other “Safe Harbors” cannot be characterized as perfect “safe harbors,” particularly because the tax authorities have the power to not accept the amount of revenues recognized by the taxpayer in accordance with those “safe harbors.”
Treasury Ruling No. 1,312/12 provides as follows:

- The taxpayer that, before the provision of income tax and social contribution on net income, has a minimum 10 percent net profit on its total export net revenues to related parties can demonstrate its compliance with the transfer pricing rules only with the documents of the export transactions with related parties. The 10 percent net profit must be calculated based on the annual average profit of the current year and the two precedent years. The referred “safe harbor” only applies when the net revenues of exports to related parties are higher than 20 percent of the total export net revenues. In the calculation of the net profit corresponding to these exports, the costs and expenses common to all sales shall be shared according to the respective net revenue. The calculation of this safe harbor cannot encompass sales transactions of rights, goods or services whose profit margin has already been changed through a formal request for ruling with the Ministry of Finance. Note that, before the enactment of Treasury Ruling No. 1,312/12, the “safe harbor” percentage was 5 percent and there was no obligation that the net revenues of exports to related parties be higher than 20 percent of the total export net revenues. Those previous rules are only applicable until 2012 and, as of 1 January 2013, the new rules described above must be applied.

- The taxpayer whose export net revenue in the calendar year does not exceed 5 percent of its total net revenue in the same period may demonstrate its compliance with the transfer pricing rules with the export documents only.

As mentioned above, these safe harbors are not perfect as they only shift the burden of proof to the tax authorities to demonstrate that the prices are not arm’s-length.

The safe harbors do not apply in case of sales transactions of rights, goods or services to buyers domiciled in low-tax jurisdiction or in jurisdiction that prohibits disclosure of equity ownership.
Book Adjustments (Law No. 10,637/02)

In case the acquisition cost exceeds the highest deductible amount determined according to the methods provided for in Law No. 9,430/96, Article 45 of Law No. 10,637/02 established proceedings for the adjustment of the acquisition cost of goods, rights and services imported from related companies. Accordingly, the excess shall be debited from the accumulated profits account and credited to: (i) the asset account where the acquisition of the goods was registered or (ii) the specific account of cost or expense, in case the relevant asset has already been written-off.

Supporting Documentation

In Brazil, the taxpayer has the burden of proof to demonstrate compliance with transfer pricing rules. Otherwise, the tax administration may start an administrative proceeding. The costs and average prices to which Law No. 9,430/96 refers must be based on either: (i) official information and reports from the importing or exporting country or research conducted by companies or (ii) institutions with renowned technical expertise.

Informative Return

There is no specific Transfer Pricing Return. Taxpayers need to inform in their annual tax return (ECF) the existence of any relationship with related individuals or legal entities domiciled abroad. Information on transactions with related parties that are resident abroad should be filed in an appendix to the Annual Tax Return.

Moreover, Law No. 12,546/11, regulated by Treasury Ruling No. 1,277/12, sets forth the obligation to provide information related to transactions entered between entities resident or domiciled in Brazil and those resident or domiciled abroad involving services, intangibles and other transactions that result in variations in the assets of individuals, legal entities or entities without legal personality, based on Brazilian Nomenclature of Services and Intangibles (NBS) created on 2 April 2012, by Decree No. 7,708. Such information shall be provided in an electronic system named “Integrated System of Foreign
Trade of Services and Intangibles – SISCOSERV.” Such system is available in the Taxpayers Assistance Virtual Center (e-CAC) since 1 August 2012.

The referred obligation of providing information on SISCOSERV applies regardless of the relationship between the Brazilian and foreign parties and the applicability of the transfer pricing rules.

Place and Date of Filing

Taxpayers must file their annual income tax return and, consequently, their information related to transfer pricing according to the periods established every year by the Federal Revenue Services regulations. For calendar year 2016, filing was up to the last business day of June.

Transfer Pricing Adjustments

For goods, services and rights imported from a related party, the taxpayer must prove that the corresponding costs, expenses and charges do not exceed the maximum deductible expenses under at least one of the three methods set forth by transfer pricing regulations. Otherwise, the tax authorities may challenge the exceeding deduction. The exceeding amount shall be added back as taxable income and will thus be subject to corporate income tax at the rate of 15 percent plus a surtax of 10 percent. The 9 percent social contribution on adjusted income (CSLL) also applies on the exceeding amount.

Penalties

The penalty for incorrect information or omissions in the company’s tax return is 3 percent of the incorrect or omitted amount, but no less than BRL100 (approximately USD31), but this may be reduced in case the taxpayer corrects the omission or incorrect information as per the tax authorities’ instructions.

In case the taxpayer decides to pay the overdue tax before the corresponding tax assessment, the penalty is 0.33 percent per day limited to 20 percent. However, if during a tax investigation the tax
authorities conclude that the taxpayer was supposed to pay additional tax, the authorities will file a tax assessment and charge a 75 percent penalty on the unpaid tax, plus interest for the delay.

**Reductions**

If the taxpayer decides to pay within 30 days as from the tax assessment, there is a 15 percent discount on the 75 percent penalty. If the taxpayer decides to pay within 30 days as from the administrative decision, there is a 30 percent discount on the penalty.

**Thin Capitalization Rules**

The federal government enacted on 15 December 2009, Provisional Measure No. 472/09, which, among other changes, established limitations regarding the deductibility of accrued interest in case of loans executed with foreign related parties and/or with lenders domiciled in low-tax jurisdictions or subject to a privileged tax regime.

This Provisional Measure was converted into Law No. 12,249/10.

The new rules of thin capitalization are divided in two kinds: (i) rules applicable to transactions with related parties, except for transactions with parties subject to a privileged tax regime or domiciled in low tax jurisdictions and (ii) rules applicable to transactions under a privileged tax regime or carried out with parties domiciled in low-tax jurisdictions.

*Rules applicable to transactions with related parties, except for transactions with parties subject to a privileged tax regime or domiciled in low-tax jurisdictions*

Debt equity ratio of 2:1

Without prejudice to the rules limiting the deductibility of interest expenses foreseen in the Brazilian transfer pricing legislation, the interest paid or credited by a Brazilian source to related legal entities or individuals, residing or domiciled abroad, will be deductible within
the fiscal year for purposes of calculating the corporate income taxes if they cumulatively meet the following requirements:

- In case of the debt funding with a related entity abroad with corporate interest in the Brazilian company, the sum of the debt funding, verified on the date of the accrual of the interest, must not exceed two times the amount of equity participation of the related foreign party in the net equity of the Brazilian company.

- In case of debt funding with a related entity abroad with no corporate interest in Brazilian company, the sum of the debt funding, verified on the date of the accrual of the interest, must not exceed two times the amount of the net equity of the Brazilian company.

For purposes of the calculation of the total debt funding, every form and term of financing must be considered by the Brazilian company, regardless of the registry of the contract with the Brazilian Central Bank.

This rule also applies to debt funding transactions raised by Brazilian entities whereby the guarantor, legal representative or any intervening party is a related party.

In case any excess is verified in what concerns the limits set in items I and II above, the exceeding interest will be considered an unnecessary and non-deductible expense in the calculation of the corporate income taxes.

Additionally, the new requirements for the tax deduction of the interest expenses do not exclude the existing deductibility requirement prior to the new rules, according to which the expenses and costs will only be tax-deductible if they are necessary, usual and normal in the taxpayer’s activities.

Rules applicable to transactions under a privileged tax regime or carried out with parties domiciled in low-tax jurisdictions
Debt equity ratio of 0.3:1

Similar to the rules cited above, whenever the interest is credited or paid by a Brazilian source to any individual or legal entity residing, domiciled or organized in a low-tax jurisdiction or subject to a privileged tax regime according to Articles 24 and 24-A of Law No. 9,430/96, the amount of the debt funding meeting such specifications will have to observe a limit of 30 percent of the net equity of the Brazilian party, regardless of any effective equity participation held by the foreign party in the Brazilian entity.

In case any excess is verified in what concerns the limits of this case, the exceeding interest will be considered an unnecessary and non-deductible expense in the calculation of the corporate income taxes.

On 13 May 2011, the Brazilian Federal Revenue issued Treasury Ruling No. 1,154 (IN 1,154/11) in order to regulate Articles 24, 25 and 26 of Law No. 12,249/10.

One of the most relevant news introduced by the new regulations was the clarification of the calculation of total indebtedness, as well as the calculation of the net equity value for the purposes of application of the deductibility limits.

Article 7 of IN 1,154/11 determines that the overall indebtedness, for the purposes of calculating the deductibility limits, shall be verified based on the monthly weighted average, corresponding to the daily sum of indebtedness divided by the number of days of the corresponding month. Such monthly weighted average shall be added in each tax period (i.e., quarter or annual) and divided by the corresponding number of months. Also, the regulation establishes as basis for the application of the limits over net equity the latest balance sheet of the company or, optionally, the net equity added by the results obtained until the month preceding the accrual interest.

Furthermore, IN 1,154/11 determines that the monthly amount of deductible interest shall be verified by the ratio between the maximum allowed indebtedness limit and the actual indebtedness of the
Brazilian company, multiplied by the total interests cost or expense of the period. In case the annual income tax is calculated with monthly anticipations based on interim balance sheets, the calculation of the deductibility of interests will be made monthly and computed in the monthly income tax payments, with the final assessment of the overall non-deductibility being made at yearend.

The Treasury Ruling also clarifies that incurred and unpaid interests should be computed as total indebtedness in the calculations. It also clarifies the treatment applicable to mergers, acquisitions, spin-offs, dissolutions and liquidations.

Another clarification brought by IN 1,154/11 refers to the application of the 2:1 debt/equity ratio on transactions where the creditor, individual or legal entity characterized as related party, is resident in a jurisdiction subject to regular taxation, but the guarantor, attorney-at-law or intervenient party is domiciled in a low-tax jurisdiction or subject to a privileged tax regime. In reverse, the Treasury Ruling establishes the 0.3:1 debt/equity ratio to transactions where the creditor is domiciled in a low-tax jurisdiction or subject to a privileged tax regime, but the guarantor, attorney-at-law or intervenient party is an individual or legal entity characterized as a related party that is resident in a jurisdiction of regular taxation.

The regulations also exclude the applicability of the thin capitalization limits in case of indebtedness with creditors that are resident or domiciled in Brazil, even if the guarantor, attorney-at-law or any intervenient party is an individual or legal entity, characterized as a related party that is resident or domiciled abroad, or domiciled in a low-tax jurisdiction or subject to a privileged tax regime. However, in case the Brazilian entity defaults payment and the guarantee is executed, the transaction becomes subject to thin capitalization rules (i.e., 2:1 or 0.3:1, as applicable) with respect to interests accrued as from the date in which the guarantor, attorney-at-law or any intervenient party pays the debt in Brazil.

Another relevant innovation brought by IN 1,154/11 refers to the express provision regarding the application of the thin capitalization
rules to the following transactions commonly named “back-to-back”: (i) a nonresident corporate entity providing resources to a related recipient in Brazil through a financial institution that figures on the transaction merely as an intermediary party and (ii) a Brazilian legal entity that figures as the creditor merely acting as an intermediary party between the nonresident guarantor or attorney-at-law and the recipient of the resources in Brazil.

Moreover, the new Treasury Ruling detailed the definition of on-lending transactions, which should be characterized as the granting of credit linked to funding obtained abroad, in which the transferring institution transfers to the on-lender, individual or legal entity in Brazil the foreign exchange risk, when the transaction is fixed in foreign currency, under the same indexation of the funding obtained abroad, with no charges other than the intermediation fee. In case these transactions are carried out by certain types of institutions, the thin capitalization rules should not apply. It should be noted, however, that IN 1,154/11 restricted the scope of Law No. 12,249/10 by not including in the list of institutions subject to the referred exception the brokerage companies, securities dealers, private insurance and capitalization companies, independent insurance and credit agents, and private pension entities.

Finally, IN 1,154/11 has excluded from the application of the debt/equity ratio transactions that are related to funding obtained abroad by means of the issuance of securities, held by legal entities domiciled in Brazil, subject to certain conditions. Similarly, it excluded transactions made by investors resident or domiciled abroad, individual or collective, whose investments in Brazil are carried out in accordance with CMN Resolution No. 2,689/00.

Deductibility of Payments Abroad to Low Tax Jurisdictions and Privileged Tax Regimes

In addition to the thin capitalization rules, Article 26 of Law No. 12,249/10 states that the amounts paid, credited, delivered, employed or remitted under any title (except for the interest on equity - IOE), either directly or indirectly, to individuals or legal entities domiciled
in low-tax jurisdictions and jurisdictions of privileged tax regimes will not be deductible in the calculation of the corporate income taxes, unless the following facts are cumulatively evidenced:

1. Identification of the effective beneficiary of the payment overseas

2. The operational capacity of the nonresident individual or legal entity performing the transaction

3. The documental proof of payment of the respective price and the receipt of the goods, services or the utilization of the right transacted

[Revised as of April 2016]
Immigration

Business Visa

In order to make business contacts, evaluate markets or coordinate business activities with companies in Brazil, a business visa is generally the most appropriate type of visa (except when the trip involves the provision of technical assistance). Under a business visa the expatriate may have business contacts and meetings in the country, but may not provide any services to or receive any remuneration from a Brazilian company.

Under current legislation, foreign business people may apply for a business visa valid for a term of up to ten years, with a maximum stay of 90 days (or 180, depending on the foreigner's nationality and if an extension is duly requested to and granted by the Federal Police) per each 12-month period, which starts on the first day of entry of the foreign national in Brazil on the business visa.

Additionally, only the days spent within the country count towards the 90-day period. Thus, the business visa's 90-day period will begin on the date the foreigner enters Brazil, and the count will stop when he/she leaves Brazil, to resume upon his/her return.

Temporary Work Visas (main types)

If a longer stay is necessary, a temporary visa and work permit may be available for foreigners entering Brazil to work for a Brazilian company, either under an employment agreement or pursuant to a technical assistance agreement. Unless otherwise noted, the temporary visa under an employment agreement is valid for up to two years, with the possibility of converting into a permanent visa. A temporary visa for the provision of technical assistance is valid for up to one year, renewable for an equal period, unless specified differently by agreement or by specific regulations concerning certain types of temporary visas.
The main characteristics of the “temporary visa under an employment agreement” and the “temporary visa based on a technical assistance agreement” are, respectively:

1. The expatriate is included on the Brazilian company’s payroll, under an employment agreement. In this case, the expatriate’s worldwide income will immediately become subject to Brazilian taxation;

2. The Brazilian company and the foreign company sign a technical assistance agreement (other types of agreements, such as covenant and cooperation agreements, are also accepted). The expatriate provides technical assistance services to the Brazilian company, and remains on the foreign company’s payroll. In this case, the expatriate’s income is subject to Brazilian taxation after the expatriate has stayed 183 days in Brazil.

There are different types of temporary visas based on technical assistance that may be more appropriate if the foreigner does not need to stay in Brazil for a long period. If the foreigner providing the technical assistance does not need to stay in Brazil for more than 90 days, a “short-term technical assistance temporary visa” may be granted without the expatriate having to comply with all requirements needed for the ordinary Technical Assistance Temporary Visa. Regulation nº 100/2013 establishes that a technical assistance visa may be granted for a period of 90 days. This 90-day visa, although a type of work visa, may be issued directly by a Brazilian Consulate abroad without consultation with the Ministry of Labor. The 90-day visa is only issued once every 180 day period.

Another type of technical assistance temporary visa may be granted when a foreigner needs to enter Brazil urgently in order to render any kind of technical assistance service, as long as the applicant is able to provide strong evidence of the urgency/damage, and that the situation that caused the urgency was unexpected. This urgent visa also does not require consultation with the Ministry of Labor to be granted as other types of working visas do. Normative Resolution nº. 61/04
allows for temporary visas to be issued in cases of emergency for those petitioning under the temporary visa category for the provision of technical assistance. The visa may be issued by the Brazilian Consulate in the applicant's residential jurisdiction and is valid for 30 days, no renewals allowed. In addition, the emergency temporary visa may be granted only once every 90 days to the same person.

Permanent Work Visas

Permanent visas related to work permits are available to foreigners who are appointed to management positions in Brazil, as evidenced by the articles of organization of the Brazilian company sponsoring the visa application. With a permanent visa and work permit, the expatriate’s worldwide income will immediately become subject to Brazilian taxation.

The rules that govern applications for permanent working visas also refer to permanent visas for members of the board of directors of a Brazilian company.

Under such rules, members of the board of directors are advised to obtain a permanent work visa (valid for up to five years as long as it is in accordance with the established deadlines in the Brazilian company's corporate documents). However, if the board member obtains another position within the Brazilian company, then he/she may need to apply for a concomitancy work visa that will allow him/her to hold that second position in the company.

If an expatriate comes to Brazil under a permanent visa, as an Officer, Manager, Director or Executive Director of the Brazilian company, he/she will be required to fulfill one of the following minimum capital requirements in order to obtain the visa: (i) investment in foreign currency of an amount equal to or greater than BRL 600,000.00; or (ii) investment in foreign currency of an amount equal to or greater than BRL 150,000.00, plus the commitment to create a minimum of 10 new employment positions for Brazilian employees in the following two years.
It is also possible to apply for a permanent visa as a Foreign Private Investor, by investing foreign-owned funds from external sources into new or existing Brazilian companies. To obtain this type of permanent visa, the foreigner will be required to invest at least BRL 500,000,00 to be allocated to a new or existing Brazilian company.

**Restrictions on Brazilian Companies**

Brazilian companies are not allowed to hire expatriates who do not hold proper work visas. A violation of this rule may subject the Brazilian company to fines and the company’s officers to criminal sanctions.

**Application Process**

An application for a work permit is submitted to the Immigration Coordination of the Labor Ministry. When the work permit is approved, the Immigration authorities will instruct the Brazilian Consulate in the applicant’s residential jurisdiction to issue the proper work visa to the applicant and his or her dependents, when applicable.

The Brazilian Consulate will require additional supporting documents to issue the visa. These additional documents may vary from consulate to consulate but will generally include: passports, a non-criminal background check, and marriage and birth certificates.

If the applicant is already in Brazil, for example, under a tourist visa, note that conversion from one visa to another inside the country is not permitted, therefore a trip back to the applicant's home country will be required in order to collect the proper work visa from the corresponding Brazilian Consulate.

After arriving in Brazil under the proper work visa, the applicant has up to 30 days to apply for a Brazilian identity card, the National Registry of Foreigners, usually referred to as RNE or CIE, taxpayer registration number, and labor card (when applicable).
Applicants may enter Brazil on a business visa during the application process, either to make business contacts on behalf of the foreign company, close business deals, attend meetings, conferences, trade fairs, seminars, visit potential customers or to make arrangements for the transfer (e.g., to secure housing and look for schools for their children), but they may not work for the Brazilian company or be included on the payroll until the work permit has been duly issued and the visa obtained.

[Revised as of May 2017]
Competition/Antitrust Laws

Legislation and Scope. On 29 May 2012, Law No. 12,529/11 came into force (the “Brazilian Competition Act” or "BCA") and brought significant changes to the antitrust regulations, in particular with respect to the structure of the relevant agencies and to the rules for merger notification.

The BCA sets forth that any conduct of which the object is or has the potential to create one of the following anti-competitive effects is an antitrust violation: (i) limiting, distorting or in any way hindering competition, (ii) dominating a relevant market for goods/services, (iii) arbitrarily increasing profit; and (iv) abusively exercising a dominant position. These conducts may involve restrictions directed either to players who are active in the same relevant market of the offender(s) (horizontal restrictions) or to players active in markets vertically related to the market in which the offender holds a dominant position (vertical restrictions).

Pursuant to the BCA, not only are companies liable for wrongdoing, but managers, officers and other entities within the same group of companies involved in the violation may also be deemed responsible.

Structure of the antitrust authorities. The Administrative Council for Economic Defense ("CADE") is a two-tier structure, as follows: (i) Superintendence-General headed by a Superintendent-General and two deputy superintendents, whose responsibilities include preliminary enforcement functions regarding investigations into anticompetitive conduct, as well as the review of merger notifications and clearing directly those notifications that do not raise competition concerns\(^7\), and; (ii) an Administrative Tribunal, which has a decision-making role in the system. The Tribunal issues final decisions in

\(^7\) For complex cases, the Superintendence-General can recommend imposing restrictions, which are decided by the CADE Tribunal (composed of seven commissioners). Clearance decisions by the Superintendence-General can be appealed to the Tribunal by third parties, or reviewed by the Tribunal upon a request from one of the Commissioners.
antitrust investigations, and also in merger notifications when the transaction has been blocked by the Superintendence-General, a third-party has appealed a clearance decision issued by the Superintendence-General, or a commissioner indicates the case for further review.

**Violations of Antitrust Laws.** The BCA provides a list with examples of conduct that may be considered an antitrust violation should their object or potential effects be among those prohibited, such as:

- fixing prices in collusion with a competitor, allocating markets among competitors, rigging bids;
- limiting or hindering access of new companies to the market;
- regulating markets by agreement, aimed at controlling technological research and development of the production of goods and services;
- unjustifiably refusing to sell goods or render services within normal payment terms;
- abusively exercising or exploiting an industrial, intellectual or technological property rights;
- selling goods or rendering services below cost, aimed at eliminating competition;
- imposing resale prices, discounts, sales conditions, minimum and maximum quantities and profitability upon distributors and retailers; and
- discriminating against business relations where the other party refuses to comply with terms or business conditions that are unreasonable or anticompetitive.
**Merger Filings.** The BCA has a restrictive list of transactions subject to mandatory pre-merger notification, namely: typical merger and acquisition transactions (acquisition of companies or part of companies, shares, even acquisition of minority shareholding is reportable, stock and assets), associative agreements, consortia and joint ventures, except those formed for purposes of participation in public bids. The filing thresholds are as follows: (i) one of the parties to the transaction must have had revenues in Brazil, in the year prior to the transaction, in excess of BRL 750 million (approximately USD 229.6 million); and (ii) at least another party involved must have had revenues in Brazil in excess of BRL 75 million (approximately USD 22.9 million). The revenues considered are those of the parties’ economic group (not just revenues of the buyer and the target) and, for the purposes of defining "economic group," Brazilian regulations state that one has to consider: (i) all companies that are controlled directly or indirectly by the same parent company or individual; and (ii) all companies in which any of the companies identified in item (i) holds a participation in excess of 20% directly or indirectly in the corporate or voting capital. Nonetheless, authorities can request the notification of any transaction that does not meet these thresholds up to one year after closing, with powers to order divestitures.

**Notification to the Authority.** The BCA establishes a pre-merger notification regime, which requires parties to wait for approval by the Brazilian antitrust authorities before closing a transaction. There is no filing deadline, but transactions cannot be implemented before clearance by the Brazilian authorities, subject to heavy fines. Therefore, the parties must keep the physical structure and the competitive market conditions unchanged until final approval by the authorities, and any transfer of assets or any influence of one party over the other, as well as any exchange of competitive-relevant information is prohibited, unless strictly necessary for the execution of the agreements related to the transaction. Failure to report a transaction prior to its implementation might render it null and subject the parties to fines ranging from BRL 60 thousand to BRL 60 million (approximately USD 18.3 thousand to USD 18.3 million). Notwithstanding the above, the regulations also provide an exception
to this rule, establishing the possibility to request "a preliminary implementation" of the transaction before clearance, but only if: (i) the transaction does not impose immediate harm to competition; (ii) the measures to implement the transaction are entirely reversible; and (iii) the parties are able to prove that if such measures are not taken, the acquired company might suffer immediate and irreparable financial harm. The authorities must analyze the request for preliminary implementation within 30 days of its submission.

Maximum review period is 330 days (calendar): 240 days for the "regular analysis" with a possible 60-day extension (at the request of the parties) or a 90-day extension (by decision from the authorities). Should the authorities not issue a final decision within the 330-day period, the transaction is automatically cleared (although this is not expressly provided in the BCA, it has been the position of the authorities so far). There is a fast-track procedure in place for reviewing transactions that have no or very little possibility of causing competitive harm, such as: (i) classic or cooperative joint ventures; (ii) substitution of an economic agent; (iii) low market share (less than 20% of the horizontal overlap or less than 30% of the market share in the vertically integrated markets); and (iv) low market share increase (provided that the combined market share is not higher than 50%). The fast-track procedure is applied at the authorities' discretion; CADE’s internal regulation establishes a 30 calendar day period to review these cases – any delay must be reported and justified to CADE’s President.

**Enforcement.** Corporate fines for antitrust violations range from 0.1 to 20% of the revenues accrued by the company in the industry segment related to the market affected by the conduct under investigation, in the fiscal year before the administrative proceeding was initiated. The CADE Tribunal may, however, adopt a narrower cut for the base revenue, should using the industry segment revenue result in a disproportional sanction. The BCA establishes aggravating and mitigating circumstances that must be taken into account by the authorities in calculating the fine.
Individuals who take part in antitrust violations may also be sanctioned. Higher-level officers may be fined from 1%-20% of the fine imposed on the corporate defendant, while lower-level employees may be fined a minimum of BRL 50 thousand (approximately USD 15.3 thousand) up to BRL 2 billion (approximately USD 612.4 million).

Foreign companies may be notified through their Brazilian subsidiary, agency, representative or local office, regardless of a power of attorney or statutory provisions, even when the local office was not involved in the violation.

Antitrust violations may also be deemed criminal offenses. Criminal sanctions for antitrust violations that took place after the BCA came into force range from 2 to 5 years of imprisonment and a fine. Therefore, for antitrust criminal offenses that took place from 29 May 2012, it is not possible to apply for the conditional suspension of the criminal lawsuit (an alternative in the Brazilian criminal system for less serious criminal infractions).

Apart from fines, CADE may also: (i) publish the conviction decision in major newspapers, at the wrongdoer’s expense; (ii) debar wrongdoers from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years; (iii) include the wrongdoer’s name in the Brazilian Consumer Protection List; (iv) recommend that tax authorities block the wrongdoer from obtaining tax benefits; (v) recommend that the intellectual property authorities grant compulsory licenses on patents held by the wrongdoer; and (vi) prohibit individuals from exercising market activities on his/her behalf or representing companies for five years. CADE may also order a corporate spin-off, transfer of control, sale of assets or any measure deemed necessary to cease the harmful effects associated with the anti-competitive behavior.

Antitrust violations may also give cause to private damages claims and CADE has been taking measures to foster the private enforcement of such infringements. In this sense, CADE has recently submitted a
draft regulation for comments, which is expected to be released soon. Also on this regard, the CADE Tribunal has submitted several suggestions for changes to the provisions of the BCA governing the statute of limitations for damages claims in connection with antitrust violations.

**Leniency Program.** The BCA governs the Brazilian Antitrust Leniency Program. Leniency Agreements grant immunity to companies and/or individuals that disclose to the competition authorities the existence of a cartel and who effectively and decisively collaborate with the authorities in the investigation. If the cartel is already under investigation, an application for the Leniency Program may still be accepted, provided the authorities do not have enough evidence to support a conviction of the defendants and that the applicant willingly cooperates with the investigation – in this case, however, the Leniency Applicants will be granted partial immunity from administrative sanctions. A successful leniency application also shields the individual applicant from criminal prosecution for cartel and related crimes (e.g., conspiracy and bid rigging), but not from private enforcement (such as damages claims).

**Settlement.** Companies and individuals under investigation for taking part in cartels or other anticompetitive behavior may settle with CADE. Under the BCA and current regulation, a company willing to apply for settlement in cartel cases must undertake several obligations, including paying a settlement amount, admitting to involvement in the alleged violation, and assisting the authorities throughout the investigation. In exchange, CADE grants the Settling Party a discount on the amount that would be levied on the company if convicted by the Tribunal (i.e., the settlement amount), which varies upon the phase of the analysis (investigation or decision phase) and upon the moment on which the settlement is proposed (i.e., whether the company is the first, second, or third to apply for a settlement). Moreover, the case will be closed with regards to the Settling Party if CADE attests that all obligations provided for in the Settlement Agreement have been fulfilled when the Tribunal issues its final decision on the merits of the investigation.
Defendants have only one opportunity to settle - either during the investigation phase with the Superintendence-General or during the decision phase with the Reporting Commissioner of CADE's Tribunal - and the settlement must be reached within a certain period of time, as determined by the negotiating authorities. The settlement only applies to the administrative liability, thus there is no exemption from criminal prosecution or private lawsuits seeking damages.

**Non-Compete.** Ancillary non-compete clauses in merger transactions are subject to certain conditions, under Brazilian law. Generally, these clauses must be limited to a certain geographic area and have an expiration date, observing the particular business involved in the transaction. For instance, in acquisitions, a non-compete clause is generally allowed up to 5 years. As for joint ventures, CADE usually allows non-compete clauses for the duration of the joint venture provided they are restricted to the relevant market where the company is active. In specific cases, CADE may approve transactions conditional on the suppression or modification of a non-compete clause, in order to ensure that competition will not be harmed.

**Compliance programs.** CADE has recently issued guidelines on competition compliance programs, clarifying its view on the key elements of an effective competition compliance program. The guidelines also reveal that a company which has sought to implement a "robust" compliance program is eligible for a penalty reduction in the event of a competition law violation - adding Brazil to a growing list of jurisdictions willing to accept genuine attempts at compliance as a mitigating factor. However, a company's eligibility to receive a compliance credit depends on whether the program brings material changes to the company's corporate culture, comprising requirements such as a demonstrative commitment from the top, appropriate resources dedicated to operate the program, autonomy and independence of the compliance leader, individualized analysis of the risks associated with the company's activities, mechanisms of risk mitigation in place, and periodic review of the program. The guidelines also provide a general view of the benefits of having a
robust compliance program in place. First, it should be considered as evidence of the company's good faith, and may be used as a mitigating factor in calculating the fine. Second, in the context of settlement negotiations, it may justify CADE granting the maximum discount available to the company. Nonetheless, the guidelines clarify that the company has the burden of proving that its compliance program qualifies as robust in order to benefit from any potential fine reduction, although no details are given on how the reduction in penalty would be calculated.

[Revised as of November 2017]
Sales Representatives and Distributors

Sales Representatives or Agents

The Brazilian legal concept of a sales representative is rather broad; it includes practically any independent agent – an individual or a legal entity organized for such purpose – who works as an intermediary in the sale of products. Given the size of the country, many companies contract sales representatives so that they may best take advantage of Brazil’s vast potential market. As a result, in order to minimize unbalances in the relationship between sales representatives and principals, a specific law to protect the sales representatives was enacted, thus creating a protective environment for individuals or entities performing such services in Brazil.

Legislation: General Requirements

Law No. 4,886 of December 9, 1965, as amended by Law No. 8,420 of May 8, 1992, which are part of the Brazilian’s public policy, and as supplemented by Articles 710 to 721 of the Brazilian Civil Code, regulate the activities of independent sales representatives in Brazil. The law provides that sales representatives are individuals or legal entities that, without the existence of an employment relationship, are responsible for promoting products and commercial transactions and soliciting purchase orders on behalf of one or more principals and performing (or not) other actions connected with the implementation of such business transactions.

From a Brazilian labor standpoint, the major difference between a sales representative and an employee is that the latter is defined as an individual who renders services to a company or another individual on a continuous basis, under the direction of such company or individual, for compensation. Thus, a sales representative working under the command/subordination of the principal, which pays to it the benefits typically paid to employees (i.e., Christmas bonus and vacation) may be characterized as an employee.
Formal Requirements

The law requires that sales representative agreements in Brazil include the following: (i) general terms and conditions of the representation; (ii) general or specific identification of the products or goods on which representation is based; (iii) term (definite or indefinite) of the agreement; (iv) compensation due; (v) territory; (vi) nature (exclusive or non-exclusive) of the representation; and (vii) duties and responsibilities of the sales representative and the principal.

Term of the Agreement

A sales representative agreement may be concluded for a fixed or an indefinite period of time. A sales representative agreement for a fixed period of time should automatically terminate upon expiration of the fixed term. However, if it is renewed, it will then be considered an indefinite term agreement.

According to Law No. 4,886/65, a sales representative agreement relationship subject to any of the below will be construed as an indefinite term relationship:

- A new sales representative agreement is executed by the same parties within six months after the termination or expiration of a previous one.

- The parties extend a fixed-term agreement, even if only once.

- The parties to a fixed-term agreement continue to perform their duties thereunder after the expiration of the specified term, thus tacitly renewing it.

Unwritten agreements are automatically deemed to be of an indefinite duration.

Exclusivity of Representation

The sales representative is afforded with exclusive rights within a certain territory, zone or selected clients, as defined in the agreement,
unless there is an express indication to the contrary. This exclusivity means that the whole commission arising from the sales within that territory, zone or selected clients is guaranteed to the sales representative, even if the company itself carries out the sales. Furthermore, the sales representative is not prohibited from representing other companies with the same or similar products in that territory, zone or selected clients, unless agreed upon otherwise.

**Indemnification**

The termination for convenience by the principal of a sales representative agreement, without any of the causes set forth in Law No. 4,886/65, requires that the principal pays an indemnification to the sales representative calculated in accordance with the term of the agreement - that is, either a definite or an indefinite term.

In case of termination of an indefinite term agreement, sales representative is entitled to a minimum indemnification of one twelfth of the total amount paid to the sales representative as commissions during the sales representation term, brought to present value.

In such a case, the indemnification applies for all the period that the sales representative mediated business to the principal including precedent agreements.

However, in case of early termination of a definite term agreement, the indemnification shall be equal to the monthly average of commissions paid until the date of termination, multiplied by one-half of the number of the resulting months of agreement’s term. Apparently, there is a typographical error in Law No. 8,420/92, which has amended Law No. 4,886/65 considering that the law provides that the indemnification should be the average of the commission as mentioned above, multiplied by one-half of the number of the resulting months of the agreement. The understanding is that when the law provides “resulting,” it shall be understood as “remaining.”

Furthermore, in the case of an indefinite term agreement, if the agreement is terminated for convenience, the terminating party must
give a 30-day prior notice of termination to the other party. If such notice is not provided, then an indemnification equivalent to one-third of the commissions paid to sales representative on the previous three months must be paid to the other party. Note that the Brazilian Civil Code, in a more conservative approach, provides that such previous notice should observe a 90-day period. Although there is such a controversy, principals still usually adopt Law 4,886/65 instead of the Brazilian Civil Code.

**Commission**

In Brazil, it is quite common that the commissions of the sales representatives are established as a percentage of the sales price as set forth under the relevant invoice. Law 4,886/65 provides that the commissions should be paid upon the total amount of the invoice (including applicable taxes).

**Distributors**

Distributors who purchase products and resell them in their own name and for their own account are not afforded with the specific protection of Law No. 4,886/65, as amended by Law No. 8,420/92. Instead, they are solely ruled by the Brazilian Civil Code, with certain exceptions such as the distribution of vehicles, as explained below. Under deliberations now before the National Congress is the Bill of Law No. 7,477/2014, which aims to rule the resale relationship and distribution of manufactured products between suppliers and distributors. This bill follows some principles similar to the ones that apply to sales representatives as mentioned above, benefiting resellers and distributors in a level wider than the current legislation.

Distribution agreements may also be for a definite or an indefinite term and with different implications in case of its termination.

Due care should be exercised whenever terminating a distribution agreement with a Brazilian party contracted for an indefinite term. This is because distributor should be notified in advance regarding the termination of the agreement in order to enable it to reorganize its
business and mitigate basis for claim of damages. Hence, such previous notice varies from case to case, depending on a range of factors such as the contract amount, distribution period and profits margin that principal’s products represent in distributor’s general business, among others. Thus, for each case, the principal must estimate the reasonable term for the previous termination notice and also apply other mitigating factors if possible.

Whenever the termination for convenience refers to a fixed-term distribution agreement, the terminating party may run the risk of indemnifying the non-breaching party for the relevant damages suffered, considering the business expectations until the expiration date of the agreement.

One exception to the absence of specific legislation currently covering distribution agreements is Law No. 6,729 of 1979 (as amended by Law No. 8,132 of 1990) also known as “Lei Renato Ferrari,” which regulates the distribution of automotive vehicles in Brazil and, among other matters, provides for specific indemnification to dealers. This statute is very specific and is enforceable only with respect to Brazilian automotive industry distribution agreements. Nevertheless, there have been cases in which Brazilian courts have applied Law No. 6,729/79 to ordinary distribution agreements (as a matter of analogy).

[Revised as of March 2015]
Banking and Finance

Regulatory Framework

The Brazilian Financial System is generally governed by:

2. Law No. 4,131 of 1962
3. Law No. 4,595 of 1964
4. Law No. 6,385 of 1976
5. National Monetary Council (“CMN”) resolutions (Resoluções)
6. Central Bank of Brazil (Banco Central do Brasil or “Central Bank”) rulings and administrative acts (Circulares and Carta-Circulares)
7. Brazilian Securities and Exchange Commission (Comissão de Valores Imobiliários or “CVM”) instructions (Instruções)

Federal Law No. 4,595 considers as financial institutions the private and public entities that, on a principal or ancillary basis, collect, intermediate or invest financial resources for their own account or for third parties, in domestic or foreign currency, as well as act as custodians of assets belonging to third parties. In light of this broad definition, certain activities that are somehow related to, but do not actually constitute, strict banking activities (e.g., capital markets transactions) have been deemed activities carried out by financial institutions in Brazil. Thus, the Brazilian Financial System encompasses banking and non-banking entities under this definition.

Regulatory Bodies

The main banking regulatory bodies in Brazil are the CMN and the CVM. The Central Bank enforces CMN’s monetary policy and is in charge of supervising all financial institutions.
CMN is the highest authority in the Brazilian Financial System. It is a policy-making and regulatory body that is responsible for establishing the currency and credit policies of the country through its resolutions. CMN is composed of: (i) the Minister of Finance as president; (ii) the Minister of State Planning, Budget and Management; and (iii) the President of the Central Bank.

The Central Bank is responsible for the implementation of currency and credit policies, as established by CMN, and for the supervision of the financial market, which comprises:

1. Licensing and authorization (i.e., entry into the market of a supervised entity)

2. Supervision of the activities of public and private financial institutions, which involves risk monitoring and risk control

3. Approval of any merger, acquisition or change in the corporate control of financial institutions, as well as certain other changes in such institutions

4. Sanctioning or imposition of penalties in case of non-compliance with the applicable rules, fraud, bad management or other types of wrongdoing

5. Management of the national payments’ system and establishment of a monetary policy as well as the interest rate - It is also responsible for controlling the granting of loans.

6. Crisis management

7. Publishing foreign currency exchange rates

8. Monitoring and registering international capital flows and cross-border transactions out of/from Brazil
9. Supervising financial transactions together with the Council for Financial Activities Control ("COAF") for purposes of anti-money laundering

As mentioned above, the Central Bank also controls and supervises foreign currency exchange controls in Brazil, which comprises foreign investments in Brazil and Brazilian investments abroad, among other functions.

CVM was created by Federal Law No. 6,385 of 1976, as amended, as an independent agency with powers to regulate and supervise activities related to listed companies, as well as those in connection with the issuance of trade-in securities at the Brazilian stock exchange and over-the-counter markets, including investment funds.

In other words, CVM has among its objectives: (i) the assurance of the proper functioning of the securities exchange and over-the-counter markets; (ii) the protection of all securities holders against fraudulent issues and illegal actions performed by company managers, controlling shareholders or mutual fund managers; (iii) the prevention of any kind of fraud or manipulation that may give rise to artificial price formation in the securities market; (iv) the assurance of public access to all relevant information about the securities traded and the companies that have issued them; (v) the insurance that all market participants adopt fair trading practices; (vi) the stimulation of the formation of savings and their investment in securities; and (vii) the promotion of the expansion and efficiency of the securities market and the capitalization of Brazilian publicly held companies.

**Regulatory Environment**

It is possible to identify, within the Brazilian regulatory environment, a trend to improve regulatory efficiency, based on the growing sophistication of supervision models and tools, in addition to the increasing adherence to international standards of compliance such as the ones established in the Basel Principles.
Indeed, a series of events evidence this evolving trend, where a risk-based approach, a regulation based on internal controls and prevention is gaining momentum each day. It is also very clear that the compliance paradigm of Organisation for Economic Co-operation and Development (OECD) countries is being adhered to.

Financial Institutions and related entities

The entities described below play key political and financial roles in the Brazilian Financial System and are considered financial institutions for regulatory purposes.

1. Commercial Banks (Bancos Comerciais)

Typical commercial banking transactions include the following:

   a. Granting loans
   b. Holding checking and investment accounts
   c. Receiving cash deposits
   d. Receiving and processing payments of public utility and private entity bills
   e. Collecting drafts and other credit instruments

Commercial banks may also obtain authorization to deal with foreign exchange transactions.

2. Investment Banks (Bancos de Investimento)

The main activities carried out by investment banks are the management of investment funds and the provision of medium- to long-term debt or equity financing. Investment banks may also obtain authorization in dealing with foreign exchange transactions if they comply with certain specific requirements.

3. Savings Banks (Sociedades de Poupança e Empréstimos)
These banks, which are mostly state-owned institutions, play a similar role to that of commercial banks since they receive savings deposits from the public.

_Caixa Econômica Federal_ (CEF) is currently the major savings bank and one of the largest financial institutions in Brazil. Most of the loans under the Federal Housing Credit Program are extended by CEF. It also manages the funds of the National Unemployment Compensation Fund (FGTS) and the Social Integration Program (PIS/PASEP), as well as domestic lotteries.

1. **Credit, Finance and Investment Companies (Financeiras)**

The main business of credit, finance and investment companies consists of the following:

   a. Financing consumer purchases of goods and services

   b. Trading credit instruments, such as promissory notes, bills of exchange, etc.

2. **Brokerage firms (Corretoras or “CCVM”)**

Under Laws No. 4,728/65 and No. 6,385/76, brokerage firms are authorized to deal at the Brazilian Stock Exchange with listed securities and other negotiable instruments. These companies may be established as corporations or limited liability companies, and operate as intermediary parties in the said transactions. As such, they can, among other things, perform the following:

   a. Organize, manage and participate in consortia for underwriting and managing securities offerings

   b. Manage securities portfolios and act as custodian of securities

   c. Act as a fiduciary agent

   d. Purchase and resell securities
e. Manage funds and investment associations

f. Intermediate foreign exchange transaction

g. Distribute and place securities in the capital market

h. CMN Resolution No. 1,655/89, as amended, regulates the organization and operations of CCVMs. It also specifies all activities that such companies may perform.

3. Securities Dealers (Distribuidoras de Títulos de Valores Mobiliários or “DTVM”)

These companies are also subject to Laws no. 4,728/65 and no. 6,385/76. Their main business is the subscription of securities issued for resale or distribution. Thus, they act as intermediaries in the placement of public offerings and in the distribution of securities. Their business is similar to that of brokerage firms, and according to the Joint Decision of CVM and CMN No. 17/2009, issued on 2 March 2009, the DTVMs are now able to directly deal at the stock exchange. The organization and operation of such companies are set forth in CMN Resolution No. 1,120/86, as amended. They may be organized as corporations or limited liability companies.

4. Currency Exchange Brokerage Companies (Corretoras de Câmbio)

These institutions, regulated by CMN Resolution No. 1,770/90, as amended, perform foreign currency exchange transactions, and may be organized as corporations or limited liability companies. Other financial institutions may be authorized by the Central Bank to deal with currency exchange transactions.

5. Brazilian Development Bank (Banco Nacional de Desenvolvimento Econômico e Social or “BNDES”)

BNDES is a state-owned financial institution that acts as an auxiliary agency in the implementation of the federal government’s credit and
development policy. It is a relevant player since it stimulates the expansion of industry and infrastructure in the country. Its main activity includes support for exports, technological innovation, sustainable socio-environmental development, the modernization of public administration and financing industrial, agricultural and commercial projects.

6. FINEP (Technology and Innovation Financing Agency)

FINEP is a state-owned financing agency under the Ministry of Science and Technology, created to expand the role of BNDES in the promotion of economic and social development of Brazil, supporting science, technology and innovation in companies, universities, technological institutes and other public or private institutions.

7. Banks with multiple portfolios (Bancos Múltiplos)

Banks with multiple portfolios (Bancos Múltiplos) were created under the umbrella of the 1988 financial system reforms and are now regulated by CMN Resolution No. 2,099/94. The main purpose of multiple banks is to enable a single financial institution to maintain different types of portfolios (which means allowing the performance of all activities pertaining to financial institutions described in items 1 to 4 above), which, in turn, significantly increases the administrative efficiency among banking conglomerates. As a matter of fact, almost all banks in Brazil are authorized to act as Bancos Múltiplos (in the past, banks were required to have one license for each type of activity).

8. Leasing Companies (Sociedades de Arrendamento Mercantil)

Leasing companies are incorporated as corporations and it is mandatory that the company’s name has the expression “Leasing.” The main role of leasing companies is to enter into leasing transactions. Also, such companies may issue debentures and may act in financing transactions. Leasing companies are regulated by CMN Resolution No. 2,309 of 1996, as amended.
Incorporation of Financial Institutions

The operation of Brazilian financial institutions is subject to the prior authorization of the Central Bank, pursuant to CMN Resolution No. 4.122/12. To obtain such authorization, a financial institution must present documents confirming the following:

1. The financial conditions compatible with the proposed undertaking
2. The election of its directors and officers
3. The meeting of a certain minimum capital requirement
4. The acceptance of certain protection mechanisms of creditors
5. Evidence of the origin of the funds used in the undertaking

The application procedure for such authorization is the same regardless whether the financial institution’s controllers are domiciled in Brazil or abroad. However, the analysis process in case of foreign investors is different, since, after the Central Bank’s approval, the application will be submitted by the Central Bank to the CMN and, finally, to the Brazilian President, who authorizes the incorporation of the financial institution and the foreign participation by means of a decree. Additionally, in case of a financial institution domiciled abroad, the constitution of a subsidiary in Brazil and its admission in the control group of a Brazilian financial institution, whether direct or indirect, is subject to the authorization (or no objection) of the governmental body responsible for such activity abroad.

Corporate Structure

A foreign financial institution may have presence in Brazil by means of any of the following:

1. A representative office
2. A branch organized in Brazil
3. A subsidiary organized in Brazil, whether as a corporation (Sociedade por ações) or a limited liability company (Sociedade Empresária Limitada), as the case may be

Most financial institutions, such as banks and leasing companies, may not be organized as limited liability companies.

Pursuant to CMN Resolution No. 4.122/12, financial institutions must obtain prior authorization from the Central Bank to, among other acts, perform the following:

1. Transfer their control
2. Modify their corporate purpose
3. Create or cancel operational portfolio by multiple bank
4. Perform consolidation, spin-off or merger
5. Undertake corporate transformation
6. Cancel the authorization to operate.

Branch of Foreign Entity

Establishing a branch of a foreign financial institution is a bureaucratic and cumbersome process, as it requires the Brazilian President’s authorization by decree, issued on a reciprocal basis, just like the organization of a subsidiary. In addition, the organization of a branch is generally not recommended due to tax and immigration requirements and implications.

Representative Office

The representation within Brazil of a financial institution or similar entity with headquarters located in a foreign country is regulated by CMN Resolution No. 2,592/99 and Central Bank’s Ruling (Circular) No. 2,943/99. Accordingly, such representation depends on the Central Bank’s previous authorization, which is granted on a
discretionary basis, taking into consideration the national interests and international treaties. Such representation may only be performed by individuals or legal entities domiciled in Brazil. Also, representative offices may only perform marketing and promotional roles, and may not carry out any actual banking activity.

Foreign-Owned Bank Subsidiaries

All banks in Brazil must be organized as corporations, and at least 50 percent of the stated initial capital (in conformity with the applicable minimum capital requirements, depending on the type of institution) shall be paid in at the time of incorporation (as well as of any further capital increase). The balance must be paid within one year and before any credit or guarantee operations can commence.

Article 52 of the Transitory Constitutional Provisions Act (Ato das Disposições Constitucionais Transitórias) of the Brazilian Federal Constitution of 1988 prohibits foreign financial institutions from opening new branches in Brazil and from increasing their equity interest in Brazilian financial institutions, except if authorized by international treaties providing for reciprocity, or in the event such transactions are recognized by the Brazilian government to be of Brazil’s best interest.

The federal government tends to treat most acquisitions of Brazilian financial institutions by foreign investors as acquisitions made in the best interest of the country and in view of that, it analyzes the controlling group. As a result, such institutions interested in receiving foreign equity interest may present a formal request to the Central Bank, which shall review and submit it for CMN’s approval, with the latter forwarding the request to the President of Brazil for final authorization by decree. Such process is ruled by Central Bank’s Ruling No. 3,317/2006.

For purposes of such request, the foreign entity must present to the Central Bank information on the controlling group, as well as attest to the relevance of the project for the Brazilian economy. The Central Bank makes a deep analysis of the foreign investor, requesting
its financial statements, corporate documents, as well as any other information that it may deem appropriate. The formalities and timing of approval depend on the structure of the transaction, but it is usually a very time-consuming and bureaucratic procedure. For instance, if foreign interest is obtained through the issuance of new shares rather than the purchase of existing ones, the new subscription amount must be deposited at the Central Bank prior to obtaining final approval for the change in control. In addition, the Central Bank may require that the foreign investor purchase certain assets (i.e., loans receivable) of banks under intervention or liquidation.

**Correspondent Banks**

Pursuant to CMN’s Resolution No. 3,954/2011, as amended, Brazilian financial institutions may contract companies or certain kinds of entrepreneurs, including both members and non-members of the National Financial System, to render the following services on their behalf:

1. Acceptance and routing of opening proposals for checking, time deposit and savings accounts

2. Receipt, payment and electronic transfers for purposes of implementing transactions related to checking accounts held by clients

3. Receipt and payments of any nature and other activities resulting from the service agreements entered into by the contracting financial institution with third parties

4. Execution of money orders

5. Acceptance and routing of loan and leasing requests, as well as, other ancillary services for monitoring the transaction

6. Receipt and payment related to bills of exchange

7. Acceptance and routing of proposals for credit card issuance
8. Execution of exchange transactions

9. Other control services, including data processing, of contracted operations

Correspondents for Foreign Exchange Transactions

CMN’s Resolution No. 3,954/2011, as amended, establishes that Brazilian financial institutions may also contract companies or certain kinds of entrepreneurs, whether financial institutions or not, to carry on certain foreign exchange currency transactions, whose individual amount must be limited to the equivalent of USD3,000, to render the following services on their behalf:

1. Carry out transactions for the purchase and sale of foreign currency in cash, checks or traveler checks, as well as, the recharge of foreign currency in prepaid cards

2. Carry out unilateral transfers from and to Brazil

3. Receiving and routing of exchange transactions proposal

For such purpose, the financial institution must enter into an agreement with the correspondent to render the services listed above and register the information of the correspondent as established by the Central Bank.

Operational Requirements

The Central Bank imposes certain operational rules on financial institutions, including on the following aspects:

1. The period during which bank agencies may remain open to the public

2. Operational limits for certain financial transactions

3. Formalities in the recording of financial transactions
4. Requirements for opening new branches

Moreover, Brazilian financial institutions are subject to the Basel Convention rules, incorporated into the Brazilian law under various CMN Resolutions. More recently, the Central Bank has issued the procedures and timeline for the regulation and compliance with Basel III, with deadline for compliance in Brazil varying between 2019 and 2022, depending on the rule.

Bank Secrecy

Financial institutions shall maintain the confidentiality of all information regarding their clients and respective transactions. Client information may be disclosed only upon judicial order or as required by law. Various measures have been adopted to lift such secrecy rules for criminal investigations and law enforcement. The main regulation on bank secrecy is Complementary Law No. 105 of 2001.

Money Laundering Rules

Federal Law No. 9,613 of 1998 (“AML Act”), as amended by Law No. 12,683/2012, made the penal prosecution more efficient for money laundering crimes. This regulation establishes a stricter penal regime for the crime of money laundering, broadening its scope and establishing additional sanctions on different parties who participate in money laundering schemes. The AML Act no longer restricts the crime of “money laundering,” to the prior occurrence of one of the crimes previously described in Article 1 of the AML Act. Hence, the list of predicate offenses has been extinguished and this concept now encompasses any criminal offense, including misdemeanors, and notably, tax evasion crimes.

The measures are designed to prevent the misuse of the financial system for illicit actions described in this law. It also attributes to legal entities the responsibility concerning the identification of customers and the maintenance of updated records from any transactions, as well as the reporting of transactions that seem related to crimes referred to
in such law. In case of omission, entities may be subject to administrative penalties for non-compliance.

The same law creates the Council for the Control of Financial Activities (Conselho de Controle Atividades Financeiras- COAF, as defined above), an agency subordinated to the Ministry of Finance that is responsible for the regulation and investigation of transactions suspected of money laundering. The COAF has the power to impose administrative penalties. Law No. 12,683/2012 broadened the number of individuals and legal entities that are obliged to inform suspicious activities to COAF. Some entities such as stock exchanges, commodities exchanges, derivative exchanges, banks, securities brokers and dealers, insurance companies and factoring companies shall pay special attention to suspicious transactions vis-à-vis money laundering rules and shall inform the COAF of transactions that violate money laundering laws. Moreover, any transaction conducted with those entities involving assets that can be converted into currency exceeding BRL10,000 shall be reported to the COAF. The Central Bank has published specific rules regarding money laundering prevention.

On 24 July 2009, the Central Bank of Brazil issued new rulings (Circulares Nos. 3,461/09, as amended, and 3,462/09) in order to enhance the Anti-Money Laundering and Terrorist Finance system in Brazil. These rules were enacted in accordance with the recommendations of the Financial Action Task Force (FATF), the inter-governmental body created to promote the development of international policies to combat money laundering and terrorist finance. Brazil is a member of FATF since 2000.

In order to clarify certain aspects and grant the Circular No. 3,461/09 more effectiveness, the Central Bank issued on 11 February 2010, the administrative act (Carta-Circular) No. 3,430/2010.
Domestic Branches

The establishment of branches by Brazilian financial institutions shall follow the requirements of Circular No. 2,501/1994 and Resolution No. 4,072/12.

Bankruptcy and Reorganization

Financial institutions are subject to a special insolvency system in Brazil. The regular insolvency system provided by Law No. 11,101, enacted on 9 February 2005, is not directly applicable to financial institutions. Rather, financial institutions are primarily subject to Law No. 6,024, enacted on 13 March 1974, which provides for a specific insolvency system encompassing two different administrative measures by the Central Bank: (i) the extra-judicial intervention (intervenção extra judicial) and (ii) the extra-judicial liquidation (liquidação extra judicial). The intervention may occur in case of the following:

1. Losses arising out of mismanagement
2. A violation of rules resulting in significant losses
3. Facts constituting bankruptcy, as provided under Articles 94 of Law No. 11,101/05 (corresponding to Articles 1 and 2 of the revoked Decree-Law 7,661/1945)

During the intervention, a trustee appointed by the Central Bank will carry out an investigation that will interrupt the institution’s operations for up to six months. The extra-judicial liquidation represents an extreme measure, at the Central Bank’s discretion, and it is taken to prevent the insolvency of financial institutions. It may occur even without the submission of a prior request for intervention. The interruption of activities may be avoided under the RAET (Regime de Administração Especial Temporária), created by Decree-law 2,321 enacted on 25 February 1987. In addition, the Central Bank is authorized, as a consequence of the intervention, RAET or
liquidation or as a preventive measure, to, among other things, undertake the following:

1. Reorganize the financial institution

2. Request the expropriation (eminent domain) of the shareholding ownership of the financial institution in favor of the federal government

Law No. 6,024/1974 also provides for the possibility of a subsidiary application of Law No. 11,101/2005 to the intervention and liquidation proceedings. In addition, as provided under Article 21, item “b” of Law No. 6,024/1974, it would be possible to lift the bankruptcy of a financial institution, provided that the following conditions are fulfilled:

1. The liquidation survey concludes that the assets are insufficient to cover at least 50 percent of the liabilities.

2. The complexity of the business or the seriousness of the financial condition requires that more severe measures be taken.

3. The extra judicial liquidation requested to the Central Bank is deemed inappropriate.

Payment Service Providers

In November 2013, Law 12,865/2013 was enacted, setting forth the first Brazilian regulatory framework on payment services. Furthermore, Law 12,865/2013 granted authority to CMN and to the Central Bank to regulate the payment entities.

As a consequence, payment arrangements became regulated and are part of the Brazilian Payments Systems (SPB) and payment entities that participate in these arrangements are subject to licensing by the Central Bank.

Although they are part of the SPB and are subject to licensing by the Central Bank, payment entities are not financial institutions. As a
matter of fact, they are prohibited from engaging in activities reserved for financial institutions.

Central Bank’s Ruling 3,683 establishes the requirements for organization, authorization and operation of payment entities – including, among others, the requirement of prior approval by the Central Bank for the transfer of shareholding control and a minimum initial capital requirement (BRL2 million for each payment entity type). Furthermore, Central Bank’s Ruling 3,681 lists several risk management requirements.

Until Law 12,865/2013 and relevant ruling came to force, credit cards services were not subject to the regulation or supervision of any Brazilian authority. However, credit cards are currently subject to such regulatory framework.

Furthermore, credit card service providers are also self-regulated by the Code of Ethics and Self-Regulation of the Brazilian Association of Credit Cards and Services Companies (“Código de Ética e Auto-Regulação da Associação de Empresas de Cartões de Crédito e Serviços – ABECS”), which was created for purposes of establishing principles and rules that conduct the activities of the companies involved in the credit card system. This code only applies to companies that are associated to ABECS. ABECS created a Certificate of Good Practices (“Selo ABECS de Boas Práticas”), which is granted only to members that strictly comply with the principles and rules set forth in the Code of Ethics and Self-Regulation.

Charge cards are issued under banking accounts and can be used to: (i) obtain cash at automated teller machines, for exclusive or shared use, and (ii) make payments upon showing the card at accredited commercial establishments that have proper equipment for Electronic Funds Transfer from the Point of Sale (EFTPOS).

[Revised as of March 2016]
Energy

The Power Industry

Unlike other infrastructure industries in Brazil, the power industry began in the late 1800s as a private investment. It was not until the early 1950s, due to a postwar nationalization wave, that the sector became predominantly state-owned. In the mid-1990s, the Brazilian federal and state governments carried out one of the world’s largest privatization programs in the power sector, and all restrictions on foreign investment were lifted. In the early-2000s, after an energy crisis, the regulatory framework was significantly altered, especially the rules relating to power procurement and trading (Law 10,848). In the 2010s, the federal government introduced new rules aimed at reducing the end tariffs and imposing conditions for the renewal of expiring concessions (Law 12,783 of 2013). The new rules were not well received by the market and inhibited private investment. On the top of that, a rain shortage caused a price hike which washed out the 2013 tariff reductions.

To re-attract private investors, the current Government intends to reform the regulatory framework by the end of 2017/early 2018, introducing "pro-market" changes, reducing state intervention, and mitigating negative impacts of new technologies on current legislation. Discussion on the subject, among other issues, encourages the migration of consumers to the Unregulated Contracts Framework - ACL (as defined below), by reducing the minimum load amount from the current 3 megawatts (MW) to 0.5 MW to freely choose their suppliers.

Another important measure announced is the privatization of Eletrobras, the largest industry player, which is controlled by the Brazilian government and holds approximately 31% of generating capacity, 47% of transmission capacity and 7% of distribution capacity in Brazil. In principle, the privatization of Eletrobras should be completed in the first half of 2018.
Industry Overview and Trends

Historically, the Brazilian power industry has enjoyed outstanding growth. In November 2017, Brazil had 4,750 operating power plants, with an installed capacity of 163,696,032 kW, out of which 60.74% derives from large hydroelectric plants, 26.61% from thermoelectric plants, 7.55% from wind farms, 3.19% from small hydroelectric plants\(^8\), 1.28% from nuclear power plants, and 0.63% from other sources.

Even though hydroelectric generation prevails in the Brazilian energy matrix, thermoelectric generation is regarded as an important supplementary source for use in the isolated (off-grid) systems and/or in periods when hydroelectric power is scarce. A combination of water shortages, environmental restrictions on expansion of new major hydroelectric plants, new sources of gas supply (mostly from the Santos basin), and the abolition of state monopolies on upstream prospecting may boost thermal expansion. Shale gas may also become an important source, even though at this stage discussion on the environmental impacts for its exploration are taking place.

In the 2000s and 2010s, the government introduced a program to foster renewable energy, so-called “alternative energy sources”, which included thermal/biomass, wind farms, and small hydroelectric plants. Renewable energy generators are entitled to discounts on transmission tariffs and financing by the state development bank (BNDES) at favorable interest rates and conditions. Most of such generation has been sold through public auctions usually not open to other competing energy sources, which secures renewable energy long-term power purchase agreements.

In 2012, incentives for solar energy were created by increasing from 50% to 80% the discount on the regular tariffs for use of the transmission/distribution grid. The discount applies to solar plants

\(^8\) A small hydroelectric plant (“PCH”) is a hydro plant with an installed capacity higher than 5 MW and equal to or lower than 30 MW, with a total reservoir area of up to 13 km\(^2\).
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In 2012, incentives for solar energy were created by increasing from 50% to 80% the discount on the regular tariffs for use of the transmission/distribution grid. The discount applies to solar plants with installed capacity equal to or lower than 30 MW and for projects commencing commercial operations through 31 December 2017, and for the first 10 years of commercial operation thereafter. Another incentive was the so-called “micro generation” (capacity up to 75 kW) and “mini generation” (capacity higher than 75 kW and up to 5 MW) for self consumption (distributed generation). Micro/mini solar generators will be allowed to offset quantities generated by their solar panels against quantities of energy that otherwise they would consume (and pay) to the distribution company – the so-called “net metering” (such generators will not be allowed, however, to trade any surplus in the free market). Further, mini/micro generators are not required to execute agreements for the use of and connection with the distribution grid.

In 2014-2015, there was an increase in the tax benefits extended to alternative sources of energy such as PCHs, solar power plants and wind farms. Laws 13,203 of 2015 and 13,360 of 2016, created a discount of at least 50% in the transmission and distribution tariffs applicable to hydroelectric plants that produce up to 5,000 kW and to power plants that use "alternative sources" such as wind or solar energy that produce up to 300,000 kW.

Introduction of new technologies (smart grids, energy storage, hybrid plants, etc) are gradually reshaping the traditional regulatory framework and expansion plans of the regulators and companies alike. One expects that disruptive technologies may interfere with the traditional forms of doing business in this industry, with the consumers' having unprecedented prominence in discussions. One recent sign of such "new normal" way of doing business has been the massive migration of corporate consumers to the free market.

Regulatory Overview

The Brazilian Constitution grants the federal government power to legislate on energy matters, as well as ownership rights over hydropower resources. Conversely, the Constitution requires that

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9 Article 176 of the Brazilian Constitution.
federal, state and municipal governments render certain services to the public, including the supply of electricity. The power to explore energy resources and the responsibility to supply electricity may be delegated by the government to private entities. Such delegation is generally granted and regulated by concession / permission contracts and authorization deeds (see chapter on Concessions).

The key statutes of the Brazilian legal framework are:

1. the Federal Constitution of 1988 as amended by the Sixth Amendment of 1995, which eliminated certain restrictions to foreign investment in the industry;

2. the Water Code (Decree 24,643 of 1934);

3. the Antitrust Statute (Law 12,529 of 2011);

4. Law 8631 of 1993, which altered the rate-making rules;

5. the Statute of Concessions (Law 8,987 of 1995);

6. Law 9074 of 1995, which allowed the organization of independent power producers;

7. Law 9427 of 1996, which created ANEEL (see below),

8. Law 10,438 of 2004;

9. Law 10,848 of 2004, which restructured the institutional framework and changed the rules on the trade of electric energy (see paragraphs below);

10. Decree 5,163 of 2004, which provides the rules for energy trading;

11. Law 12,111 of 2009, which addresses electric energy services in off-grid (isolated) systems;
12. Law 12,767 of 2012, which provides for the termination of public concessions and the government's step-in rights in case of companies under financial distress;

13. Law 12,783 of 2013, which introduced rules for the renewal of concessions and reduction of end-user tariffs;

14. Law 12,097 of 2015, which changed certain definitions of small scale hydroelectric plants, and introduced new rules on conditions for the takeover and temporary administration of concessionaries by project finance lenders; and

15. Law 13,203 of 2015, which provides for the reallocation of the hydrological risk among the industry players.

16. Law 13,360 of 2016, which introduced certain changes in the power sector's laws mentioned above;

17. Decree 9,187 of 2017, which introduced rules for the extension of thermoelectric power generation concessions;

18. Decree 9,192 of 2017, which introduced rules for public bid of power distribution and transmission concessions related to change of control of the concessionaires directly or indirectly controlled by the Federal Government, States or Municipalities.

The key entities of the industry are the National Energy Council (Conselho Nacional de Política Energética), the Ministry of Mines and Energy, the Energy Research Company (Empresa de Pesquisa Energética), ANEEL, the Chamber for Trading of Energy (Câmara de Comercialização de Energia Elétrica or “CCEE”) which manages both the regulated and unregulated markets, the National Grid Operator or “ONS”, responsible for dispatching and general grid operations, and the Electric Industry Monitoring Committee (Comitê de Monitoramento do Setor Elétrico or "CMSE"), responsible for (among others) monitoring and ensuring the continuous supply of electricity.
Along with other duties, ANEEL must implement the federal government’s electric energy policies and directives, as well as provide and enforce industry regulations in connection with antitrust restrictions, tariffs, quality standards and transmission fees. Through cooperation agreements, it may delegate inspection and enforcement powers to local (state) agencies.

**Trading Energy**

Electricity is negotiated under the rules of either the “Regulated Contracts Framework” (ACR in the Portuguese acronym) or the “Unregulated Contracts Framework” (ACL in Portuguese).

Under the ACR, one sells electricity that public utility distribution companies use to supply their end customers. Except for specific cases as mentioned below, the distribution companies cannot acquire electric energy outside the ACR. The sale of electric energy under the ACR is made through public bidding conducted by ANEEL or by CCEE, if so delegated by the former. The winning bidder will execute a power purchase agreement with the distribution companies connected to the Brazilian grid. ACR contracts must be fully regulated.

Under the ACL, one sells electric energy to “free” customers through bilateral contracts freely negotiated. Because distribution companies are not allowed to purchase from the ACL (except as provided below), the volume of energy to be freely traded is limited.

Power purchase agreements under both the ACR and ACL must be registered with the CCEE.

**Environmental Controls**

Any business activity which may cause harm to life and the environment is subject to environmental controls (see chapter on Environmental laws). Under existing regulations, the construction of power plants with a capacity greater than 10 MW requires the submission and approval of an environmental impact report.
Along with other duties, ANEEL must implement the federal government's electric energy policies and directives, as well as provide and enforce industry regulations in connection with antitrust restrictions, tariffs, quality standards and transmission fees. Through cooperation agreements, it may delegate inspection and enforcement powers to local (state) agencies.

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Environmental Controls

Any business activity which may cause harm to life and the environment is subject to environmental controls (see chapter on Environmental laws). Under existing regulations, the construction of power plants with a capacity greater than 10 MW requires the submission and approval of an environmental impact report ("RIMA"). RIMAs must discuss alternative technologies and locations; identify and evaluate the environmental impact during construction and operation; define the affected areas; and evaluate whether governmental plans within the construction area are compatible with the project.

In addition, one should note that any activity or project intended for the use of environmental resources, with a potential or effective polluting capacity or that may harm the environment, is subject to prior environmental license\(^\text{10}\). The main common licenses in Brazil are (i) Previous License, (ii) Installation License and (iii) Operation License.

Distribution

Distribution companies (concessionárias de serviço público de distribuição) are entities awarded with a concession or permit to provide electricity to the end-user. The rights and obligations arising from the concession/permit are set forth in a concession/permission contract (see chapter on Concessions).

Generally, concession contracts last for a term of up to 35 years for generation, or for a term of up to 30 years for transmission and distribution. Extensions are permitted for an additional term. The rationale for the length of the terms and extensions is that the investor must be allowed sufficient time to amortize its investment.

Several distribution companies have already been privatized and are currently run by private foreign and domestic investors. Privatized distribution companies usually have their prior concession contracts replaced by new ones that already incorporate current legal requirements. The concession terms are renewed accordingly.

The major advantage of a distribution company is the right of exclusivity over a service area (such right does not apply to large customers), areas supplied by cooperatives, or other exceptional cases

\(^{10}\) Complementary Law No. 140 of 2011.
provided by law. In consideration for such monopoly, the distribution companies must observe certain obligations, mostly focused on public interest, such as rendering services on a regular, efficient and safe basis; expand the company’s business; and observe quality standards.

Distribution companies are also subject to price controls enforced by the concession authority. The law requires that tariffs must be reasonably moderate and must not discriminate among customers. Current tariff formulas allow pass-through of costs subject to certain caps. Tariffs are adjusted annually for inflation and revised according to performance targets with periods varying from three to seven years. Distribution companies may also seek alternative revenue sources, which complement or supplement the public service being rendered to the extent permitted by law. The additional revenue resulting therefrom will be subject to the tariff revisions mentioned above.

In accordance with the current framework, energy distribution companies must acquire all of their energy requirements through:

1. ACR-regulated contracts;
2. contracts derived from distributed energy, alternative sources;
3. contracts derived from Itaipu Binacional;
4. contracts derived from Angra I and Angra II, after 1 January 2013.
5. generation plants which had their concession extended or auctioned.
6. energy contracted for the reallocation of hydrological risk among the industry players provided for in Law 13,203 of 2015.

Distribution companies must inform the Government of their energy requirements as necessary to supply their forecasted demand, and will be subject to penalty in case of deviation.
Distribution companies are also prohibited from carrying out activities not related to their core business. In particular, distribution companies must not:

1. develop generation or transmission activities,
2. sell energy to “free” customers out of their concession area, except for the sale of the energy contracted in excess, which can be traded by the distribution companies under the ACL,
3. hold equity interest in other companies (except for equity participation related to financing transactions for the benefit of the distribution company, subject to ANEEL’s authorization), or
4. develop activities not related to the purpose of their concession.

Pursuant to Article 16 of Law 10,438/2012, a company holding a concession/authorization to provide energy related services and any company of the same group cannot explore state gas distribution service, except when its controller is a government-controlled company.

Power purchase agreements executed by the distribution companies up to 16 March 2004, as well as those to be executed not later than the actual start-up of the bidding, will be treated under the ACL rules until their termination. However, contracts that were already registered with or approved by ANEEL on or before 16 March 2004 cannot extend their term or their energy amounts, or increase their prices (except to amend the “initial contracts” or their equivalent instruments).

Distribution companies that fail to pay regulatory charges or power purchase agreements will not be entitled to the periodic tariff reset or annual tariff adjustment.
Generation

*Independent Power Producers (IPPs), Self-Generators and Generating Companies*

IPPs and self-generators are not awarded with public service concessions or permits to render public services. Rather, they are granted authorizations or specific concessions to explore water resources that merely allow them to produce, use and/or sell electric energy. The IPP may sell part or all of its output to customers on its own account and risk. The self-generator may sell or trade any exceeding energy it is unable to consume, upon specific authorization from ANEEL.

IPPs and self-generators are not granted monopoly rights and are not subject to price controls, with the exception of specific cases. The IPPs compete with public utilities and among themselves for large customers, pools of customers of distribution companies or any customers unattended by a public utility. Project sponsors and lenders should pay particular attention to the intricacies of current laws when negotiating or reviewing project documentation. In addition to the above-mentioned authorization deed, the rights and obligations of IPPs are stated in the power purchase agreements (PPAs) they execute with customers. Except for ACR contracts, PPAs do not follow a specific standard, and the regulatory framework is not as organized and thorough as it is in other countries with project financing background. Nevertheless, certain important terms may be secured through the proper use of our codified contract law and the construction of existing industry principles.

Generating companies may sell electric energy either in the ACR or the ACL. The ACR sales are made through reverse public auctions (lowest price wins). One will promote distinct auction for energy derived from:

1. existing projects (“existing energy”),
2. new projects (“new energy”), and
3. alternative sources.

Public auctions for "new energy" projects\(^{11}\) shall supply the projected additional requirements of the distribution companies. The PPAs shall have a term of 15-35 years and the delivery of energy must start within three to seven years. The hydrologic risks may be assumed either by the generator, in the case of “contracts for energy quantities”, or by the distribution companies with a pass-through of costs to end customers in case of “contracts for availability of energy”. In the event of rationing, the contracts for energy quantities shall have their amounts adjusted in the same proportion as the applicable rationing restrictions.

Public auctions for "existing energy" projects shall supply the current requirements of the distribution companies. The PPAs shall have a term of 1-15 years and the energy supply shall start in the same year or until the fifth year following the auction, except for those occurring in years 2004, 2005 and 2007, which contracts allowed generators to start delivery of energy within a maximum of five years. These contracts are defined as “contracts for energy quantities” in which the hydrologic risks are assumed totally or partially either by the generation company or by the buyer, being entitled to the transfer the tariffs to the final consumer.

State-owned generators may sell energy directly to customers, but under more restrictive conditions. They may sell energy through tender offers or by Requests for Approval (“RFPs”) conducted by the end customers.

Self-generators are granted authorization deeds to produce electricity primarily for their own consumption. They are allowed to sell the excess production to third parties, similarly to the IPPs. Self-generators enjoy a discount of at least 50% over the tariffs charged for the use of the transmission and distribution grids. Companies who

\(^{11}\) Applicable law defines "new energy" projects as the ones that, at the time of the relevant public auction, do not possess a license or are expanding their existing capacity.
explore energy sources primarily for their own consumption may organize themselves in the form of a consortium or a special purpose company. If they organize a special purpose company, the shareholders will be entitled to enjoy the discount attributable to self-generators, in the proportion of the lower of (a) the portion of energy used by the shareholder for its own consumption and (b) the equity participation in the special purpose company.

Public utility generators are companies that are awarded, through an auction promoted by ANEEL, the right to explore energy generation for the purpose of selling said energy to the distribution companies within the regulated market.

**Transmission**

Given the unique features of hydropower, most plants in Brazil are interconnected with regional transmission systems and are subject to the control of their respective dispatch by the ONS, which is responsible for the dispatch, scheduling and planning of the generation, as well as the coordination and management of the transmission grid. Such interconnection/coordination allows power plants be part of energy pools through which they can trade excess capacity, and thus, reduce waste. Most of the country’s territory is connected into a National Interconnected System (SIN), which serves 98.3% of Brazil’s generation capacity.

Some isolated, non-interconnected systems still exist, mostly in the far North. Some major hydropower plants under construction and/or operating in the North region will contribute to connect such remote areas to the SIN.

For the use of, and interconnection with, a transmission grid, interested parties must execute two agreements:

(i) one for interconnection with the grid (*Contrato de Conexão ao Sistema de Transmissão* or CCT) by paying the corresponding fees, and
(ii) another for the use of the transmission lines of the grid 
(Contrato de Uso do Sistema de Transmissão or CUST), also 
by paying the usage fees established by ANEEL. Other 
connection contracts may also be needed, depending on the 
ownership of the transmission facilities.

The exploration of the transmission line system was also opened to the 
private sector through the grant of authorization for operation and 
maintenance. The purpose of the authorization is two-fold: to expand 
the national market’s supply capacity and to allow industry agents free 
access to the Brazilian transmission grid.

Consumers

Even though Law 10,848 contains guidelines and general references to 
the principle of “reasonable tariffs” (modicidade tarifária), as well as 
to the limits of cost pass-through, customers generally bear the costs 
of electricity procurement, including regulatory charges and taxes. 
Furthermore, the costs associated with the acquisition of back-up 
capacity and the contracts for “availability of energy” (through which 
generators will be paid regardless of the actual delivery of energy to 
the system) will also be borne by the end users. They will also bear 
the costs of the CDE charge, which will be included in the distribution 
and transmission fees\textsuperscript{12}, as well as ESS charges\textsuperscript{13}.

\textsuperscript{12} CDE charge’s purpose is to subsidize competitiveness of alternative energy 
providers, namely wind power, PCHs, biomass, among others; promote 
universal access to electricity in the national territory; ensure the 
enforceability of the "reasonable tariffs" principle to the poor section of the 
population; provide funds to the Fuels Consumption Account; provide 
resources and allow the amortization of financial operations in connection 
with either the indemnity resultant of the return of the concession after its 
term or the "reasonable tariffs" principle; cover the costs of fuels in 
thermoelectric power plants in order to foster competitiveness; provide funds 
in order to compensate discounts applied to tariffs in accordance to the 
current regulation; and provide funds to compensate the effect of the non-
adherence to the extension of the generation concessions.
Article 28 of Law 10,848 contains the principle which ensures “equal treatment” between regulated and “free” (unregulated) customers as far as regulatory charges are concerned. This principle may turn out to be an important tool to protect customers.

Large consumers can elect to become “free” or "unregulated". Free customers may acquire electric energy from energy trading companies, generators, and even the local distribution company (though under regulated conditions). This choice may be exercised according to the chart below:

<table>
<thead>
<tr>
<th>Load Amount</th>
<th>Supply Voltage</th>
<th>Consumer’s Connection Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>≥ 3 MW</td>
<td>Any Voltage</td>
<td>After July 1995</td>
</tr>
<tr>
<td>≥ 3 MW*</td>
<td>≥ 69 kV</td>
<td>Before July 1995</td>
</tr>
<tr>
<td>≥ 0.5 MW**</td>
<td>Any Voltage</td>
<td>Any date</td>
</tr>
</tbody>
</table>

* From 1 January 2019, existing consumers on 7 July 1995 with loads equal to or greater than 3 MW, served in a voltage lower than 69 kV will be able to become free consumers.

**If the energy originates from small hydro plants (PCHs) or renewable sources.

In addition to the chart above, the aggregated loads of two or more consumers which is higher than or equal to 0.5 MW (in case the energy originates from PCHs or renewable sources) may qualify such group as "free consumers", provided that such consumers: (i) are enrolled with the General Taxpayers’ Registry and/or (ii) located in contiguous areas.

The free customer must report its load requirement to the Government and must contract all of such load, and may be financially exposed in case of deviations. It must execute CCT/CCD and CUSD/CUST

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13 The ESS charge is paid by the large consumers and are aimed at covering the costs of dispatch of thermoelectric generators.
connection agreements and pay for connection fees. It must also join the CCEE.

In cases where current contracts with distribution companies do not have a specific term, the free customer option must be exercised within 36 months, counting from the date of notification issued to the relevant distribution company. Return to the regulated condition must be requested at least five years in advance.

**Consortia**

Investors may form a consortia to generate electric energy under the IPP or self-generator regimes, subject to applicable regulation.

Under Brazilian law, consortia are non-incorporated entities. Each consortium member must be a party to a relevant concession contract, and all members must be jointly and severally liable for the concession / authorization obligations. They are strongly advised to execute detailed consortium agreements, operation agreements, and other documents defusing their rights and obligations.

**Change of Control - Prior Consent**

Transactions involving changes of corporate control of public utilities (distribution, transmission, an generation companies) are subject to ANEEL's prior consent.

Transactions involving changes of corporate control of certain IPPs/self-generators which are not public utilities may require prior approval of ANEEL. Otherwise, a simple notice to ANEEL, served within 30 days after registration of the transaction with the local Commercial Board is acceptable.

Prior approval is required if the generation sources are hydro, nuclear thermal or “any primary energy source that may have a material impact to the security of the national system”. The concept of “materiality” has not been defined yet.

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14 Pursuant to ANEEL Resolution No. 484, of 24 April 2012.
Prior approval is not required for solar, wind and thermal (other than nuclear) power sources, as long as that the size of the relevant plant “will not impact in the security of the national power market”. A 30-day post-transaction notice is sufficient.

Prior approval is also not required for corporate restructurings within the same economic group and which do not imply a change of indirect control, the so-called “Controle Intermediário”. A 30-day post-restructuring notice is sufficient.

### IPP/Self-generators’ Change of Control

<table>
<thead>
<tr>
<th>Source</th>
<th>Prior Approval from/ Post-Transaction Notice to ANEEL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hydro</td>
<td>Prior approval is required, except if the change of control takes place within the same economic group and does not imply an indirect change of control, in which case a 30-day post-transaction notice to ANEEL is sufficient</td>
</tr>
<tr>
<td>Any primary source with “material impact to the safety of the national system” (materiality to be defined)</td>
<td>Prior approval</td>
</tr>
<tr>
<td>Nuclear</td>
<td>Prior approval</td>
</tr>
<tr>
<td>Thermal (other than nuclear), wind and solar</td>
<td>30-day post-transaction notice</td>
</tr>
</tbody>
</table>

[Revised as of November 2017]
Ports

Introduction

In Brazil, the federal government has a constitutional monopoly over the exploration of sea, river and lake ports (Brazilian Federal Constitution article 21, XII, “f”). Ports may be operated either directly by the federal government or by third parties by means of federal granting or delegation. Such granting or delegation usually takes the form of “concessions” or “authorizations”. Some port operations have been delegated to state and municipal governments, while others are the responsibility of the so-called “dock companies” (Companhias Docas), which are controlled by the federal government (each being deemed a “port authority”). Private parties may operate port terminals and other port facilities under specific government granting, as further described in this chapter.

Law 12,815/13 ("Ports Act") sets the regulatory framework of the port industry. Decree 8,033/13 regulates the Ports Act.

Institutional Framework

The institutional framework of the industry is rather complex, composed of several governmental and non-governmental bodies, sometimes assuming concurrent roles and not always complying with a clear hierarchical order. Generally, the industry is ultimately subject to the federal government either directly or via the relevant regulatory agency.

The Ports Act concentrates most powers with the federal government. In past years the powers were exercised by the Special Ports Department (Secretaria Especial de Portos), created in 2007. However, as a result of a restructuring of the federal ministries in 2016, the Ministry of Transport, Ports and Civil Aviation ("MTPAC") was created and the Special Ports Department was replaced by the National Ports Department (Decree 9,000/17).
The new administrative body now has four subdivisions: the Department of Port Infrastructure and Environmental Management; the Department of Port Concessions; the Department of Planning, Logistics and Real State Management; the Department of Port Management and Modernization, Safety and Health; and the National Institute of Waterways Researches.

The main responsibilities of the National Ports Department are i) advising the Minister of State in the coordination and supervision of the agencies and entities related to the port and maritime sector and facilities; ii) implementing and monitoring the national waterways transport policy, the port sector and maritime, river and lake port facilities, in coordination with the Secretariat for Policy and Integration; iii) participating in formulating and implementing the Ministry's strategic planning for the port and maritime sector and facilities, and proposing priorities for investment programs; iv) coordinating and monitoring matters that require the Brazilian Government's position before international organizations; v) preparing and proposing approval of concession plans for the exploration of infrastructure, and providing services to the ports sector.

Furthermore, ports are subject to the regulations of the Waterway Transportation National Agency (Agência Nacional de Transportes Aquaviários, or “ANTAQ”), which is responsible for, among others, carrying out public bids, and selecting, authorizing, and monitoring private parties operating port facilities.

Moreover, each port has a (1) Port Authority Council (Conselho de Autoridade Portuária or “CAP”), composed of representatives of many port constituents (from labor workers to governments to operators to users, among others), and is in charge of approving the relevant port’s rules, zoning and development, to ensure market competition, among others; (2) Port Authority (Administração Portuária), responsible for the general administration of the port, enforcing port rules, constructing, maintaining and operating port facilities, collecting tariffs, among others; and (3) Labor Manager (Órgão de Gestão de Mão-de-Obra do Trabalho Portuário, or “OGMO”), which coordinates labor in the port.
Other important bodies include customs, the navy, including the coast guard, health and sanitation authorities, municipal governments, and environmental agencies.

Forms of Doing Business

In general terms, a private party may operate port facilities in two distinct ways: (1) by a concession or a lease, in the case of terminals located within organized public port areas ("public terminals"), or (2) by an authorization in the case of terminals located outside public port areas ("private terminals").

The granting of concessions/leases of public terminals depends on a prior public bidding process. The criteria to award winners will be, individual or in combination: higher cargo volume, shortest handling time and/or lowest tariff. The maximum term for a concession or lease is 25 years, which may be extended once for the same initial period (Article 19, Decree No. 8,033/2013). Grants of concessions or execution of leases are subject to detailed and rigorous public procurement legal requirements.

The operation of private terminals is granted by means of an authorization deed, which is formalized by an adhesion contract executed with ANTAQ. The adhesion contract has a 25-year term, which may be extended for additional 25-year periods as long as certain conditions are fulfilled such as: (i) maintenance of port activities and (ii) improvements in the port facilities by the authorized party.

The public procurement requirement

Public terminals are deemed to embody the national public interest and its delegation to private parties is subject to stringent requirements. Grants of public port facilities (by means of either federal concession or port authority lease) must necessarily be preceded by a public bidding selection process, to be organized and conducted by ANTAQ or delegated by ANTAQ to the port authority (Article 27, Law No. 10,233/2001). Moreover, the rights and
obligations of the private parties are set forth in the bidding public notice as well as in the concession or lease agreements, as the case may be, which in turn are subject to rigorous principles and mandatory clauses applicable to government procurement contracts, in general. For further information on public bidding and government procurement contracts, see the chapter on Public Bids.

Private Use Terminals

Any interested party may request ANTAQ to make a public call (chamada pública), which is simpler and less formal than a public tender, for the selection and granting of private terminal authorizations. The public call aims at identifying other parties that may be interested in obtaining authorizations in the same geographical area and for similar purposes. Moreover, ANTAQ may also make a public call for the granting of authorizations regardless of any interested party's request (anúncio público), which shall follow the same requirements of the chamada pública.

Private terminals are subject to less regulations than public terminals. For instance, private terminals are not required to hire a labor force from OGMO (Labor Manager), as with public terminals. On the other hand, private terminals assume all risks related to their business and are not entitled to or protected by public tariffs.

Tariffs (Public Terminals)

The exploration of public port facilities is remunerated by means of public tariffs. The port authority has the power to set and collect port tariffs. The port authority charges tariffs from the user and from the lessees/authorized parties in connection with administrative services rendered or made available to port users.

ANTAQ has powers to approve tariff revision/adjustment, after prior notice is given to the Ministry of Finance. Even though each port is allowed to charge distinct tariffs, in practice they do not tend to vary across the country.
Tariffs are usually charged for: (i) use of waterway infrastructure to be paid by the ship owner or by the user; (ii) use of berth facilities to be paid by the ship owner or by the user; and (iii) use of terrestrial infrastructure to be paid by the port operator or by the cargo owner.

**Port Labor (Public Terminals)**

Port labor is carried out by (i) workers with employment agreements with the port operator and (ii) dockworkers not bound by employment agreements (temporary workers). Each port has a Labor Manager for temporary port work, or "OGMO", which is responsible for maintaining registration of dockworkers.

Public terminal operators must procure dockworkers solely from the relevant OGMO. Dockworkers, however, have no employment relationship with the port operator or with OGMO.

According to the Brazilian Federal Constitution (Article 7 XXXIV), dockworkers and port operator employees are entitled to the same labor rights, as for example, Christmas bonus, vacation, severance fund contributions (FGTS), among others.

Wages and work conditions related to dockworkers will be established in collective bargaining agreements executed between the unions representing dockworkers and port operators.

**Change of Control**

On 5 March 2015, the former Special Ports Department regulated the procedure for prior authorization to change of control and transfer of lease or concession agreements (Ordinance No. 50/2015).

Under the current regulations, requests for prior consent must be submitted to ANTAQ for analysis. In its analysis, ANTAQ will consider whether the transaction will result in any violation to competition within the ports' sector and whether the new controller/concessionaire/lessee is in compliance with all rules set forth by the port's administration and ANTAQ.
In case of transfer of the lease or concession, ANTAQ will carry out the analysis, but the ultimate decision will come from the National Ports Department. On the other hand, in case of change of control of the relevant concessionaire/lessee, ANTAQ will be solely responsible for the analysis and decision.

[Revised as of November 2017]
Airports

Legal Framework

Pursuant to the Brazilian Constitution, the federal government has powers to explore airport infrastructure, directly or by delegation to third parties, by means of authorization, concession or permission (Article 21, XII, c).

Under the Brazilian Aeronautics Code (Law No. 7,565/1986), airports are public aerodromes equipped with facilities to support aircraft operations, as well as the boarding and deplaning of passengers and cargo. The Brazilian Aeronautics Code provides that public aerodromes will be built, maintained and operated:

(i) directly by the federal government;

(ii) by entities owned by the federal government or their subsidiaries;

(iii) by states or municipalities under a convention executed with federal government; or

(iv) by private parties under a concession or authorization instrument.

Most Brazilian airports are operated by Infraero, which is wholly-owned by the federal government (item “ii” above). There are also airports operated by states or municipalities (item “iii” above), such as the airports operated by the São Paulo State Air Department (DAESP). In the past, private entities operated a relatively small number of airports. However, after 2012, the federal government started auctioning concessions for the long-term operation of several Brazilian airports.

The operations of some Brazilian airports may not be profitable. In these cases, the government may delegate the operations using a public private partnership model, more specifically a “sponsored
concession” scheme (*concessão patrocinada*), through which the government pays the operator cash compensation in addition to the fees charged to the service users, as necessary to make up for the financial shortfall. Such model, however, has not been used in recent years for the concessions conducted at some of the most important airports in Brazil.

Some of the main governmental bodies with jurisdiction over the airports are the Civil Aviation Council (“CONAC”), the National Civil Aviation Agency (“ANAC”) and the Secretariat of Civil Aviation, which operates under the Ministry of Transportation, Ports and Civil Aviation.

According to Decree 3,564/2000 and Decree 3.955/2001, CONAC is an advisory body responsible for formulating policies on civil aviation and proposes airport concession plans to the Brazilian president. CONAC is part of the Ministry of Transport, Ports and Civil Aviation and is composed of the Minister of Defense, the Minister of External Relations, the Minister of Finance, the Minister of Development, Industry and Foreign Trade, the Chief of the Presidential Staff Office and the Commander of the Brazilian Air Force.

ANAC is a regulatory agency created in 2005 by Law 11,182/05. It is responsible for the regulation and safety of civil aviation. ANAC has assumed the staff, structure and functions of the Air Force’s Civil Aviation Department (DAC), the former civil aviation authority.

ANAC observes and implements the directions, guidelines and policies established by CONAC, including airport concession plans. ANAC represents the State when granting concessions or authorizations for the operation of airports, in whole or in part, and is responsible for the tariff system for the exploration of airport infrastructure.

**Privatization**

Investments in Brazilian airport infrastructure have increased in the past few years. Passengers and cargo demand growth in Brazilian
airports became a federal government’s concern -- considering, for instance, Brazil’s hosting of the 2014 FIFA Soccer World Cup and the 2016 Olympic Games. In 2009, the government published the National Policy for Civil Aviation (PNAC) and set forth the conditions for implementing a concessions (privatization) plan (Decree 6,780/16).

After intense discussions regarding the concessions model, in February 2012 ANAC carried out a public auction for the granting of Build Operate Transfer concessions for three major Brazilian international airports: Franco Montoro, in the city of Guarulhos, Viracopos, in the city of Campinas, and Brasilia, the federal capital. In November 2013 ANAC carried out auctions for concessions of the international airports of Rio de Janeiro and Minas Gerais. Therefore, at this time, concessions for Brazil's top five airports for passenger traffic were awarded.

Under that model, the Brazilian Airports Infrastructure Company ("INFRAERO") - the state-owned company that manages the airports that are still under public control - was an obligatory part of the consortiums with 49% of the stakeholding. That fact led to a series of challenges to the operators, including the necessity of investments in the concessions.

In September 2016 the Federal Government launched an investment program focused on infrastructure, aimed at attracting private investments to Brazil: Project Growth ("Projeto Crescer"), or Investments Partnership Program ("PPI"). PPI initially provided concessions to private companies for four airports - Fortaleza, Salvador, Florianópolis and Porto Alegre. The public tender process was successfully completed on 16 March 2017. Those airports were awarded under more investor-friendly rules, including the non-participation of INFRAERO in the consortia. The favorable conditions resulted in the airports being awarded to foreign airport operators that presented individual offers to the consortiums (while the first concessions were awarded to a consortium that included INFRAERO and Brazilian construction companies).
Recently the government announced its intention to launch new public tenders for the concessions of existing airports in 10 more cities: Belém, Cuiabá, Curitiba, Foz do Iguaçu (PR), Goiânia, Maceió, Manaus, Recife, São Luís and Vitória.

The terms of these concession contracts range from 20 to 30 years, depending on the airport.

Each winning bidder or bidding consortium must incorporate a special purpose company (“SPC”), whose purpose will be to hold an equity interest in the concessionaire of the relevant airport (“Concessionaire”).

Also, on 24 November 2016, the Brazilian Federal Government issued Provisional Measure 752/2016 ("PM"), with new rules for extending the terms of some infrastructure concessions, including airports, in consideration for additional investment. Those rules also apply to the termination of certain supposedly problematic concessions, which will be subject to new bids to replace the service provider. Those rules were issued in the context of Brazil’s recent Investment Partnership Program.

The PM has already been confirmed by Congress and is currently waiting for the presidential sanction (note that under Brazilian Law Provisional Measures have immediate legal effect).

**Tariffs and Fees**

The fees charged on cargo handling and passenger transportation are important sources of revenue in airport operations. Other important income, such as ancillary revenues, originate from the sublease of areas for shops, service facilities, parking lots, advertisements, among others.

Each airport may have distinct tariffs, in accordance to its profile. Naturally, airports that have higher volumes of cargo handling or passengers generate more ancillary revenue.
On the other hand, under the terms of the Brazilian Aeronautics Code, airport concessionaires are subject to paying the Civil Aviation Tax (TFAC), for administrative activities related to review, approval and record-filing.

[Revised as of May 2017]
Environmental Protection

Environmental protection is reflected in the Federal Constitution and in federal, state and municipal legislation, international treaties and provisions of MERCOSUR. The scope of polluters’ liability and the standards for environmental protection against pollution are, in some cases, at a level comparable with those of developed nations. Some states, including Sao Paulo, have established supplemental rules and standards that provide even greater protection.

Federal and state district attorneys, the Public Defendant’s Office, as well as Brazilian nongovernmental organizations (NGOs) registered with public record offices have standing orders to sue polluters for money-damages and specific performance (e.g., cleanup or recovery of damaged areas and indemnification for collective damage) in public civil actions (similar to US class actions) regulated by Federal Laws No. 7,347/85 and No. 8,078/90. Although individuals are not entitled to sue under Federal Law No. 7,347/85, they may sue to recover personal damages under Brazilian nuisance and tort laws.

Environmental protection agencies at the state and federal levels have concurrent jurisdiction to: (i) control the quality of water for public consumption; (ii) establish environmental standards and discharge limitations; (iii) issue environmental installation and operating licenses for new and existing sources of pollution; (i) monitor polluting activities; and (v) shut down serious violators, temporarily or permanently.

In general, administrative penalties against polluters include warnings, simple and daily fines, denial of public subvention and financing, and partial or total suspension or interruption of plant operations. These and other administrative penalties have been established by Federal Decree No. 6,514/08, which regulates Federal Law No. 9,605/98 (the “Environmental Crimes Law”). Federal Law No. 9,605/98 establishes criminal and administrative liability for damage to the environment.

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15 Brazil is a member of the Southern common market established in Asuncion, Paraguay in 1991.
The law imposes severe criminal punishment on individuals and legal entities that contribute to environmental damage, including officers, controllers, management boards, managers and employees of legal entities.

Under this law, environmental licenses are of significant relevance. The lack of environmental licenses is listed as a crime and may result in the interdiction of the activities, as well as confinement. Environmental agencies have been more restrictive in the issuance of such licenses, since they are also subject to criminal sanctions for the issuance of licenses to companies that do not comply with environmental laws. The law also provides for piercing the corporate veil whenever the existence of a legal entity is deemed as a barrier to the recovery of damages caused to the environment.

Penalties for such crimes are severe and may include restrictions on freedom (i.e., imprisonment and confinement) and rights (e.g., rendering services to a community, temporary limitation of rights, temporary loss of authorization or license, interruption of activities, etc.), and fines (ranging from BRL50 [approximately USD25] to BRL50 million [approximately USD25 million]). In certain cases, penalties restricting freedom imposed on individuals may be replaced by those restrictive to rights. For legal entities, the following sanctions might be applicable in an isolated, cumulative or alternative manner: (i) fines; (ii) restrictive penalty of law or (iii) service to the community.

**Scope**

Most of the existing federal laws address the following aspects of the environment:

**Water**

Businesses operating in Brazil that discharge liquid effluents are subject to federal and state government environmental control. National Environmental Council (“CONAMA”) Resolution No. 357/05, altered by CONAMA Resolution No. 430/11, sets the
standards for effluents, their maximum levels of pollutants and the discharger regime. Governmental water quality standards differ according to water suitability of the water body receiving the discharged effluent. Brazil’s water quality standards cover a broad range of pollutants and substances, including oil, fecal coliforms, dissolved oxygen and various toxins. The use of specific segments of streams and water bodies are ruled by competent governmental agencies.

Some Brazilian states, including São Paulo, have established supplemental standards that exceed federal minimum standards. The state environmental protection agency may impose even stricter standards to a given company depending upon the characteristics of the receiving water body and its level of saturation, or as a result of peculiar characteristics of the company’s processes and wastes. Based on constitutional provision, in case of conflict, the more restrictive standards shall apply.

National Policy on Water Resources (Federal Law No. 9,433/97)

The National Policy on Water Resources is based on the idea that water is a public good and a limited natural resource with economic value. The use of water resources is thus subject to prior authorization by environmental authorities (Art. 12). The uses subject to prior authorization will also imply payment for the use of water. The government shall use such funds to promote the rational use of water and finance programs contemplated under the Water Resources Plans.

The law also creates regional river basin committees comprising public and private parties to manage the water resources and implement policies and regulations on a regional basis.

The following acts are deemed illegal and subject to administrative sanctions: (i) the use of water resources without a proper water use permit; (ii) start-up of activities related to the use of superficial or underground water resources, which may alter its quantity or quality, without the prior authorization from the competent authority; (iii) the use of water resources in breach of the conditions of the water use
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The following acts are deemed illegal and subject to administrative sanctions: (i) the use of water resources without a proper water use permit; (iv) unauthorized drilling of a well to obtain access to groundwater; and (v) providing false information when reporting the volume of used water.

The National Policy of Water Resources is enforced by the Federal Water Agency (“ANA”), which is responsible for controlling and managing the use of federal waters (Union rivers and lakes). At state level, governments may create their own water agencies and water resources policies to grant the right to use water from rivers and water sources under their jurisdictions. Some states, such as São Paulo, Rio de Janeiro and Rio Grande do Sul, have their own rules on water resources, which generally follow the federal policy’s principles and structures.

Recently, due to the low levels of rain and water reserves that most regions have been facing, the use of water has become an important issue for public policies and has impacted all sectors of the economy, especially agriculture and industry. As a result, the use of a great amount of water has been requiring the elaboration of detailed planning and additional investments from companies.

Hazardous and solid wastes

According to Brazilian legislation, the generator is responsible for the proper final disposal of hazardous and non-hazardous waste. Federal and some state regulations require that the transportation, treatment and disposal of wastes (whether solid, hazardous, non-hazardous or medical) must be subject to the prior approval of a state environmental protection agency. In some cases, companies may temporarily store waste in their facilities under state approval and supervision.

There are also specific requirements for hazardous waste classification, inventory and disposal reporting requirements, and waste import and export, transport, storage and disposal. The general rule is that hazardous wastes are those that pose potential risks to the environment and public health. As a general rule, the environmental protection agencies adopt the waste classification of ABNT Technical
Standard NBR 10.004, which considers as hazardous the waste that is toxic, corrosive, flammable and radioactive.

Federal Law No. 12,305/10 created the National Policy on Solid Waste, which, among other provisions, requires the implementation of a reverse logistic (take back requirements) by manufacturers, importers, retailers and distributors of agrochemicals and fertilizers, batteries, tires, lubricant oil, fluorescent lamps, electronics, among others.

The federal law also obliges certain manufacturers, retail sellers and service providers to prepare a solid waste management plan to become part of the environmental licensing proceeding of the relevant activity. Please refer to Item 7 for further details on this policy.

At state and municipal level, governments may have their own policies on solid waste, which may specify particularities of their jurisdictions related to the implementation of the policies.

Air pollution

Federal laws and some state laws establish air quality and emission standards, taking into account the concentration of atmospheric pollutants that may affect public health, safety and the environment. CONAMA Resolution No. 05/89 sets the National Air Quality Monitoring Program ("PRONAR"). This program provides for primary and secondary air quality standards and classifies different regions of the country in order to prevent deterioration. Class I areas are those with pristine air quality and which should have no air quality impact, Class II areas must be limited by secondary air quality standards, while Class III regions must comply with primary air quality standards.

CONAMA Resolution No. 03/90, together with CONAMA Resolution No. 08/90, complemented PRONAR by establishing primary and secondary standards for total suspended particulates, smoke, free particulates, sulfur dioxide, carbon monoxide, ozone and nitrogen dioxide. It also establishes sampling and analysis methods for
mentioned pollutants. The states are responsible for monitoring these programs. Some states have enacted their own air quality standards, which cannot be less restrictive than the federal laws.

CONAMA Resolution No. 382/06 (complemented by CONAMA Resolution No. 436/2011) provides for criteria to monitor air emissions, as well as emission standards applicable to specific stationary sources that generate heat. This resolution applies to stationary emission sources whose corresponding installation licenses were requested as of 2 January 2007, while CONAMA Resolution No. 436/11 regulates the existing stationary emission sources up to 2 January 2007 or for which the respective installation licenses were required prior to this date, establishing their standards.

**Toxic fertilizers - Biocides**

Research, production, packaging, labeling, destination, registration, transport, storage, commercial advertising, use, control and inspection of biocides, their components and similar products are ruled by Federal Law No. 7,802/89.

In addition, Federal Law No. 9,974/00 obliges producers, resellers, and users of biocides to take back the packages of toxic fertilizers used as of 31 May 2002, imposing to producers, resellers, as well as users of toxic fertilizers the responsibility for the final destination and cleaning of used packages. Criminal liability is also imposed on those who fail to comply with the legal requirements.

CONAMA Resolution No. 465/14 establishes the rules for environmental licensing of facilities involved in the receiving and final disposing of packages of toxic fertilizers, setting forth many requirements aimed at preventing environmental damages, specific definitions and grounds of liability. Brazilian normative rulings regulate the advertising of toxic fertilizers, as well as the use and labeling of mineral fertilizers.
Soil and groundwater protection

Brazil’s progress in the control of soil and groundwater pollution is one of the country’s priorities. The discovery of severe cases of soil and groundwater contamination and the stricter enforcement of the legislation by government authorities have raised discussions on whether the country should establish soil and groundwater control and intervention. Until now, the federal government has issued no references or legislation. However, the government of the state of São Paulo issued on 9 July, 2009, State Law No. 13,577, which determines that the legal representative for a contaminated area in the State of São Paulo, when detecting evidence or perceiving a suspicion that an area is contaminated, must immediately communicate this fact to the competent environmental and health authorities and proceed with the remediation of the area. Other states are currently following the São Paulo regulation and working on their own state laws on the subject.

CONAMA Resolution No. 420 established criteria and values that determine the soil quality in view of the presence of chemical substances, and guidelines for the management of areas contaminated by such substances. The resolution establishes that the management of contaminated sites shall include procedures for reducing risks to human health and to the environment, enabling the use of the area. The management measures shall observe the following steps: (i) identification (investigation of the areas based on a preliminary assessment); (ii) diagnostic (detailed investigation and risk assessment of the area); and (iii) intervention (corrective measures to eliminate the identified risks or to reduce it to acceptable standards considering the intended use for the site). In the State of São Paulo, the Environmental Protection Agency (CETESB) has developed guidelines on standards and parameters for soil contamination. CETESB’s list of reference values for soil and groundwater was first issued in 2005, and then updated in February 2014, through its Management Decision No. 045/2014/E/C/I. This list comprises 85 compounds. Most of the state’s environmental protection agencies are adopting these values as reference, as well as the Dutch and the US EPA values on a supplementary basis. For groundwater, agencies also consider the Brazilian Health Ministry’s Normative Resolution
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The CETESB values corroborate the concepts of: (i) Quality Reference Value (“VRQ”) regarding the values for clean soil and groundwater; (ii) Prevention Value (“VP”) regarding the values above which there may be damage to the soil and groundwater; and (iii) Intervention Value (“VI”) regarding the values above which there may be direct or indirect potential risks to human health.

In case the referred intervention values for soil and/or groundwater are exceeded, the company responsible for the site shall engage in remediation activities.

CONAMA Resolution No. 396, as amended, provides for guidelines on the environmental standards for the prevention and control of groundwater pollution. The rule defines water conditions and standards under concepts of “maximum allowed values” (“VMP”) for predetermined parameters and “quality reference values” (“VRQ”).

Furthermore, CONAMA Resolution No. 398 regulates the minimum content of the Individual Emergency Plan (PEI) related to contamination by oil spills.

Reverse logistic system and take-back requirements

Federal Law No. 12,305/10 provides for the reverse logistic system designed for several industries of production of certain goods, such as agrochemicals, batteries, tires, lubricant oils, fluorescent lamps and electrical and electronic equipment. Pursuant to the reverse logistic system, manufacturers, importers, retailers and distributors of such products shall implement the system taking into consideration their obligation to receive used products by consumers and provide the environmentally sound final disposal of the wastes. Federal Decree No. 7,404/10 regulates the abovementioned federal law and details the obligations regarding the reverse logistic system, among other provisions.
Among the instruments for implementation of the reverse logistic system, the law provides for the execution of sectorial agreements between the federal environmental agency and some segments of the industry. Some segments of the industry, such as the lubricant oil package industry and fluorescent lamps, have already signed the sectorial agreement, while others are under discussion. The sectorial agreements define policies and measures to be adopted by each of the actors of the production chain and the consumers toward the responsibility for the life cycle of the product until its final and environmentally appropriate destination.

The law did not revoke former rules regarding the take-back requirements, such as Federal Decree No. 4,074/02, which was enacted on 4 January 2002. It even regulates: (i) Federal Law No. 7.802/1989, which establishes take-back requirements for packages containing toxic fertilizers; (ii) CONAMA Resolution No. 401/08 (altered by Resolution No. 424/10), which establishes criteria and standards for the adequate environmental management of batteries containing mercury, cadmium and lead commercialized in Brazil; and (iii) CONAMA Resolution No. 416/09, which requires manufacturers and importers of tires to collect and properly dispose of tires that are no longer in use and which establishes that for each new traded tire, manufacturers and importers must provide final disposal to one, among others.

BIO-SAFETY

The Cartagena Protocol on Biosafety to the Convention on Biodiversity Protection was ratified in Brazil by Federal Decree No. 5,705/06. In addition, Federal Law No. 11,105/05 (regulated by Federal Decree No. 5,591/05) (the Biosafety Law) provides for the safety and inspection mechanisms for the use of genetic engineering techniques for the manipulation, harvesting, transportation, consumption, commerce and disposal of genetically modified organisms (GMOs). The law aims at protecting public health and the environment. It prohibits human cloning but allows research with genetic manipulation of steam human cells.
The Biosafety Law is enforced by CTNBio, the authority responsible for implementing and updating the National Biosafety Policy and enacting rules regarding GMOs. The final decision on the commercial approval of GMOs are taken by the National Biosafety Council (CNBS), composed of Ministries of State.

The release of GMOs into the environment without observing the rules established by the CTNBio and the plantation, production, transportation, commercialization, importation, exportation or storage of GMOs, or their derived products, without authorization or observation of legal provisions are considered crimes under the law. It also provides for administrative sanctions and civil liability applicable in case of environmental degradation or damages to third parties caused by GMOs.

Several normative instructions have been issued by CTNBio. According to Normative Instruction No. 01/96, all national, foreign and international legal entities developing activities and projects related to GMOs must secure a Biosafety Quality Certificate issued by CTNBio. The procedure for releasing such organisms into the environment, as well as the importation, commercialization, transport, storage, manipulation, consumption and disposal of products derived from GMOs are subject to the CTNBio normative instructions.

Additionally, Federal Resolution CONAMA No. 305/02 regulates the environmental licensing procedure and the Environmental Impact Assessment for the release of GMOs into the environment, the Environmental Impact Study (EIA) and the Environmental Impact Report (RIMA) on activities regarding GMOs and their by-products. According to the Biosafety Law, however, the environmental agencies will only have the authority to set requirements to merit the approval of certain GMOs if CTNBio understands that such products have the ability to cause significant negative environmental impact. The provision has been challenged before the Brazilian Supreme Court, but it has not been addressed yet.

Federal Decree No. 4,680/03 regulates the right to information guaranteed by Federal Law No. 8,078/90 (Consumer Defense Code)
on genetically modified food or ingredients intended for human or animal consumption. According to this federal decree, any kind of food or by-product containing more than 1 percent of a GMO shall include a warning label on its packages, such as “genetically modified product,” “contains genetically modified ingredient” or “manufactured from genetically modified material.”

Federal Ordinance No. 2,658/03 also states that all products containing more than 1 percent of GMOs must present a specific label containing a highlighted GMO symbol, together with the warning described above.

Urban Law and Environment

Zoning

The federal government (Federal Law No. 6,803/80), several state governments and the most populated cities have enacted zoning laws for the protection of specific areas. These laws restrict the establishment of new industrial plants, commercial facilities and the expansion of existing ones in certain areas. Before investing in land for industrial and commercial purposes, a buyer must carefully analyze existing land restrictions.

City’s Ordinance

Federal Law No. 10,257/01 (the City’s Ordinance Law) refers to the basic policy on the use of urban land. This subject was first regulated by the Federal Constitution (Articles 182 and 183), which determines that the policy of urban development, executed by the Local Public Authority, aims to command the development of the social functions of the city and guarantee the welfare of inhabitants.

With the enactment of the City Ordinance Law, many legal possibilities for the regulated use of urban land and real estate were implemented. Further to defining a policy for the use of urban land based on its social function, the City Ordinance Law also implemented: (i) the Tax for Urban Land (IPTU) progressively in time; (ii) the expropriation with the payment of government debt
instrument; (iii) the special adverse possession in urban real estate; (iv) the surface right; (v) the preemption right; (vi) onerous grant of the right to build; (vii) transfer of the right to build; and (viii) neighborhood impact study, among others.

Environmental Audits

The practice of environmental auditing in Brazil is relatively new. Given the growth of potential liability for polluting activities and the impact of the activities of subsidiaries on their parent companies, environmental audits are becoming increasingly important in determining compliance with environmental laws.

Parallel to voluntary initiatives, legislation (including provisions in some state constitutions) has been developed by some states and the federal government to mandate environmental auditing of some industry sectors. Thus, Federal Law No. 11,284/06, which established proceedings for the management of public forests by private companies, also elected forest audits as an important instrument to guarantee the sustainable use of concession areas. According to the law, all concessions must be subject to independent forest audits, which will be carried out at least every three years and supported by the assignee.

At state level, Rio de Janeiro initiated these legislative approaches in 1991, followed by Minas Gerais, Espírito Santo, São Paulo and Paraná. The Rio de Janeiro and the São Paulo laws require periodic environmental auditing of pollution control systems and of activities that may cause potential harm to the environment. Other states have also adopted similar legislation. Major cities have also included environmental auditing mandates as part of the local environmental requirements (e.g., Santos-SP and Vitória-ES).

Federal Resolution CONAMA No. 306/02 (altered by Resolution No. 381/06) establishes minimum requirements for environmental audits.

[Revised as of March 2015]
Climate Change

As a non-Annex I country, Brazil’s participation in the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol is focused on the Clean Development Mechanism (CDM), which foresees, among other opportunities, that developing countries may obtain foreign investments to implement clean energy, emission reductions and carbon sink projects in exchange for emission credits granted to the developed countries responsible for the investments. Moreover, there is also an opportunity for developing countries to implement “unilateral CDM projects” without the participation of developed nations.

The governmental actions are coordinated by the Brazilian DNA, which is linked to the Ministry of Science and Technology and was created by a President’s Decree enacted on 7 July 1999, and amended on 10 January 2006. In November 2003, the DNA enacted Ordinance No. 1/03, which established the procedure for government approval of CDM projects, and internalized the Marraques Accords. The DNA also enacted on 10 August 2005, Ordinance No. 2/05 that provides for the establishment of CDM forest projects. The DNA has already enacted several resolutions to internalize decisions enacted by the CDM Executive Board or to regulate specific CDM matters in Brazil.

Concerning the legal nature of CERs, according to the understanding of the Securities and Exchange Commission of Brazil (Comissão de Valores Mobiliários – CVM), published on 21 July 2009, at the CVM website, the Certified Emission Reductions (CERs) under the Kyoto Protocol regime, also referred to as Carbon Credits, are not securities. Consequently, they are not subject to Federal Law No. 6,385/76. Other instruments eventually connected to CERs, such as certificates, condensed or derivative instruments, may be considered securities, depending on its nature that applied for such cases and the regime established by the regulation in force. Investment funds are authorized

16 Available at http://www.cvm.gov.br/. Administrative Proceeding CVM No. RJ 2009/6346, Decision of CVM’s Director, Mr. Otavio Yazbek.
to acquire CERs, according to CVM Normative ruling No. 409/04, article 2, VIII and paragraphs 5 and 8.¹⁷

In the energy sector, the country has launched the Brazilian Renewable Energy Incentive Program (PROINFA¹⁸), which sets forth financial incentives for the production of renewable energy by wind, biomass and small hydroelectric plants, and intends to reduce CO2 emissions to about 2.5 million tons per year.

It is important to mention that the Public Forest Concession Law (Federal Law No. 11,284/06) has allowed government authorities to grant the concession of sustainable use management of public forests to private organizations upon a bidding process. Article 16 of this law establishes that the concession may include the right to commercialize CERs from CDM reforestation and activities concerning land-use change projects in public forests.

In addition, the Brazilian Forest Code (Federal Law No. 12,651/12) also provides for payment of environmental services, which includes carbon sequestration, conservation, maintenance, increase of inventory and decrease of flow, aiming to generate carbon credits (as tradable objects).

In order to illustrate the scenario, by March 2013, Brazil was responsible for 6.4 percent of all CERs issued, which makes Brazil the fourth country in terms of the number of issued CERs. Aside from the activities related to the Kyoto Protocol, the Brazilian government has adopted several measures to avoid or mitigate the effects of climate change, such as the increased legal protection to environmentally

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¹⁷ CVM Normative Ruling No. 409/04 will be replaced by CVM Normative Ruling No. 555/14, which will come into force on 1 July 2015, and provides for the same dispositions.

¹⁸ The PROINFA was launched in Brazil by Federal Law 10,438 of April 2002, as amended by Federal Law 10,762 of November 2003. It was organized by the Ministry of Energy and Mines and foresees the purchase of 3,000 MW of renewable energy.
relevant areas and the development of an updated energy policy, among other policies.

In addition, an important step was the creation of the Brazilian Mercantile Exchange (BM&F) Carbon Facility, which resulted from an agreement executed with the Brazilian Ministry of Development, Industry and Foreign Trade. This BM&F Carbon Facility aims to generate public awareness of CDM project activities and implement the same to meet the worldwide CDM demand and supply, and thus, foster a favorable business environment, as well as cut transaction costs. BM&F also develops the auction of CERs with the Brazilian and international communities.

In 2008, the federal government launched the National Policy on Climate Change ("Política Nacional sobre Mudança do Clima" - PNMC) and its voluntary commitment to reduce GHGs emissions. The plan defines actions and measures to mitigate and adapt to climate change. Its specific objectives are to: (i) stimulate energy efficiency increase in a constant search for better practices in the economic sectors; (ii) keep the high share of renewable energy in the electricity matrix; (iii) encourage the sustainable increase in the share of biofuels in the national transport matrix and also work toward the structuring of an international market of sustainable biofuels; (iv) seek for sustained reduction of deforestation rates in all Brazilian biomes, in order to reach a zero illegal deforestation; and (v) encourage reforesting and forestation activities under the Clean Development Mechanism (CDM).

Furthermore, the federal government issued Federal Decree No. 7,390, of December 9, 2010, which regulates Articles 6, 11 and 12 of the National Policy on Climate Change – PNMC, which was published in the Federal Official Gazette on 10 December 2010. According to the decree, public policies and governmental programs must always ensure that applicable policies are compatible with the PNMC. In order to achieve the target set for 2020, as regards reducing

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19 Besides the Amazon biome, the Brazilian territory has the Caatinga, Cerrado, Mata Atlântica, Pampa and Pantanal biomes.
greenhouse gases emissions, the decree considers, among other projects, the expansion of hydroelectric and other renewable energy supply, as well as the reduction in the annual rating of deforestation in the Amazon biome by 80 percent and in the Cerrado biome by 35 percent.

In addition, in monetary terms, it is notable that in 2014, the National Climate Change Fund invested BRL380 million (approximately USD160 million) in projects linked to the reduction or avoidance of greenhouse gases and to promote the adaptation of populations vulnerable to climate change.

Due to constitutional provisions that empower federal, state and municipal jurisdiction on environmental matter, Brazilian states and municipalities are also following the steps of federal government, enacting regulations related to climate change. Several states have enacted laws defining mechanisms to mitigate greenhouse gases and to adapt to their negative effects. These states laws provide for the same principles of the National Policy on Climate Change, such as sustainable development, precaution and common responsibilities. States have also exerted certain efforts to implement forums focused on climate change discussions. Some of them, such as Paraíba, São Paulo and Rio de Janeiro, came to adopt voluntary targets to mitigate greenhouse gases.

As a pioneering initiative of retribution, the State of Acre has been paying those that preserve ecosystem services. This seems to be a trend to be followed, once it was accompanied by the States of Amazonas, Paraná, Santa Catarina and Minas Gerais, among others.

Brazil is also turning its attention to the voluntary carbon market, despite the implementation of a national REDD+ strategy yet being discussed. Accordingly, there are some initiatives under discussion at the Brazilian House of Representatives and Senate.

Due to its continental area and untouched forests, Brazil stands as the main player in the REDD+ market. Several initiatives are already in place in the private and public sector. As an example, the government
of California signed a memorandum of understanding with the State of Acre (located in the Amazon region) to develop sectorial REDD crediting. The State of Amazonas also created a REDD+ program in some of its state forest reserves. More recently, a private standards specifically related to forestry projects was developed in Brazil (Brasil Mata Viva - BMV). The Brazilian Association for Technical Standards (ABNT) also developed a standard dealing specifically with principles, requirements and guidelines to commercialize verified emission reductions in the country.

[Revised as of March 2015]
Consumer Protection

Consumer protection in Brazil has its basis in the Federal Constitution and in federal, state and municipal legislation. The main rule applicable to consumer protection matters is the Consumer Protection Code (CDC - Federal Law No. 8.078 of 1990) and its regulations.

The CDC is a protective law with principles and duties intended to look after the “vulnerable party” of the relationship (i.e., the consumer). It establishes: (i) basic rights of consumers and (ii) rules regarding quality of products and services, taking into consideration the health and safety of consumers. It also determines suppliers’ liability for defects of products and services and (ii) rules on commercial practices, encompassing advertisement and abusive practices, and contractual protection. The CDC likewise sets forth criminal infractions, administrative penalties, as well as rules for individual and collective lawsuits on consumer matters.

As a rule, the CDC is applicable whenever there is a consumer relation between the parties involved, characterized by the existence of a product or service offered to consumers by a supplier.

The CDC defines supplier as any private or public individual or legal entity, Brazilian or foreign, that manufactures, assembles, creates, builds, transforms, imports, distributes or markets products or renders services to consumers. On the other hand, the CDC, as a general rule, defines consumer as individuals or legal entities that acquire or use products or services as end-users. Current trends of Brazilian courts show that large companies may be considered as consumers, if they present, for instance, any sort of technical, legal, informational or economic vulnerability.

The scope of liability for suppliers and the standards for consumer protection in Brazil are, in some cases, more severe than the consumer rules applicable in developed nations.

The Brazilian CDC establishes a strict liability regime, which means that under the CDC, the consumer will not have to prove the agent’s
fault, but only the connection between the damage and the action of
the agent. As a general rule, if the offense was caused by more than
one responsible party, all the suppliers may be held jointly liable.

Violation to legal provisions of the consumer protection legislation
may subject the supplier to administrative and criminal penalties, in
addition to the need to indemnify damages or harm caused to
consumer (civil liability).

Federal and state district attorneys as well as Brazilian non-
governmental organizations (NGOs) registered with public record
offices have standing orders to sue suppliers for damages caused to
consumers individually and/or collectively, in view of non-compliance
with the consumer protection legislation, in public civil actions
regulated by Federal Laws No. 7,347/85 and No. 8,078/90.

Consumer protection agencies at the state and federal levels have
concurrent jurisdiction to implement the consumer protection policy,
as well as to sanction companies, in the administrative sphere, in case
of non-compliance with consumer protection rules.

Generally, administrative penalties against suppliers include fines,
product seizure, destruction of the product, cancellation of product
registration with the competent authorities, prohibition to manufacture
the product, suspension of product or service supply, temporary
suspension of the activity, revocation of concession or permission to
use, cancellation of license for the establishment or activity, total or
partial closing down of the establishment, work or activity;
administrative intervention and imposition of counter-advertising.
Please note that such penalties may be applied cumulatively.

The penalty most commonly applied are fines. Such penalty is
graduated according to the seriousness of the infraction and the
advantage obtained, and ranges from BRL466.89 to approximately
BRL7 million. Please note that this amount is updated on a quarterly
basis.
Concerning e-commerce, consumer protection authorities tend to impose alternative sanctions, such as the suspension of websites in case of websites that do not comply with consumer protection rules.

Recently, two federal decrees that innovate in consumer protection rules were published. The first, Decree No. 7,692/13, determines rules on e-commerce, whereas the second, Decree No. 7,963/13, establishes the National Plan of Consumption and Citizenship.

The e-commerce decree provides rules on collective purchasing, right of retraction, data protection, imposing specific duties and behaviors on suppliers who offer products and services online.

With regard to the National Plan of Consumption and Citizenship, the decree creates the National Chamber of Consumer Relations, which contains the following instances for its management: (i) Council of Ministers, responsible for guiding the formulation, implementation, monitoring and evaluation of the National Plan of Consumption and Citizenship, and (ii) the National Observatory of Consumer Relations, which has the task to promote studies, prepare proposals for the achievement of the plan’s objectives and monitor the execution of policies, programs and actions of the National Plan of Consumption and Citizenship.

Currently, there are some bills of law in progress in the Brazilian Senate that aim at updating the CDC with regard to e-commerce, collective lawsuits and overindebtedness.

Scope

The CDC addresses the following aspects of consumer relations:

1. Principles

The CDC has as its main principle the recognition of the vulnerability of consumers, which means that consumer protection rules were created in order to balance the relationship established between the supplier and the vulnerable party - the consumer. With this approach,
consumer protection authorities, as well as Brazilian judges, tend to adopt, in most cases, a pro-consumer attitude.

Other consumer principles brought by the CDC are: (i) education and information of consumers and suppliers; (ii) repression of abusive practices in the consumer market; and (iii) support for the creation, by suppliers, of alternative means of dispute resolution.

2. Basic Rights of Consumers

As consumers basic rights, the CDC established: (i) the protection of consumers’ health and safety in case of harmful products or services; (ii) clear and adequate information on the main characteristics of products and services; (iii) protection against abusive and misleading advertisement; (iv) modification of the contractual clauses that establish disproportional duties to consumers; (v) the effective indemnification for damages to property as well as moral, individual, collective and natural damages (full reparation right); (vi) access to judiciary and administrative courts for the full prevention and reparation of damages; and (vii) the adequate rendering of public services.

The basic rights listed above are applied by judges and administrative authorities in order to grant consumers rights and/or apply penalties against companies in case of non-compliance with the CDC.

3. Quality of Products and Services

3.1 Liability against vices

Products and services offered in the Brazilian market must guarantee to consumers the quality that consumers expect from them, particularly their being proper and adequate for consumption. This, for instance, would require that products and services have their quantity indicated in the package and that they have no imperfections.

In case of commercialization of products or services with defects, consumers have the right to claim its reparation and/or substitution to
suppliers, in addition to the rights to claim for reparation of damage caused in view of the imperfections.

The CDC grants to consumers the legal warranty (also known as “statutory warranty”), which is mandatory and cannot be waived, nor modified and limited, by the parties. Statutory warranty also provides consumers a 90-day term to claim for evident defects of the product, whose period is counted as of the delivery of the product to consumers. With regard to hidden or concealed defects, consumers have a 90-day term to claim for it, whose period will count as of the date the defect is noticed by the consumer, also considering the reasonable lifespan of the product/service. Suppliers also have the option to offer to consumers contractual warranty with specific terms, which will be used by consumers in addition to the provisions of the legal warranty.

3.2 Liability against defects

Consumers also have their health and safety protected and, in view of this, suppliers are considered liable for any damage caused to consumers brought about by defects of products or services. In this case, consumers have a five-year term to file lawsuits against suppliers in view of damages caused to them.

Suppliers are also obliged to inform consumers on potential risks that products and services might pose to health and safety. The information on the risks of harmful products and services must be provided in an ostensive manner to consumers.

If suppliers identify that products or services pose risks to consumers’ health and safety after placing these goods in the consumer market, then suppliers must immediately inform authorities and implement a recall campaign. Ordinance No. 487 of 2012 issued by the Ministry of Justice sets forth this recall procedure.

The Brazilian National Health Surveillance Agency - ANVISA is currently studying the issuance of a regulation that will provide specific rules to the recall campaigns of foods. One of the following
aspects that can be anticipated is that companies will have to observe both the recall regulations issued by consumer protection authorities and by ANVISA.

4. Commercial practices

4.1 Advertisement

In terms of advertising, the CDC provides that advertisements must be construed in such a way that consumers will be able to easily and immediately identify them as advertisements of products and services (“Identification Principle”).

In accordance with Article 30 of the CDC, every sufficiently accurate information or advertising, announced by any vehicle or communication means, concerning products and services offered or presented are a binding offer of the supplier that announces it or is making use of it, and must be included in the contract to be executed by and between the supplier and the consumer.

The CDC expressly forbids abusive and misleading advertisements. The CDC understands abusive advertisement as discriminatory advertising that incites violence, exploits fear or superstition, profits from the immaturity in judging and inexperience of children, disregards environmental values or that can lead consumers to behave harmfully or hazardously with respect to their health or safety. On the other hand, the CDC understands misleading advertisements as any information or communication bearing advertising characteristics, which is totally or partially false, or that for any other reason, even by omission, might lead consumers to err with respect to the nature, characteristics, quality, quantity, attributes, origin, price and any other data about the products and services.

The advertising industry is self-regulated by CONAR - a non-governmental organization (founded and maintained by advertising agencies, advertising companies and by the media) - whose main purpose is to prevent misleading or abusive advertisements from causing harm to consumers or companies, by recommending the
alteration or suspension of advertisement. The Brazilian Code of Self-Regulation of Advertisement is the document that establishes ethical values and standards to be observed by the advertising industry (please note that this is not a law but a conduct code of the industry, which is widely accepted).

The advertisement targeted to children and teenagers is a matter that has been under significant discussion in Brazil, and some non-profitable organization have focused their attention at developing activities on behalf of children and teenagers affected by consumption, aiming to minimize and prevent damage caused by advertisement (such as the offering of food with low nutritional value and high caloric value or “tying practices”).

4.2 Abusive practices

Abusive practices are those understood as behaviors of suppliers taken prior, during and after the offer of products or services that place consumers at a disadvantage and that, in view of this, are prohibited by the legislation in force.

The CDC presents examples of abusive practices, such as “tying” (to condition the purchase of a product/service to the purchase of another product/service that are normally offered separately) and placing in the consumer market product that does not respect technical rules, among others.

5. Contracts

Mass consumption triggered the elaboration, by suppliers, of adhesion contracts, which are agreements with pre-elaborated clauses that suppliers use whenever they sell a product or service to consumers. This type of relationship is also regulated by the CDC, which determines that consumers will only be bound to the terms of the contract if they had the opportunity to previously acknowledge the terms of the agreement.
With regard to the contractual clauses, the law specifies that they shall always be interpreted to the benefit of consumers, prohibiting abusive clauses that place consumers at a disadvantage. Abusive clauses can be declared null by judges and/or authorities even if consumers do not expressly require it. Also, the list of abusive clauses mentioned in the CDC is considered as non-exhaustive, which means that authorities and/or courts may give their own interpretation in rendering a clause as abusive or not.

Some examples of abusive clauses as given by law are: (i) those that prevent, exempt or reduce suppliers’ liability for defects of any nature in their products and services; (ii) those that transfer responsibility to third parties; (iii) those that determine the compulsory use of arbitration; and (iv) those that make it possible for the supplier to directly or indirectly change the price unilaterally, among others.

6. Criminal infractions

The CDC considers certain practices as crime against consumer relations, providing penalties such as imprisonment from three months to two years and/or payment of fines. Misleading and abusive advertisements are considered crimes against consumer relations. In the same way, not performing a recall campaign is understood by the CDC as a crime.

Federal Law No. 8,137/90, which defines crimes against the tax and economic systems, also provides for crimes against consumer relations, establishing penalties such as imprisonment from two to five years and/or fines. Some examples given by this law are: (i) selling or exposing for sale goods that are not in compliance with legal requirements or that do not fit their official classification and (ii) selling or storing product with improper conditions for consumption.

7. Individual and Collective lawsuits

With regard to collective lawsuits, Public Civil Actions were created in our legal system, by means of Federal Law No. 7,347/85, in order to protect the environment, consumers, goods and rights related to
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7. Individual and Collective lawsuits

With regard to collective lawsuits, Public Civil Actions were created in our legal system, by means of Federal Law No. 7,347/85, in order to protect the environment, consumers, goods and rights related to artistic, historic, touristic values and any other collective or diffuse interest. In addition to this, the CDC also establishes rules for collective lawsuits in general, in order to protect collective, diffuse and homogenous individual rights.

Such laws list the authorities that share common jurisdiction to file collective lawsuits on behalf of the society. These authorities are the district attorney offices, public defenders, the federal state, states and municipalities and entities of public administration created to protect diffuse rights, in general. Associations that protect diffuse rights also share such jurisdiction.

Most of the public civil actions filed in Brazil were and are initiated by federal or state district attorneys’ offices. In these cases, district attorneys initiate civil inquiries prior to filing public civil actions, in order to evaluate whether the supplier has caused damage to consumers or not. In the civil inquiry procedure, companies usually have the opportunity to present the appropriate information regarding the investigation.

It is also possible to reach an agreement during the civil inquiry procedure. Such agreement, known as “Consent Decrees” normally establishes corrective practices to be adopted by the suppliers, which, in case of non-compliance will be subject to fines. Consent Decrees also usually have a clause that provides for the payment of an indemnification for the damage caused to the consumers, collectively.

As to individual civil liability lawsuits against suppliers, the CDC provides procedural tools to be used for the protection of consumers. In this scenario, the lawsuit may be filed in the consumers’ residence jurisdiction, once it facilitates the access to the judiciary.

Also, according to the CDC, consumers have as one of their basic right the facilitation for the defense of their rights, including the inversion of the burden of proof in their favor.

[Revised as of March 2015]
Social Responsibility

Social Responsibility is a management system that aims to attain sustainable development through the implementation of good relationships with the company’s stakeholders and achieve a balance among social, environmental and economic impacts/aspects. It is a set of policies and practices that meet high ethical criteria, contributing to reach sustainable economic success in the long term.

Therefore, a company that incorporates the concept of social responsibility into its activities maintains an ethical position toward its stakeholders\(^{20}\) and is co-responsible for sustainable development.

Several initiatives in Brazil regarding social responsibility are derived not only from the third sector but also from industrial sectors, including commercial and industrial associations and interested groups, such as associations involved in the study and development of social responsibility values and policies, as well as organizations that disseminate the corporative governance initiative, among others.

The diversity of sectors involved in the development and dissemination of the social responsibility concept confirms the increasing importance of those initiatives in economic activities.

Social Responsibility and the Law

Compliance with the law is also a part of corporate responsibility. When organizations incorporate the concept of social responsibility into their activities, they intend to include in their business practices and goals the principles that lead to an ethical and sustainable conduct, particularly transparency, respect, honesty and legality. In this sense, compliance with the relevant law is a basic social responsibility requirement.

\(^{20}\) Interested parties include entrepreneurs, employees, suppliers, consumers, the community and the government.
Thus, it is important that companies aiming at excellence in social responsibility adopt a strategy to improve compliance with the law and with their internal values and policies. It is recommended that companies develop Legal Management Systems, including mechanisms to identify the applicable legislation to their activities so as to incorporate the relevant legal requirements into their daily activities and to make possible the legal self-evaluation of the system (“controlling” component).

Social Responsibility Legal Self-Evaluation Program

As provided above, the implementation of a Social Responsibility Legal Management System provides for the existence of some type of internal control of the system. An alternative is to implement a Social Responsibility Legal Self-Evaluation Program.

The Social Responsibility Legal Self-Evaluation Program intends to verify, on a systematic and objective basis, compliance with the law in relation to the social responsibility issues chosen by the company for its performance evaluation. If non-compliance is verified upon self-evaluation, the company will have to comply with the relevant laws. Finally, technical and legal self-evaluations on a regular basis are required and are intended to periodically monitor the company’s legal performance.

Thus, according to the most important social responsibility guidelines, such as those of the Ethos Institute, Global Reporting Guidelines, Brazilian Social and Economic Analysis Institute’s - IBASE Reporting and SA 8000, the company must identify the applicable legal aspects related to its activity, in compliance with the specific laws of its sector and location. Such legal aspects will be incorporated into self-evaluation tools in order to support a systematic and objective evaluation. Referred guidelines encompasses the following company’s aspects: (i) values of transparency and governance; (ii)

21 Ethos Institute launched a new version of its social responsibility indicators in 2012, and had intended to reformulate it and launch the third generation of indicators by 2013.
internal public; (iii) environment; (iv) suppliers; (v) consumers and clients; (vi) community; and (vii) government and society.

The International Organization for Standardization (“ISO”) issued in 2010, a Standard on Social Responsibility called ISO-26000. This standard has as its goal the orientation of all kinds of organizations on the implementation of social responsibility programs.

There are other initiatives that are directly related to the promotion of Social Responsibility goals, such as: (i) Millennium Development Goals (MDGs) created by the United Nations - UN and (ii) the United Nations Global Compact, which is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with 10 universally accepted principles in the areas of human rights, labor, environment and anti-corruption.

[Revised as of March 2015]
Telecommunications

Introduction and Current Topics

Privatization of the Brazilian telecommunications sector began in 1995, following liberalization movements in several countries. This took place also because of the understanding that the federal government would not be able to make investments to keep up with the emerging technology. Privatization was made possible due to an amendment in the Brazilian Constitution (Amendment No. 8 dated 15 August 1995), which allowed private entities to invest in and provide telecommunications services under licenses granted by the federal government. Amendment No. 8 also called for a new law to set the telecommunications’ industry’s general rules, including the creation of a sector-specific regulatory agency (the National Telecommunications Agency – ANATEL, created by Law No. 9,472, of 16 July 1997 – the “General Telecommunications Law”).

After this liberalization, the number of accesses, fixed and mobile, experienced a large increase in Brazil, reaching 44.7 million active accesses for fixed telephony and over 271.1 million mobile phones in 2013. In addition, competition has been successfully introduced in several segments of the market, particularly in mobile and corporate services.

One sector receiving particular attention in Brazil are M2M (machine-to-machine) services. The Ministry of Communications expects that in 2020, there will be 2 billion connected machines in Brazil (an average of seven machines per person). Recently, the federal government implemented measures to accelerate the sector growth, such as reducing applicable fees. As a result, Brazilian operators have

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indicated that investments of nearly BRL19 billion could be made by 2016, for the relevant infrastructure.23

Basic Legal Structure

The following is an outline of the major steps in the telecommunications reform in Brazil:

- January 1995 Cable TV Law
- August 1995 Constitutional Amendment
- July 1997 General Telecommunications Law
- November 1997 Establishment of the Regulatory Entity - ANATEL
- April 1998 General Plan of Grants (“PGO”) - Decree No. 2,534
- July 1998 Privatization of Telebrás
- June 2003 Discussion of the renewal of fixed telephony concession contracts
- December 2005 Fixed telephone operators sign new long-term concession contracts
- June 2006 Digital TV decree enacted
- March 2007 Regulation on Number Portability enacted

Ownership by Foreign Investors

The General Telecommunications Law establishes that as a condition precedent for the exploitation of telecommunications services, the company should be located and managed in Brazil and organized under Brazilian laws. Indirect foreign investment is allowed via a holding company established in the country.

Notwithstanding the above, restrictions may vary for specific telecommunication services.

State Control and Regulation

ANATEL, the regulatory authority for telecommunications, is an independent federal entity with administrative and financial autonomy granted by law. It is composed of a council of five directors appointed by the Brazilian President and endorsed by the Senate. The directors are assisted by eight executive offices, namely: (i) superintendencies of planning and regulation; (ii) grants and resources; (iii) inspection; (iv) obligation control; (v) competition; (vi) consumer relationship; (vii) internal information management; and (viii) administration and finance.
Among its other duties, ANATEL is responsible for granting licenses, signing contracts, inspecting the adequacy of the services, managing the spectrum, mediating conflicts among the players in the sector and, imposing sanctions against operators violating regulations, as provided in the General Telecommunications Law and Decree No. 2,338/97.

The Brazilian Congress has some power over the agency, derived mainly from its capacity to change legislation and mobilize public opinion. The Congress’ interest in the regulatory agency’s work is increasing, and thus, the creation of further monitoring instruments is expected.

The judiciary is still unfamiliar with most issues related to telecommunications regulations due to the specificity of the matter. However, this is changing gradually, since the number of players seeking judicial measures to protect their interests is growing.

In a nutshell, even in view of the legal and cultural difficulties of implementing an efficient regulatory scheme in Brazil, particularly in the telecommunications sector, progress has been fast, especially in the past 10 – 15 years (i.e., after the issuance of the General Telecommunications Law).

**Licenses**

Operators need licenses to engage in any form of telecommunications services, which are defined as the set of activities enabling the offering of transmission, emission or reception of symbols, characters, signals, writings, images, sounds or information of any nature by wire, radioelectricity, optical means or any other electromagnetic process. Such licenses are non-exclusive and are granted by the federal government, through ANATEL, and may be classified as a concession, an authorization or a permission.

**Concessions**

Concessions are generally used for services considered to be of public interest (services ensured by the state and in which the obligations of
universal service and continuity are present). For concessionaires, prices are controlled and the license is granted for a specific period. The incumbent fixed telephony operators, which are the privatized companies of the former “Telebrás system,” are the most relevant example of concessionaries in the telecom sector.

Authorization

Authorizations are granted for services where the public interest is not of critical importance and, accordingly, no universal service and continuity obligations are present. In the case of authorizations, prices are usually not controlled. Most telecommunications services today are rendered under this type of license, including the SMP, satellite services, corporate networks, as well as the competitive segment of fixed telephony.

Authorization terms are generally undetermined, but may be established in the Term of Authorization granted by ANATEL, particularly when the use of the spectrum is required. Whereas a public bidding is, in theory, required for granting a concession, for authorizations, a public bidding is necessary only when the demand for licenses exceeds availability, or when the use of spectrum is required.

Permissions

Permissions are used only in exceptional circumstances and on a provisional basis. ANATEL should grant permissions to fill in a temporary absence of provision of service.

Licenses Transfer

Transfer of the license or of ownership control of the operator usually requires approval of the regulatory authorities. In the case of concessions, this approval must be obtained prior to closing the transaction. In the case of authorizations, depending on the service at stake, the approval may be prior or after the transaction. Approval by the antitrust authorities may also be required if the transaction meets
notification thresholds set forth in the antitrust law (Law No. 12,529/11).

Access and Connection Rules

Access Rules

Obligations regarding access and non-discrimination is applicable to every kind of service and protects both users and operators from abusive practices.

Users cannot be discriminated by operators in relation to tariffs, quality and access to the service or additional utilities. Operators cannot discriminate other players in relation to interconnection tariffs and network use.

Since the general law establishes that telecommunication services must be available to the entire population at reasonable prices, ANATEL monitors the tariffs applied by the service operators to each service in order to prevent abuse and maintain the balance between the earnings obtained and the provision of services.

The country is divided into regions and different tariffs are established for each region in view of the socioeconomic conditions/disparities in the country. The agency is responsible for supervising the tariffs charged by the operators of services offered under the private regime. Tariffs for fixed-line service provided under the public regime are previously established in the concession contract and so is the calculation method for adjustments/updates of the tariff amount.

Connection Network

The network is a necessary part of the infrastructure for the provision of telecommunication services. Ownership thereof and the tariffs paid to the owner are one of the most relevant issues in the Brazilian regulatory environment.

Brazilian laws establish an interconnection obligation, by which network owners must allow other operators to use their network upon
payment of the relevant tariff (such tariff is negotiated between the parties involved, based on ANATEL’s policies).

**Interconnection Service**

The interconnection between networks used for the provision of services of collective interest is mandatory whenever requested by a service provider under the private regime.

The interconnection between networks used for the provision of other services must also be assured at proper technical conditions and reasonable and fair prices.

The conditions for interconnection can be freely negotiated by the interested parties, but the agreement terms will be subject to ANATEL’s approval.

If the parties are not able to agree on the provision of interconnection, ANATEL will arbitrate the conditions to be applied.

**Regulation on Free Competition**

The general rules of economic protection apply to the provision of telecommunication services. The General Telecommunications Law establishes that telecommunication services shall be organized under the principles of free and fair competition among all operators, making the government responsible for correcting the effects of unfair competition and repressing violations of the economic order.

**Satellite Communication**

The license to operate satellites is granted by means of an authorization. Use of foreign satellites in Brazil is only permitted if such use is negotiated by a representative of the foreign operator established under Brazilian laws, with headquarters and administration in the country. The authorization is usually granted for a term of 15 years, renewable for an equal period.
Technical and Equipment Regulation

There are many specific regulations concerning the technical conditions and equipment necessary to provide telecommunications services. For each service, ANATEL has a different resolution.

Electronic Numbering and Address

Licensees must follow the Numbering Plan set by ANATEL. The Numbering Plan determines the ranges of telephone numbers for different telecommunication services and also assigns ranges of numbers to different licensees.

Numbering Plans must include the necessary resources for the provision of telecommunication services, access to public utility services, including emergency calls, and access to value-added services.

Number Portability

Users of telecommunication services are free to keep their access codes for any service when moving to a different service provider. Because of that, operators must make available the technological resources to allow users to keep their access codes, if they so wish, when changing to a different operator.

Specific Regulation of Services

Telephone Services

*Local and Long Distance Telephone Service*

The Switched Fixed Telephony Service (“STFC”) can be rendered either as a public service (as in the case of the former state-owned companies), through a concession, or as a private service (as in the case of the competitive operators), through an authorization. The PGO sets forth the general rules governing the introduction of competition among STFC operators.
The original 1998 PGO established the division of the Brazilian territory into four concession areas (“Regions”), three of which were for local and regional long-distance services, as follows: Region 1, North and Northeast; Region 2, South and West; Region 3, the State of São Paulo. Region 4 was reserved for domestic long distance and international services. One concession per Region was granted to the incumbent fixed telephony operators. In the second stage, authorizations were granted to one competitive operator for each region (the so-called “mirror companies”).

The result was a “duopoly,” with two competitors operating per region. This result remained until January 2002, when most of the market for local fixed telephony was open to competition.

As a result of the liberalization, the Brazilian market for fixed telephony now accounts for over 44.7 million active accesses. This number is constantly increasing, although recent independent researches show that nearly 20 percent of fixed telephony users in Brazil intend to cancel the service. Besides the incumbent operators and the mirror companies, there are dozens of other companies authorized to render STFC. The incumbent operators bear universal service obligations, as established in their concession contracts, while competitive operators are bound mainly to coverage obligations and quality of service requirements. Nowadays, entry in the market to render STFC is open, provided that minimum legal, financial and technical requirements are met.

In November 2008, a new PGO was enacted. The main change was that the same group of companies would be allowed to control concession-holders in up to two Regions of the PGO. This opened the way for a government-backed merger of two fixed-line incumbents (i.e., Oi and Brasil Telecom) that are active in different Regions, which would not have been allowed under the previous PGO.

*Mobile and Cellular Phone Service*

To implement competition in the mobile telephony market, the country has been divided into 10 areas. Initially, there were two
companies operating in each area in two different frequency bands - Mobile Cellular Service ("SMC") Band A licenses were granted to former state-owned companies, and band B licenses were granted to new competitors. In 2002, ANATEL created the Personal Mobile Service (SMP, similar to the American PCS), a more flexible service intended to progressively replace the SMC. The first operator started activities in July 2002, using GSM technology. In October 2002, the rules to be observed by SMC operators willing to migrate to the SMP regime were enacted. Currently, all of the SMC operators have already migrated to the SMP regime, and SMC has been extinguished.

The Brazilian cellular market has always been very competitive. According to the Brazilian Telecommunications Association (Telebrasil), in the first 3 quarters of 2013, Brazil reached 268 million mobile phone lines - this amounts to 135.3 mobile phone lines for each group of 100 inhabitants.

**Mobile Virtual Network**

Entry into the market is relatively open, the acquisition of frequency being the main barrier. However, the regulation for Mobile Virtual Network Operators (MVNO) published in November 2010, by ANATEL allows new competitors to enter the market using third parties’ networks and, especially, frequencies.

Interested companies are now able to resell mobile telephone service without having their own licensed frequency allocation of radio spectrum, nor the infrastructure required to provide the service. The requirements for Mobile Virtual Network Operators are basically the same applied to Mobile Network Operators with regard to legal, technical and economic capacity, as well as to fiscal compliance. The Mobile Virtual Network Operators, however, are not subject to license obligations, which means that ANATEL will not require a specific license for the operation of a virtual network, but only the homologation of the agreement between the original service provider and the new operator. The agreement must be submitted for ANATEL’s approval within 30 days following its execution and will only be valid after ANATEL’s homologation.
New Generation Telephony and VoIP

Voice over the Internet ("VoIP")

There is no specific regulation in Brazil for VoIP. The matter, however, has raised many discussions.

Voice over IP is a technology that uses the Internet (or private Internet Protocol networks) to allow voice communication – and so it is not exactly a telecommunications service. Considering that ANATEL does not regulate technologies, but only the telecommunications service itself, ANATEL would generally not regulate VoIP. Nevertheless, given the debates as to the nature of VoIP, ANATEL classifies VoIP into two different groups, which are as follows:

1. Voice traffic between two PCs or similar equipment using a specific software and the equipment’s own audio resources, the access to which is restricted to users who also have that specific software - In this scenario, VoIP is not considered a telecommunications service, but a value-added service using the Internet as means to enable communication. In this scenario, VoIP will be supported by a data traffic network operated by a licensed carrier. Therefore, no prior license from ANATEL would be required.

2. Unrestricted voice traffic, access to which is offered to users of other telecommunications services and with specific numbering - This type of service is considered a telecommunications service and, as such, requires prior license from ANATEL and is subject to ANATEL’s surveillance.

Broadcasting Services

Broadcasting services are defined at law as those which are freely and directly delivered to the public as a whole. It includes radio and television broadcasting. Currently, radio and TV networks are mostly under private ownership, but some public entities also control a few networks. Broadcasting is not under the jurisdiction of ANATEL. It is
directly supervised by the Ministry of Communications. ANATEL is responsible only for surveillance of the spectrum in this regard.

In December 2002, Federal Law No. 10,610 was enacted to regulate the opening of the Brazilian media market (i.e., newspapers, radio and TV) to foreign capital. Since then, foreigners and Brazilian citizens naturalized for less than 10 years may hold up to 30 percent of the total and voting capital of Brazilian media companies. Such equity participation must be indirect, through a legal entity organized in Brazil. The percentage also applies to foreign entities that hold equity in any company with indirect interest in any Brazilian media company. Furthermore, editorial and programming managers and directors of such companies must be Brazilian or naturalized citizens for more than 10 years. Government authorities may require companies to provide information and documents that evidence compliance with these rules. Information as to changes in the equity control of the referred companies must be relayed to competent authorities.

**Conditioned Access Services**

Before the new pay TV law (Law No. 12,485/11) was enacted, pay TV was generally identified as “mass communications services,” and there were different regulations according to the technology used to provide such services (e.g., DTH, MMDS, cable). Upon the enactment of the new pay TV law, one single regulation for pay TV was created, and all mass communications services must gradually migrate to the “conditioned access service” and comply with the applicable regulation, as pay TV has now been identified at law.

The new pay TV law has imposed certain local content quotas (both on programmers and on operators) and has opened the pay TV market subject to certain cross-ownership restrictions between the producers of content (i.e., broadcasting companies, producers and programmers) and telecommunications companies.
Access to the Internet

**Limitations on the use of the Internet**

The provision of Internet access is not considered a telecommunications service but rather a value-added service. This means that it is an activity that adds value to a telecommunications service. Therefore, Internet Service Operators ("ISPs") are not subject to licensing before ANATEL.

However, ANATEL is reportedly planning to deploy measures aimed at improving security and the quality of Internet services. Operators and ISPs would be monitored. For example, the agency is reportedly planning to monitor the networks of service operators so as to be able to identify potential problems and responsibilities.

Broadband Internet falls within the Multimedia Communications Service category (described below). Therefore, even though the ISP does not need any kind of license, the company that operates data transmission lines does need an authorization from ANATEL.

**Multimedia Communication Service**

SCM is a fixed telecommunications service characterized by the transmission, emission and reception of multimedia information (i.e., sound, data, image, etc.) through any technical means. The applicable regulations establish that SCM shall be differentiated from STFC and pay TV. In fact, SCM is an “all purpose” service with a wide range of applications, with the exception of applications similar to fixed telephony or pay TV. In order to provide SCM, a license granted by ANATEL is required. There are several operators of such service, mainly acting as carriers for other operators, or as operators of private network services for corporations.

**Market Description**

**The Industry Generally**

The telecommunications industry has developed since the beginning of the 1990s, when the privatization of the public telephone services
took place. Currently, the market is very dynamic and there are several companies (the incumbents as well as new competitors) providing different type of telecommunications services. The development of new technologies allows companies to offer new services.

Industry Associations

There are several industry associations, including the Brazilian Telecommunications Association (Associação brasileira de telecomunicações – Telebrasil), the Brazilian Association of Telecommunications and Information Technology Solutions Companies (Associação Brasileira de Empresas de Soluções de Telecomunicações e Informática – Abeprest) and the Brazilian Association of Telecommunications Resources (Associação Brasileira de Recursos em Telecomunicações – ABR Telecom).

Fees and Taxation

All telecommunications services are subject to fees collected by ANATEL. These fees are required for licensing and inspection, and are based on a number of factors, such as the specific type of service, the number of stations and the range used in the spectrum, among others.

The main tax for telecommunications services is the sales tax (“ICMS”), collected at the state level and due at a rate varying from 25 percent up to 30 percent of the total price charged for the service, depending on the state. The taxable event is broadly defined to include the generation, transmission, retransmission, repetition, amplification or reception of communications of any nature.

Furthermore, there are also specific taxes applicable to telecommunications services operators. FUST is a fund for universal service and is charged based on 1 percent of the provider’s monthly gross income. FUNTTEL is a fund for technology development in telecommunications and is levied based on 0.5 percent of the provider’s gross income. FISTEL is a surveillance fee levied
According to the size and complexity of the network, FISTEL is composed of two taxes: (i) Installation Surveillance Fee (TFI) – due as of the issuing of the licensing certificate for operation of the stations – and (ii) Operation Surveillance Fee (TFF) – an annual fee that corresponds to 50 percent of the TFI.

The pay TV law created a new tax applicable specifically to pay TV operators: the CONDECINE. The CONDECINE rate is calculated according to the coverage area of the operator, the technology used and the type of service provided.

[Revised as of March 2015]

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24 For the sake of completeness, the CONDECINE existed prior to the pay TV law and was levied on the exploitation of audiovisual works. Upon the enactment of the pay TV law, a CONDECINE was created for pay TV operators.
Public Tender, Concession of Public Services in Brazil and Public-Private Partnerships (PPPs)

This chapter provides an overview of the regulations that apply to public tender procedures in Brazil; the main rules on concession of public utility services for a number of industries, such as oil and gas, power, roads, mining, water sewage, waste treatment, and telecommunications, among other industries; and those related to Public and Private Partnerships.

Public Tender and Administrative Contracts

In Brazil, the Government must acquire goods or services (including public works and concessions) by public tender. According to Article 37, XXI of the 1988 Federal Constitution, “except for cases specified in law, public works, services, purchases and sales shall be contracted by a public tender process, that ensures equal conditions to all bidders, with clauses that establish payment obligations, maintain effective proposal conditions, according to law, which will only allow required technical and economic qualifications essential to secure performance of the obligations.”

In compliance with the constitution, Law 8.666/1993 (“Public Procurement Law”) sets out the general rules on public tenders and administrative contracts for works, services (including advertising), purchases, sales and leases within the jurisdiction of the Federal Government, States, the Federal District and Municipalities, including their direct administrative bodies, autonomous governmental entities, public foundations and other entities (“Public Administration”). As for state-owned and state-controlled companies, Law 13,303/2016 ("State Controlled Companies Statute") sets out the specific rules applicable to public tender and administrative contracts.

In general the abovementioned legislation does not apply to private entities. However, please note that public procurement principles should be observed by third sector entities, such as non-governmental and nonprofit organizations, when managing public resources. Also,
private companies when entering into agreements with the public administration (also managing public funds) must observe those principles.

Public Tender

The Public Procurement Law and State Controlled Companies Statute do not define “public tender.” Nevertheless, case law is unanimous in understanding that public tender is a procedure by which the Public Administration is bound to evaluate, pursuant to the objectives and previously established guidelines and criteria, the largest number of alternatives possible for any given contract to be entered into with a private company or individual.

General Rules of Public Tender under the Public Procurement Law

In most cases, entering into a lawful contract with the government (including concession and permission contracts) is subject to prior public tender procedures. Pursuant to the Public Procurement Law, the general rules are:

1. The public tender procedure is classified into different categories, i.e., competitive tender (concorrência), “price request” (tomada de preço), invitation to tender (convite), contest (concurso), and auction (leilão), and is adopted depending on the estimated value of the contract. For concession contracts, competitive tender is the suitable category as set forth by Law 8.987/95.

In 2000, the Federal Government created a new category of public tender for the acquisition of common goods and services. This is the “reverse auction” (“Pregão”), which is currently regulated by Law No. 10.520 of 17 July 2002. This category provides a more simplified procedure than the standard public tender procedure, with the presentation of the proposal before the eligibility stage, and without the need to present a guarantee of the proposal (bid bond), etc. Decree No. 3555/00 which regulates such Law, lists the products and services that may be acquired using the reverse
auction. It includes, among others, services of equipment maintenance, general consumables (except computer goods), and office supplies, among others. Decree 3555/2005 determines that all procedures for the acquisition of such "common goods and services" must follow this category. Later, the Federal Government enacted Decree 5,450/2005, which rules the Pregão in its electronic form (via internet), establishes that this form shall be preferable in relation to the regular Pregão. Note, however, that the electronic form is not applicable for engineering works or real estate rental or sale.

2. The public tender procedure may be waived in a number of specific situations (which are described in Article 24). The procedure may also be deemed inapplicable if competition is not feasible, allowing the direct hiring of a provider of goods or services, for example:

a. in the event only one provider is able to supply the goods or render the services; or

b. in case of hiring technical services from professionals or companies of known expertise (Article 25).

3. Any interested party meeting the minimum legal, technical and economic/financial qualification requirements (Articles 27 to 33), as well as tax or fiscal good standing, may take part in a competitive tender (see Eligibility to Tender).

4. The Request for Proposal ("RFP") is the instrument by which the conditions of the transaction to be entered into with the Public Administration are made public. Pursuant to Article 40 of the Public Procurement Law (as confirmed in the wording of Article 18 of Law 8,987/1995 ("Concession Law")), the RFP must, among other details, indicate:

a. the object of the tender;
b. deadlines and conditions for executing and performing the contract, as well as delivering the contracted object;

c. possible penalties in case of non-compliance;

d. the executive project, if any;

e. conditions for taking part in the tender and form for presenting proposals;

f. criteria for assessing proposals;

g. assessment procedures;

h. contractual principles, rules on contract execution, amendment, performance, non-performance and termination;

i. administrative sanctions;

j. definition of crimes and relevant penalties; and

procedures for administrative appeals.

General Rules of Public Tender in the State Controlled Companies Statute

Law 13,303/16 determines that state-owned and state-controlled companies must perform public tenders in order to purchase goods and contract services (including advertising and engineering), and proceed with sales and leases, among others. Pursuant to the State Controlled Companies Statute, the general rules on the matter are:

1. In relation to public procurement procedures, this law reproduces some of the Alternative Contract Regime rules (please see below), providing for use of the integrated contracting category for engineering services and works;
2. When contracting civil engineering and related services, the preferred public procurement category is the semi-integrated, under which the private party will be responsible for the executive design and performance of the engineering works and services;

3. It is possible to waive public tender procedures for civil engineering and related services for values up to BRL 100,000 and other services and acquisitions up to BRL 50,000 (under the Public Procurement Law, the limits were respectively BRL 15,000 and 8,000). Also, such limits may be changed due to deliberation of the administrative council of the state-owned or state-controlled company, in order to reflect the variation of costs of such services and goods in the market.

4. The State Controlled Companies Statute also added new conditions for direct engagements - compared with the Public Procurement Law - such as (i) waivers in cases when the choice of a partner is linked to a specific business opportunity, after proper justification of unfeasibility of a public procurement proceeding, as well as (ii) waivers for the purchase and sale of shares, credit and debt securities, and goods those companies produce or sell (meaning they do not need to conduct a public tender procedure in order to sell products or render services to the market, only to acquire).

5. The Public Administration, when contracting with a private party, generally has certain powers, such as modifying the contract unilaterally, which does not apply to these contracts.

6. There is an express provision for the Expression of Interest Procedure ("PMI"), so state-owned and state-controlled companies can collect, from individuals or companies, studies, solutions, researches and surveys for structuring future projects. Those involved in structuring the basic design that will be
subject to a public tender procedure may not be allowed to participate in the procedure aiming to execute such project.

7. Note that these companies have up to 24 months, starting 30 June 2016, to adapt to the rules of the State Controlled Companies Statute.

Public Tender under the Alternative Contract Regime

Law No. 12.462 enacted on 5 August 2011 instituted an alternative regime for public acquisitions, the “RDC”. This regime initially applied exclusively to acquisitions related to the 2013 FIFA Confederations Cup, the 2014 FIFA World Cup and the 2016 Olympic Games. When acquiring goods and services related to these events, public entities were allowed to rely on procedures that were not allowed under the general public tender regime.

Later, the use of RDCs was expanded to tender procedures in areas considered strategic for national growth. In this sense, the RDC currently applies to contracts related to (i) actions related to the Plan for Growth Acceleration ("PAC") (Federal Law No. 12,688/2012), (ii) works and engineering services within the Unified Health System ("SUS") (Federal Law No. 12,745/2012); (iii) works and engineering services to build, enlarge and reform criminal establishments and social education unities (Federal Law No. 13,190/2015); (iv) public safety actions (Federal Law No. 13.190/2015); (v) works and engineering services related to urban mobility and expansion of logistics infrastructures (Federal Law No. 13.190/2015); (vi) specific lease agreements by the Public Administration (Federal Law 13.190/2015); and (vii) actions related to science, technology and innovation (Federal Law No. 13.243/2016).

The RDC allows, for example, payments to private entities on a variable basis according to the company’s performance. Another possibility is to negotiate better prices with the awarded company.

The main innovation brought by the RDC is “integrated contracting”. Such procedure allows the procurement of a single company to...
prepare the Basic Design and to perform the whole contract, which is not permitted in the general regime provided in Law No. 8.666/93. Under the general regime, the company that prepares the Basic Design cannot participate in the related tender procedure. Note, however, that integrated contracting can only be used when the contract involves technological or technical innovation, when the contract can be performed using different technologies, or when the performance of the contract implies the use of technology that is restricted on the market.

Qualification of Companies - Fundamental Principles

In principle, any entity able to meet the preliminary qualification requirements may submit a proposal. Article 3 of the Public Procurement Law provides that “the tender is designed to guarantee that the constitutional principle of equality is observed, as well as to select the proposal that is most advantageous for the Administration. The tender shall be processed and analyzed strictly in accordance with the basic principles of legality, impartiality, morality, equality, publicity, administrative probity, compliance with the public invitation notice, objective judgment, and other related principles.”

Public Procurement Legislation expressly forbids public agents from allowing the RFP to contain any conditions that may restrict or hinder in any way the competitive nature of the tender. In this sense, preferences or distinctions between bidders based on nationality, domicile, or other conditions irrelevant to the object of the tender are forbidden.

Federal Law 12,349/2010 reintroduced differentiated treatment between domestic and foreign companies. The legislation establishes beneficial treatment in favor of products manufactured in Brazil or services provided by Brazilian companies in public tenders. Pursuant to this rule “nationally manufactured products” are ones produced in the Brazilian territory complying with “basic production processes” or other regulations regarding a product’s origin as defined by the Federal Administration. On the other hand, “national services” refer to
any service performed in the country under conditions determined by the Federal Administration.

Furthermore, the preference for national services or products may be up to 25% of the price offered by a foreign competitor. The exact percentage must be defined in the RFPs.

In RFPs Government entities may also include an obligation for the awarded company to promote measures to commercially, industrially or technologically compensate the Public Administration or whoever it nominates. Therefore, public procurements may now include offset measures, as has already been practiced in deals involving the Ministry of Defense.

Regarding the implementation of information and communication technology deemed strategically important to the Country, a public tender may be restricted to products and services using technology developed in Brazil.

The Concession Law also maintains these guidelines by reiterating that concessions need to be preceded by a public tender procedure in accordance with the terms of the applicable legislation. The previously mentioned principles of legality, morality, publicity, and judgment, in accordance with objective criteria, and compliance with the invitation notice are also to be observed in the case of concessions (Article 14).

The Public Procurement Law and the Concession Law convey one of the most important principles in Brazilian Public Law, which is “equality among bidders.” Nevertheless, this does not prevent the Public Administration from establishing minimum participation requirements, provided they are necessary to guarantee performance of the contract, security and perfection of the work or service, regularity of supply, or any other criteria of public interest, in accordance with the provisions of the Public Procurement Law.
Administrative Contracts

According to the Public Procurement Law, administrative contracts are “any and all contracts between the Public Administration and private entities in which there is a binding agreement - stipulating reciprocal obligations - regardless of the name given thereto” (Article 2, Sole Paragraph). These contracts are governed by the Public Procurement Law, the principles of public and administrative law, and, as a supplement, by the general theory of contracts and private law. However, due to the legality of such contracts, the Public Administration has certain obligations towards the private party on which we shall elaborate later.

Contracts entered into by state-owned companies and state-controlled companies, are governed by the State Controlled Companies Statute, principles of public and administrative law, and, as a supplement, by the general theory of contracts and private law.

Administrative Contracts under Public Procurement Law

In any contract entered into with the Public Administration, one of the major concerns of the contracting party is contract stability. This is also the case with concession contracts, which require a considerable investment. In this respect, it is advisable to review these issues.

A contract is a typical Private Law arrangement, based on the parties’ free will to contract. Nevertheless, when used by the Public Administration, the contract becomes public in nature, in view of the extraordinary powers of the Public Administration. This is why administrative contracts are governed by Public Law principles, partially complimented by Private Law rules (on a supplementary basis).

A number of characteristics can determine whether a contract is administrative in nature. However, an essential feature of an administrative contract is the presence of the Public Administration as one of the parties with authority over the private contracting party.
Another crucial element of administrative contracts is the underlying public interest, on which we shall comment further.

Due to the legal status of this type of contract, the Public Administration has the authority to:

1. modify the contract unilaterally to adjust it in accordance with public interest;

2. terminate the contract unilaterally, should public interest make it inconvenient, as well as in those material cases established by the law;

3. monitor performance under the contract;

4. apply penalties for total or partial non-performance; and

5. as a precaution, in case of essential services, take temporary possession of personal property, real estate and services covered by the object of the contract.

The private contracting party’s rights are also clearly assured by the Public Procurement Law. In case of termination for cause attributable to the Public Administration (as listed in items XII to XVII of Article 78 of the Public Procurement Law), to which the contracted party has not contributed, the latter will be reimbursed for the losses actually incurred, without prejudice to the devolution of guaranties, payment for works executed up to the termination date, and payment of stoppage costs (Article 79, Paragraph 2 of the Public Procurement Law).

**Stability and Preservation of Financial & Economic Equilibrium in Administrative Contracts**

Under a contract entered into with the Public Administration, the private party is also assured under the Brazilian Federal Constitution and under the Tender and Concession Laws of the right to revise the
prices or tariffs contracted whenever necessary to restore or preserve the original conditions of its proposal or the so-called “financial and economic equilibrium” between the obligations and the respective compensation.

In this sense, protecting the private economic rights set forth by the economic and financial equilibrium of the contract may occur in the following situations: (i) economic burdens generated due to the use by the Public Administration if its power to unilaterally modify the Contract (i.e. extension of the contract); (ii) economic burdens caused by the Public Administration resulting from actions performed by other governmental agencies and authorities (i.e. elevation of taxes by the Public Administration); and, (iii) economic burdens resulting from unforeseeable facts produced by other forces than the contractual parties (i.e. an extraordinary increase in the price of materials used in a construction project).

The contract's economic and financial equilibrium is grounded on the belief that the above mentioned events profoundly change the original obligation, breaching the initial arrangement and thus, obligating the Public Administration to review the values owed to the private party in order to reestablish the terms of the conditions originally agreed.

**Administrative Contracts for the Concession/Permission of Public Services**

Ordinary administrative contracts are not the only contracts subject to public procurement procedures. Contracts for Concession and Permission of Public Services, “which involve both the Public Administration and third parties, shall necessarily be preceded by tender,” pursuant to Article 2 thereof. Article 124 of the Public Procurement Law further establishes that provisions that do not conflict with specific legislation on the matter will also apply to contracts for the permission or concession of public services.

The Public Procurement Law is, therefore, in line with the provisions of Article 175 of the 1988 Federal Constitution, which state that the
Public Administration is responsible for providing public utility services, either directly or through concession or authorization, which will always be preceded by public tender. The Constitution further establishes that the law will provide for:

1. the regime for public utility service concessionaires and permission holders, the special nature of their contract and of extensions thereof, as well as conditions of forfeiture, control and termination of the concession or permission;

2. the rights of users;

3. tariff policy; and

4. the obligation of maintaining adequate services.

On this topic, Law 8,987/1995 establishes the following definitions (Article 2):

1. Public Service Concession. The render of services will be delegated by the granting authority (the Federal Government, the States, the Federal District or the Municipality in which the service is located), by means of a competitive tender process, to the legal entity or consortium of companies that demonstrates capacity for performance thereunder, on its own account, and for a defined period;

2. Public Service Concession Preceded by Execution of Public Work. The total or partial construction, maintenance, remodeling, extension or improvement of any works of public interest, delegated by the granting authority, by means of a competitive tender process, to the legal entity or consortium of companies that demonstrates the capacity for execution thereof, on its own account, in such a way that the concessionaire's investment is remunerated and amortized by means of the exploration of the service or work for a defined period;
3. Public Service Permission. The delegation (on a temporary and revocable basis), by means of a competitive tender process, of the rendering of public services, made by the granting authority to the individual or legal entity that demonstrates the capacity for performance thereof on its own account.

The Concessionaire’s Rights and Duties

In addition to the rights and obligations described in the previous topics, the Concession Law dedicates Article 31 to the description of the concessionaire’s duties as follows:

1. to render adequate services;

2. to keep up-to-date inventory and registration of the concession assets;

3. to keep the Public Administration and users informed of the management of services;

4. to allow free access to inspection;

5. to carry out expropriations and establish rights-of-way, pursuant to the contract and relevant tender invitation;

6. to take care of and insure the concession assets; and

7. to collect, invest and manage the financial resources necessary for the rendering of the services.

For purposes of the Concession Law, adequate services are those which meet conditions of regularity, continuity, efficiency, security, modernity (in technology, equipment, premises and relevant maintenance, as well as enhancement and enlargement of the service), generality, courtesy in providing, and at a moderate rate of tariff (Article 6).
With regard to the concessionaire’s rights, however, the Concession Law does not show the same level of systematization. Nevertheless, we list below some of the most important rights of a public service concessionaire in Brazil:

1. Article 9: to maintain the service tariff in accordance with the criteria established in the Concession Law, the contract and the relevant tender invitation;

2. Article 13: to establish different tariff levels, given the technical characteristics and specific costs of each segment of users;

3. Article 14: compliance on the part of the granting power by the previously mentioned principles of the tender (which precedes the granting of the concession);

4. Article 25, Paragraph 1: to outsource activities that are complementary, supplementary or inherent to the concession (keeping, however, its original liability for losses and damages caused to the Public Administration or to any third parties);

5. Article 26: to grant sub-concessions within the limits of the contract, and if authorized by the Public Administration;

6. Article 28: to offer the rights emerging from the concession as a guarantee for financing agreements (provided that the operation and continuity of the service is not hindered);

7. Article 39: to terminate the contract, by means of a lawsuit, in case of breach by the Public Administration;

Termination of Concession Contracts

The termination of a concession is regulated by Articles 35 to 39 of the Concession Law. To this effect, the concession will be terminated if one of the following occurs:

1. expiration of the contractual term;
2. expropriation;

3. forfeiture by the Public Administration, by means of administrative process, due to contractual breach by the concessionaire;

4. rescission by the concessionaire, by means of a lawsuit, due to contractual breach by the Public Administration;

5. annulment for any illegality in the tender which precedes the concession; and

6. bankruptcy or termination of the concessionaire (note that Law 13,097/15 of the Concession Law includes the possibility for the lenders to gain control or temporary administration of the Concessionaire in order to solve financial issues and guarantee the continuation of the activities).

Termination of the concession entails reversion to the granting power of all “revertible assets, rights and privileges,” as established in the contract and in the original public invitation notice (RFP). In this event, the Public Administration is also entitled to take over the service and relevant premises in order to allow its continuity (Article 35, Paragraphs 1 to 3).

Pursuant to Article 35, Paragraph 4, however, termination for completion of the contractual term or expropriation obliges the granting power to proceed with prior surveys and appraisals in order to determine the indemnification due to the concessionaire for the investments made.

Upon completion of the contractual term, ownership of the concession assets must be reverted to the Government, along with reimbursement by the Public Administration of the non-amortized or non-depreciated amount of the investment made in assets, subject to reversion. (Article 36)
The concessionaire is also entitled to indemnification in case of expropriation. For purposes of the Concession Law (Article 37), expropriation is considered to be the takeover during the term of the concession, for public interest reasons, upon enactment of an authorizing law to that effect. Indemnification due to the concessionaire in this case will also be calculated in accordance with the criteria mentioned in Article 36 of the Concession Law.

In case of forfeiture, the concessionaire is also entitled to indemnification, from which any penalties or contractual damages due to the Public Administration are to be deducted. In this event, however, termination is only effective after the applicable administrative procedure, in which full defense is allowed. Pursuant to the Concession Law, forfeiture of the concession may be declared by the granting power in the following events:

1. services rendered in an inadequate or deficient manner;

2. failure by the concessionaire to comply with contractual, legal or regulatory rules regarding the concession;

3. if the concessionaire halts or contributes in the halting of the services, except for acts of God or force majeure;

4. loss of the concessionaire’s economic, technical or operation conditions to maintain the concession;

5. failure by the concessionaire to comply with penalties imposed by the granting power, or with notice to rectify the rendering of services; or

6. if the concessionaire does not respond within 180 days the summon of the granting power to present documents related to the company's tax regularity. (Article 38)
Public and Private Partnership Contracts

Public and Private Partnerships ("PPP") are governed by Law 11,079/2004. This regime is applicable to and may be used by all entities of the direct public administration, as well as by the special funds, governmental agencies, foundations, public companies, and other entities controlled by the Federal Government, States and Municipalities.

In addition to the common concession of public services, as provided in the previous chapter, two other types of public service concessions were created by this law. These are the sponsored concession (Concessão Patrocinada) and the administrative concession (Concessão Administrativa).

Sponsored concession is the delegation of public services or works in which the private party's remuneration is made up of the tariff charged from users and the public partner's complementary remuneration. Administrative concession is a service agreement in which the Public Administration is the direct or indirect user (e.g., building, operation and management of public buildings), even if it involves the execution of works or the supply and installation of goods.

Law 11,079/2004 also allows (i) variable private party remuneration, based on the performance indexes and (ii) the private partner's payment during the construction period, thus anticipating the private partner's compensation for the works.

The difference between the new types of concessions and the common concession, which continues to exist according to the rules mentioned above, is in the payment and remuneration by the Public Administration to the private entity. Therefore, when the concession does not involve any remuneration from the Public Administration, it will not be a PPP contract, but a common concession.

The law also establishes limits for contracting Public and Private Partnerships, setting forth that it is not allowed to execute contracts:
1. involving less than BRL 20 million;

2. with a final term of less than five years; or

3. whose purpose is solely the supply of workers, the supply and installation of equipment, or the execution of public works or construction.

Administrative contracts regulated by the PPP Law must have terms compatible to the amortization of the investments effectuated by the private partner – never less than five and more than 35 years, including a possible extension. To execute these contracts, a Specific Purpose Company will need to be created for the exclusive scope of implementing and managing the PPP projects.

One of the main innovations brought by PPP Law was the creation of a USD 3 billion Guarantor Fund (composed of shares of public and private companies, real estate, money, etc.). Such fund guarantees that the public sector will duly pay its assumed obligations, by hiring the private sector. Its assets will serve to guarantee possible collection actions filed against the contracting Public Partner.

Also PPP Law provides for the possibility of arbitration in case of dispute resolution that may arise in a PPP contract.

In addition to Federal Legislation, Brazilian States have also enacted state laws regulating the subject. These laws create new forms of guaranties, such as the creation of public companies with assets that offer warranties. These are also responsible for signing and managing the contracts. The main States that have already published their own laws are São Paulo, Rio de Janeiro, Minas Gerais, Santa Catarina, Amazonas, Federal District, Mato Grosso, Bahia, Ceará and Rio Grande do Sul, and currently, almost all Brazilian States have their own PPP regulation.
[Revised as of May 2017]
Insurance

The insurance business in Brazil is regulated mainly by the Civil Code enacted in 2002 and laws some of which passed in 1966-1967, which delegated regulatory authority to:

(i) the National Council of Private Insurance (Conselho Nacional de Seguros Privados), known as “CNSP”, a body composed of governmental authorities, responsible for establishing the main rules for the organization and operation of insurance companies in Brazil; and

(ii) the Superintendence of the Private Insurance (Superintendência de Seguros Privados), known as “SUSEP”, which is CNSP’s regulatory and implementing agency, is subordinated to the Ministry of Finance, responsible for regulating, monitoring compliance of, and imposing penalties involving insurance, pension (open plans), capitalization, reinsurance and brokerage companies and brokers of products related therein, in Brazil.

Insurance rules and regulations are basically divided into two categories - life insurance and non-life insurance. Health insurance is regulated separately.

As of 1992, the insurance has became an opened marked, but it is still strictly regulated, especially in relation to financial solvency. There is no pre-approval requirements for the adoption of new insurance products and SUSEP generally adopts the “file and use” system. The mechanisms for verifying the solvency and reserves of insurance companies are currently strong.

Incorporating an Insurance Company in Brazil

An insurance company in Brazil must be organized in the form of a stock corporation (sociedade anônima) and may not conduct any business other than insurance. Pursuant to the insurance licensing rules contained in CNSP Resolution 330/2015, insurance companies should be managed by individuals with proven technical capacity in
his/her respective practice area, with legal domicile in Brazil, except for members of the board of directors and those who have never been charged with a criminal offense. Finally, except if an insurance company becomes insolvent and its assets are insufficient to pay fifty percent (50%) of its creditors, or if the company or its administrators commit a bankruptcy crime, an insurance company shall not be subject to the Brazilian general bankruptcy and reorganization legislation.

Licensing Requirements

There are no restrictions on foreign equity and voting interests in Brazilian insurance companies. To obtain a license authorization for operation, the shareholders must first send a pre-filing consultation addressed to SUSEP’s Superintendent outlining the capital structure and other information. After SUSEP’s pre-approval, the petitioners must submit to SUSEP a licensing application with the information and documents required by CNSP Resolution No. 330/2015. The documents shall include statement of intent indicating the types of insurance and the locations where the company intends to operate, which must be published in newspapers of broad circulation; business plan; capital structure chart; evidence of economic and financial capacity compatible with the business to be carried out; authorization for SUSEP and federal tax authorities to share information.

Required equity capital and risk-based capital

Upon incorporation and prior to filing the licensing application, the founding shareholders must pay in cash or in cash equivalent (Brazilian federal bonds) at least fifty percent (50%) of the company’s stock capital. The cash portion must be deposited in a special bank account, pledged to SUSEP until the granting of the license. The remaining fifty percent (50%) of the stock capital must be paid in within one year from the issuance of the operating license and its publication in the official newspaper.

CNSP Resolution 321/2015 provides for the required capital for insurance companies and underwriting risk-based capital, and the remedial and contingency rules applicable to capital shortfall events.
The "required minimum capital" under CNSP Resolution No. 321/2015, equals to the higher value between the base capital and the risk capital.

The “base capital” is formed by a fixed portion (of R$ 1.2 million) and a variable portion based on the operating region. The variable portion changes according to the region/states where the company has been authorized to operate. The base capital that an insurer must have to operate in all Brazilian regions is R$ 15 million.

The risk capital is based on the risks inherent in the insurance company’s operations, such as credit, market, legal, underwriting and operating risks. CNSP Resolution 321/2015 sets forth the provisions for establishment of capital for underwriting risks of the insurance and pension plans operated by insurance companies and pension funds. The method of ascertaining the risk capital for underwrite insurance operations depends on whether the line has an internal model.

The rulings also regulate cases of capital insufficiency according to the level of insufficiency of the adjusted net worth in relation to the minimum capital required:

a) Up to 50%: In case the insufficiency of the adjusted net worth in relation to the minimum capital required is up to 50% or in case the insufficiency of liquidity in relation to the minimum capital required, the insurance company shall file a solvency regularization plan to solve the problems. The solvency regularization plan will only be required in case the insufficiency has been verified for three consecutive months, or specifically on June and December.

b) 50%-70%: In case the insufficiency of the adjusted net worth in relation to the minimum capital required is 50%, the insurance company will be subject to an inception of a special inspection regime (intervention).
c) More than 70%: In case the insufficiency of the adjusted net worth in relation to the minimum capital required is more than 70%, the insurance company will be submitted to an extrajudicial liquidation.

Pre-filing for Corporate Acts

According to CNSP Resolution No. 330/2015, SUSEP must pre-approve any transactions of incorporation, acquisition, merger, spin-off, sale or any other form of corporate restructuring of insurance companies, capitalization companies and open pension entities, as well as the transfer of direct or indirect corporate control, or any other act which may imply in the change of the decision-making control of insurance companies, capitalization companies and open pension entities deriving from: (i) legal transactions entered into by the controlling shareholders; (ii) shareholders agreement; or (iii) acts of any individual or business entity, or group of persons representing a common interest.

Operating Requirements

The insurance companies shall monthly submit to SUSEP within the closing of the monthly balance sheets, the adjusted net worth equal to or greater than the required minimum capital and liquidity in relation to the required minimum capital.

The liquidity in relation to the minimum capital required is verified when the insurance company presents the amount of "net assets" (ativos líquidos), in excess to the amount needed to cover the provisions, higher than 20% of the minimum capital required.

The net assets in excess to the amount needed of coverage shall be registered with an account bounded to SUSEP.

Brokers

Insurance brokerage provisions of Law 4,595/194 and Decree-law 73/1966 define “insurance broker” as the intermediary legally
authorized to solicit and market insurance contracts, putting together insurance companies and prospective customers.

Normative rules of the CNSP and SUSEP set forth that, save for authorized agents and direct marketing sales, the attraction of potential customers for new insurance coverage may be performed only by brokers licensed and registered with SUSEP, or by a preposto (delegate) of the broker duly empowered by him and also registered with SUSEP.

Only licensed and registered brokers may receive insurance applications, certify the corresponding policy and collect commissions through physical receipt of cash or bank account deposits. A broker may pay his preposto a portion of the commission received.

Resolution 295/2013 and its amendments, regulates the preposto activities as well as the requirements for their appointment and registration. The CNSP Resolution 295/2013 is in force since October 28, 2013 and according to its terms each insurance broker may register up to 10 (ten) prepostos.

The application for registration must be filled in by the insurance broker, through a form containing the preposto's registration data and shall be forwarded to the website of the SUSEP. The insurance broker may appoint representatives at its free choice, including replacements.

Reinsurance

From 1939 until 2007, reinsurance was a monopoly of the Brazilian government, by means of the government-controlled entity IRB (Instituto de Resseguros do Brasil), currently named IRB - Brasil Resseguros S.A. and known as “IRB-Brasil Re”. The 13th Amendment to the Brazilian Constitution of August 21, 1996 followed Brazil’s international commitments to open the reinsurance market and, as a kick-off to the demonopolization, it has stricken out from the Constitution’s Article 192, item II, the expression “official reinsurance entity”.
The government further promulgated Law No. 9.932/1999, which transferred IRB-Brasil Re’s reinsurance regulatory and enforcement powers and duties to SUSEP and delegated substantial normative authority to CNSP, but an injunction granted by the Brazilian Supreme Court suspended the effects of said statute. An intense legal debate evolved until January 2007, when the government finally enacted Lei Complementar 126 (‘‘Supplementary Law No. 126/2007’’).

Pursuant to Supplementary Law No. 126/2007, CNSP, as the insurance normative authority, shall be responsible for the regulation of coinsurance and reinsurance transactions, and SUSEP, as the insurance supervision agency, shall be responsible for the supervision of coinsurance and reinsurance transactions and for their brokerage.

The Supplementary Law No. 126/2007 provides for three types of reinsurance companies that are authorized to operate and do business in Brazil:

(i) the local reinsurer: defined as the reinsurer headquartered in Brazil and incorporated as a Brazilian corporation with the purpose of conducting reinsurance and retrocession transactions;

(ii) the admitted reinsurer: defined as the reinsurer headquartered abroad, with a representative office in Brazil and registered as such with SUSEP, in compliance with the requirements of the Supplementary Law and the applicable rules; and

(iii) the occasional reinsurer: defined as the reinsurer headquartered abroad, without a representative office in Brazil, but registered with SUSEP as such, in compliance with the requirements of the Supplementary Law and the applicable rules.

As per CNSP Resolution No. 330/2015 and SUSEP Circular 527/2016, to obtain a license, admitted reinsurers shall comply with, among others, the following requirements: (i) be in good standing with its competent supervision authority and evidence that it has been
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As per CNSP Resolution No. 330/2015 and SUSEP Circular 527/2016, to obtain a license, admitted reinsurers shall comply with, among others, the following requirements: (i) be in good standing with its competent supervision authority and evidence that it has been performing its activities in its country of origin for at least five years; (ii) have net equity not lower than one hundred million United States Dollars; (iii) have a solvency evaluation granted by a rating agency acceptable to SUSEP in the minimum levels mentioned in Article 13, III of Resolution 330/2015; (iv) have a power-of-attorney granted to an individual residing in Brazil, for purposes of receiving service of process and notices, the delegation of such powers being expressly forbidden; (v) have evidence that the laws in force in its country allow the movement of freely convertible currencies, for purposes of complying with reinsurance commitments abroad; (vi) have a foreign currency bank account in Brazil with a bank authorized to perform exchange transactions, as security for its transactions with SUSEP, with at least: (a) US$5,000,000 (five million US dollars) to do business in all lines of reinsurance and (b) US$1,000,000 (one million US dollars) for life reinsurance; and (vii) provide SUSEP with its financial accounts.

According to SUSEP Circular No. 527/2016, the applicant must also file a formal request with SUSEP for (i) opening a branch or (ii) incorporating a Brazilian subsidiary, provided that the foreign reinsurer’s holds a minimum equity interest corresponding to 4/5 of the corporate capital.

The occasional reinsurer may only be registered in Brazil if it meets the following requirements: (i) be in good standing with its competent supervision authority; (ii) have net equity not lower than one hundred and fifty million United States Dollars; (iii) have a solvency evaluation granted by a rating agency acceptable to SUSEP, at least, in the minimum levels mentioned in Article 18, III of Resolution 330/2015; (iv) have a power-of-attorney granted to an individual residing in Brazil, for purposes of receiving services of process and notices; (v) be headquartered in a country not classified as a tax haven; (vi) have evidence that the laws in force in its country allow the movement of freely convertible currencies, for purposes of complying with reinsurance commitments abroad; and (vii) provide SUSEP with its financial accounts.
Those registered as occasional reinsurers cannot apply for an authorization to operate as admitted reinsurers, but may amend their existing authorization to become admitted reinsurers, provided that all previous requirements are met.

According to Decree No. 6499, of July 1, 2008, insurance companies may assign to the occasional reinsurer up to ten percent (10%) of the total amount of the premiums assigned in reinsurance, considering the totality of its transactions in each calendar year.

Besides, the risks to be ceded from local reinsurer to occasional reinsurer (retrocession) are limited up to fifty percent (50%) of the total amount of the premiums related to the risks which was subscribed by the local reinsurer, considering the totality of its transactions in each calendar year.

CNSP Resolution 321/2015 provides for the minimum capital necessary for the authorization and operation of local reinsurers. According to such rule, the minimum capital that a local reinsurer shall maintain at all times in order to operate is equivalent to the higher value between the base capital and the risk capital.

The base capital is a fixed amount of R$ 60 million, which a local reinsurer shall maintain at all times. The risk capital is the floating capital amount used to guarantee risks inherent to the reinsurer’s transactions.

Moreover, the purchase of reinsurance and retrocession in Brazil or abroad may be performed either by means of direct negotiation between the ceding party and the reinsurer or by means of the reinsurance broker.

Foreign reinsurers headquartered in “tax havens” (countries which do not tax income or tax at a rate lower than 20% or whose laws shelter the anonymity of corporate shareholding or assets ownership) cannot register as occasional reinsurers. Such list is set out in SRF’s

Supplementary Law No. 126/2007 provides for the exclusivity of local reinsurers over survival insurance and pensions.

Resolution CNSP 168/2007, as amended establishes that local insurers or reinsurer are allowed to cede:

(i) until December 31, 2016, 20% of insurance premium per contracted coverage to an affiliated company or company pertaining to the same economic group;
(ii) 30% as of January 1, 2017;
(iii) 45% as of January 1, 2018;
(iv) 60% as of January 1, 2019; and
(v) 75% as of January 1, 2020.

Further, Article 15 of Resolution CNSP 168, of December 17, 2007, as amended, determines that insurance companies must contract with local reinsurers at least the percentages mentioned below of each cession of reinsurance in automatic or optional contracts:

(i) 40% until December 31, 2016;
(ii) 30% as of January 1, 2017;
(iii) 25% as of January 1, 2018;
(iv) 20% as of January 1, 2019; and
(v) 15% as of January 1, 2020.

However, CNSP Resolution 241 of December 1, 2011, authorizes insurance companies to contract with local reinsurer a percentage lower than the one mentioned above, exclusively when local reinsurers’ capacity is proven to be insufficient, regardless of prices and conditions offered by them.

Supplementary Law No. 126/2007 further requires ceding companies to send a copy of their reinsurance agreements to SUSEP. Reinsurance contracts not disclosed to SUSEP will not have the effect of freeing-
up the Brazilian ceding company’s retention and operational limit for all regulatory purposes such as computation of reserves.

Reinsurance contracts may have an insolvency clause providing for the cut through payment of claims to the insured upon the insolvency of the insurance ceding company but in case of facultative contracts, the insolvency cut through will be implied. In any event, Supplementary Law No. 126/2007 requires an insolvency clause making reinsurers responsible before the insured parties upon the insurer’s liquidation or bankruptcy.

The reinsurance law makes independent auditors accountable and subject to penalties for any breach or misconduct in connection with their responsibilities under insurance and reinsurance laws and regulations.

Art. 23 of Supplementary Law No. 126/2007 further authorizes the Federal Government to allow IRB-Brasil Re’s preferred shareholders (Brazilian insurance companies) an option to withdraw their equity capital in IRB-Brasil Re. for purposes of incorporating a reinsurance company in Brazil as Local Reinsurer.

Operations in Foreign Currency

Only the insurance, reinsurance and retrocession for coverage related to certain types of risk specified in Circular SUSEP No. 392/2009 may be performed in Brazil in foreign currency, subject to the legislation applicable to operations of this nature, the rules set forth by the Brazilian Monetary Council (“CMN”) and the rules set forth by the insurance regulatory authority.

CMN and Central Bank regulate the opening and maintenance in Brazil of accounts in foreign currency, held by insurance companies, local reinsurance companies, admitted reinsurance companies and reinsurance brokers.
Insurance in Brazil and Abroad

According to Supplementary Law No. 126/2007 and Resolution CNSP No. 197/2008, the following insurances shall be exclusively contracted in Brazil:

I – mandatory insurances; and

II – not mandatory insurances hired by individuals residing in Brazil or by legal entities headquartered in Brazil, regardless of the legal form, for the guarantee of risks in Brazil.

The hiring of insurance abroad by individuals residing in Brazil or by legal entities headquartered in Brazil is restricted to the following cases:

I – coverage of risks for which there is no offer of insurance in Brazil, as long as the hiring of such insurance does not represent a violation to the legislation in force;

II – coverage of risks abroad in case the insured party is an individual residing in Brazil and the term of the insurance hired by such individual is exclusively restricted to a period in which the insured party will be located abroad;

III – insurances which are object of international agreements countersigned by the Brazilian Congress; and

IV – insurances that, according to the legislation in force, on the date of publication of Supplementary Law No. 126/2007, had already been hired abroad, provided, however, that the renewal will be subject to Supplementary Law No. 126/2007.

Legal entities may hire insurance abroad for the coverage of risks located abroad, upon the communication to the Brazilian insurance inspection authority within 60 (sixty) days as of the beginning of effectiveness of the risk.
[Revised as of April 2017]
Employment Relations

The basic rules governing legal relationships between employers and employees in Brazil are set forth in the Federal Constitution and the Brazilian Labor Code (Consolidação das Leis do Trabalho).

The Brazilian Labor Code generally regulates all aspects of the labor relationship. It is supplemented by labor and social security laws, and collective bargaining agreements.

In Brazil, after the Labor Reform Law came into effect (Law No. 13,467/2017), claims involving labor matters are decided in labor courts and/or by arbitration (applicable exclusively to employees with compensation exceeding twice the social security contribution cap; and who executed at his/her own initiative or express consent an arbitration clause observing Arbitration Law requirements).

Employment Relationships

The Brazilian Labor Code defines “employee” as an individual rendering services to a company or individual on a regular basis, under the direction of such company or individual, for compensation. Brazilian courts consistently recognize the existence of an employment relationship whenever those elements are evidenced, whether or not a written employment agreement exists.

Note that in Brazil, the hiring of an employee requires filling out certain blank spaces in an employee’s Employment Booklet (Carteira de Trabalho, which is similar to a passport held by the employee) to identify the employer, date of admission, salary (generally per month), and functions to be performed by the employee. Similar annotations should be made in the company’s books (ficha de registro). Under Brazilian law, it is not necessary to execute a separate written employment agreement and is rather used as a matter of convenience to deal with certain matters.

If an employee is not under an employer's direction (for example, an independent sales representative), the relationship between such
person and the company would be subject to general Brazilian civil and commercial contract rules, not labor regulations. Nevertheless, Brazilian labor courts are generally sympathetic toward individuals who claim an employment misclassification, essentially shifting the burden of proof to the presumed employer.

**Economic Group Concept**

According to Article 2 of the Brazilian Labor Code, when one or more companies are under the same direction or control of another company, they are held jointly liable for labor code violations.

Therefore, if an employee is registered with only one company and the fact that the employee renders services only to such company does not exclude the joint liability of the company’s economic group.

Having said that, if one of the companies of the economic group fails to comply with its labor obligations, the labor courts may require another company of the group with enough assets to pay the labor debts, based on the principle that all companies of the same economic group are a “single employer”.

Note that after the Labor Reform Law came into effect, the existence of a common shareholder is not enough to trigger the recognition of an economic group, and it is now required to evidence an integrated business interest, actual common interest and joint actions of the companies.

**Brazilian Labor Rights**

Under Brazilian law, an employee is entitled to the following labor rights (in addition to what may have been agreed upon in a written employment agreement):

- Minimum Wage. The worker is assured of the right to be compensated with the national minimum wage, which includes urban and rural workers. However, there may be a minimum wage provided by the state legislation superior to the value of
the federal minimum, which shall be observed. Moreover, there may exist a minimum wage established by a collective agreement. The national minimum wage for 2018 is expected to BRL 969.00 per month (around USD 296.00).

- Annual mandatory salary increase, at the percentage set forth in either the Collective Bargaining Agreement executed by and between the respective Employees’ and the Employers’ unions;

- Annual Christmas bonus (frequently called “13th month salary”) in an amount equivalent to one monthly compensation;

- Annual vacation of thirty (30) calendar days, increased by a vacation bonus equal to one third (1/3) of the employee’s monthly compensation, in addition to the officially declared holidays during the year;

- Severance Fund (Fundo de Garantia Por Tempo de Serviço or “FGTS”) to be funded by the employer by depositing 8% of the employee’s monthly compensation in a special bank account of the employee at the Federal Savings Bank (Caixa Econômica Federal). The amount deposited in such fund may be withdrawn by the employee upon the employee’s retirement, as well as in very special cases such as the acquisition of a house and, in particular, termination of employment by the employer, without cause; and

- Other payments as set forth in the Collective Bargaining Agreement.
Contract Modification Practices

According to Article 468 of the Brazilian Labor Code, any change in employment conditions (i) must require the employee's express consent in writing and (ii) must not be detrimental (financial or otherwise) to the employee. Please note that this Article represents a true principle of Brazil's labor laws and demonstrates its protective nature.

Due to provisions contained in Article 468 of the Brazilian Labor Code, it is not possible to cancel a benefit extended to an employee or reduce his/her salary – except if such reduction is approved by the labor union - without incurring labor liabilities. Other modifications that do not adversely affect the employee (such as modifying the work schedule or position, provided that the new position has an equal or higher salary) are permitted.

In any event, all modifications to an employee’s employment conditions must be formalized in his/her Employment Booklet and in any other documents executed with him/her.

Health, Safety and Environment Issues

According to Brazilian Labor Law, employers must comply with several specific rules related to health and safety issues, such as: PCMSO, PPRA, CIPA, SESMT, additional payments related to work conditions and so on.

The direct employer is responsible for drafting, keeping and monitoring compliance with such programs.

The work hours must not exceed eight hours daily and 44 hours weekly (although collective bargaining agreements and the company's policies/practices may provide a more generous condition). Between two work days there must be a minimum interval of at least 11 consecutive hours for the worker to rest.
Profit Sharing

The 1988 Federal Constitution provides that Brazilian employees are entitled to participate in the profits of their employers. Law No. 10.101 of 19 December 2000 regulates the procedures and requirements that must be met by Brazilian companies to implement a plan for the employees’ share in the profits or results of the company. Note that some believe that this law is not mandatory, since it does not provide penalties in case of non-compliance. On the other hand, if a company intends to create a plan, it must comply with Law No. 10.101, under the penalty of the payments made under the plan being considered as part of the employees’ compensation, and, thus, subject to labor and social security charges.

Law No. 10,101 does not set forth strict rules for calculating the amounts payable to employees or even a minimum pre-established amount payable to employees.

All that is required is that the employer and the employees (represented by the employees’ committee or employees’ union) enter into an agreement setting forth: (i) clear rules in connection with the employees' right to receive a share of the company’s profits or a certain payment upon achieving certain results; (ii) objective conditions for employees to achieve such entitlement, exceptions made to goals related to health and safety matters; (iii) the dates of payment - the maximum to be paid in two installments and with an interval of at least three months; and (iv) the term of the agreement and the dates for revision thereof.

The labor union or one of its representatives is required to participate to deem the plan valid.

Probation Period

Under Brazilian labor law, an employer may hire an employee for a probationary period in order to observe whether this employee has the appropriate skills. The maximum probationary period is 90 days, or
the period set forth in the respective Collective Bargaining Agreement, provided that such term is agreed upon in writing.

**Term of Employment**

Employment agreements are generally in force for an indefinite term. As an exception, an employee can be hired for a probationary period of up to 90 days, provided that such term is agreed upon in writing (as indicated above). The employee may also be hired under a fixed-term agreement to perform services or activities of a temporary nature, in which case the employment is valid for only two years.

**Part-time Employment**

Part-time work can be contracted up to a maximum of 25 hours per week. Compensation for part-time employees must be proportional to that of other employees working full time (i.e., 44 hours per week) in the same function.

**Termination and Severance**

The concept of at-will employment is not recognized in Brazil. That said, both the employee and the company may terminate the employment relationship at any time for any reason (subject to few exceptions of job protection).

Please note that termination with cause is only possible if the fault committed by the employee is listed in the Labor Code, which sets forth a very strict list of possibilities.

Termination of an employment relationship in Brazil is a rather formal matter, as Brazilian law requires the filing of a Termination Form and submitting the employee to a medical termination examination, even if the employee resigns. All documents related to the termination (e.g. Termination Forms, Severance Forms, Communication of entitlement to extend the health insurance coverage - when applicable), in addition to the evidence of the severance payment, must be delivered to the employee within 10 days of terminating the agreement.
Brazilian employees are always entitled to severance pay if terminated. The amount of severance and labor rights will depend on whether the employee has been terminated for cause, without cause, and whether the termination was effected by the employer or the employee or by mutual agreement.

The basic and routine severance payments in case of termination without cause are the following:

- Compensation due until the day of termination;

- Accrued vacation leave credits based on one month’s compensation per year of employment. When termination occurs before a full year is completed, vacation shall be calculated on a pro rata basis;

- Vacation bonus, equal to one-third of one month’s compensation. In case of pro rata vacation, the bonus shall be calculated based on the actual amount owed to the employee for vacation;

- Pro rata Christmas bonus (also called “13th month salary”) equal to one-twelfth of the employee’s monthly compensation per month of employment, or a fraction thereof at least equal to 15 days, starting 1 January to the day of termination;

- 50% of the balance of the employee’s Severance Fund bank account (FGTS).

- The severance notice indemnity Law No. 12.506, ratified on 11 October 2011, requires that prior notice be proportional to the length of the employee's service, limited to 90 days. Under such Law, nothing changes for employees who have worked up to one year at the same company, since they will continue to be entitled to 30 days prior notice. However, for those employees with more than one year of employment in the same company,
they will be entitled to additional prior notice of three days for each year worked, up to a maximum of 60 additional days.

- Any termination benefits/advantages provided by a collective bargaining agreement and/or company's policies.

- If an employer decides to grant an employee discretionary termination benefits (e.g. termination bonus, transfer of vehicle in the name of employee, outplacement service and additional extension of health insurance), it is advisable to discuss these payments as they might have social security and labor implications.

Labor Claims and Release Agreements in Brazil

In Brazil, once the employment agreement is terminated, the former employee has a two-year limitation period to file a lawsuit.

Once the former employee files the lawsuit within the two-year term, he/she may claim labor rights for the last five years.

Note that in Brazil releases will be enforceable if the parties - each of them represented by different counsels - file jointly a single petition before the Labor Court asking for the judge to ratify the off-court agreement reached between the parties. Once it is filed, within a 15-day term, the judge must analyze the request and may either ratify the off-court agreement directly or schedule a hearing for such purpose.

Note that once a settlement is ratified before a Judge (in case of the request above mentioned or if a lawsuit has been filed), in principle, individuals cannot go back and claim the difference between the settlement payment and any unpaid labor right.

We emphasize that an amicable settlement between the parties, outside of the Labor Court, does not eliminate the risk of future labor claims.
Social Security

According to Social Security Legislation, all employees working in Brazil must be covered by the “INSS” - social security system.

Both employers and employees must pay social security contributions. Self-employed workers are also subject to social security obligations.

Employees may also choose to contribute to a private pension plan, to increase their INSS compensation.

To be able to retire from employment in Brazil, an employee must fulfill certain requirements. First, an employee may retire based on their length of contribution to the Social Security System: 30 years for women; 35 years for men. Second, it is possible to retire based on age: women must be 60 years old; men 65 years old. Finally, it is important to mention that age-based retirement is only possible after 15 years of contributions.

Contribution to the social security system must observe the following charts:

Employees’ social security contributions paid over compensation:

<p>| | | |</p>
<table>
<thead>
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<tbody>
<tr>
<td>1.</td>
<td>Up to BRL 1,659.38</td>
<td>8% of salary</td>
</tr>
<tr>
<td>2.</td>
<td>From BRL 1,659.39 to R$ 2,765.66</td>
<td>9% of salary</td>
</tr>
<tr>
<td>3.</td>
<td>From BRL 2,765.67 to 5,531.31</td>
<td>11% salary</td>
</tr>
<tr>
<td>4.</td>
<td>More than BRL 5,531.31</td>
<td>Fixed value of BRL 608.45</td>
</tr>
</tbody>
</table>

Employer’s social security contributions paid over payroll:
1. Social Security Contribution – INSS | 20.00%
2. Labor Accident Contribution – SAT | from 1.00 to 3.00% (*)
3. Third parties contribution, for instance: | from 2.70 to 5.80%

<table>
<thead>
<tr>
<th>Contribution</th>
<th>Rate</th>
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<tbody>
<tr>
<td>Education Contribution</td>
<td>2.50%</td>
</tr>
<tr>
<td>INCRA Contribution</td>
<td>0.20%</td>
</tr>
<tr>
<td>SENAI Contribution</td>
<td>1.00%</td>
</tr>
<tr>
<td>SESI Contribution</td>
<td>1.50%</td>
</tr>
<tr>
<td>SEBRAE Contribution</td>
<td>0.60%</td>
</tr>
</tbody>
</table>

(*) Note that the SAT rate shall be multiplied by the so-called Accident Prevention Factor (“FAP”), which varies from 0.5 a 2.00 depending on the risk involved on the company activities.

The main charge to be collected by the company to the social security institute is the basic social security contribution at a rate of 20%, upon the total remuneration paid to employees and self employed workers.

In addition, employers must also pay, upon the remuneration paid solely to employees, the Labor Accident Contribution (“SAT”) and other social contributions to specific entities (“third parties”) provided for by law (such as SESI, SENAI, SESC, SENAC SEBRAE and INCRA contributions).

The rate of the other social contributions mentioned above will depend on the company’s main activity.
The employees’ contribution will be levied according to the compensation amount, based on specific brackets and varying from 8% to 11% (up to the maximum limit of BRL 608.45) Employers must withhold the employees’ contribution and pay it to the social security authorities along with their contribution as employers.

In addition, for some specific industry sectors, social security contributions are calculated on the gross revenues of services and/or products, instead of on the remuneration paid to its employees and self-employed workers.

**Outsourcing**

Outsourcing or independent contracting by the company of a service or activity to a third party must be carefully carved out of the typical employment relationship. Two recent pieces of legislation (Law no 13,429/2017 - the Outsourcing Law and the Labor Reform Law) are in place and will most likely overrule current labor precedents that authorized only the outsourcing of non-core activities. In this sense, Labor Reform proposed additional amendments to the Outsourcing Law including the express possibility of outsourcing any activities, including primary ones.

Note that the Outsourcing Law provides defined requirements that a service provider must meet to enable its operations, *i.e.* having a Corporate Tax ID (CNPJ), registration with the Commercial Board and having capital stock compatible with its workforce numbers.

In addition, the Labor Reform Law provides that if an employee was previously terminated by the company, there is an 18-month waiting period during which he/she cannot be engaged by a third party to provide services back to the company. Company is defined broadly to include companies in the group. While it is still unclear what sanctions and/or liabilities will apply to entities that violate the “quarantine”, there is the risk of employment continuance claims.

It is also worth noting that the Outsourcing Law explicitly imposes a secondary liability on customers for unpaid labor rights by service
providers in relation to outsourced workers rendering services to service takers. Service takers should ask service providers to regularly them with the payment forms of social security contributions and FGTS for outsourced workers so they will be able to present such forms to the court as evidence of payments in case an outsourced worker brings a claim against a service taker enforcing the secondary liability.

**Unions**

The Federal Constitution deals with the creation of unions between employers and employees. In Brazil, certain unions represent the employees and some unions represent the employers. Employers and employees are represented by their respective unions in matters involving collective employment relations. The employees, regardless of their position and/or affiliation with the union, are entitled to the labor benefits granted in the Collective Bargaining Agreement negotiated between the employers and the employees’ union for that specific economic category.

Unions are organized according to their business activity, for example, commercial transactions, metallurgy, chemical production and the like. The union representing a given company will be that of the company's main activity and its place of business.

The employers and employees’ unions representing a given business activity negotiate the terms of a collective agreement dealing with salary increases and several other issues to be in force for one year. If no agreement is possible, the parties can avail themselves to the mediation services of the Labor Department or the Labor Courts.

[Revised as of November, 2017]
Real Estate

In Brazil, Law No. 10,406, dated 10 January 2002 (the “Brazilian Civil Code”), generally governs the rights associated with immovable properties.

The Brazilian Civil Code divides assets into two different categories: (i) movables (i.e., personal property) and (ii) immovable assets. The immovable assets category encompasses land, together with its surface and all accessions, construction and improvements, attached to or forming part of the land, the air space above the land and the subsoil. Waterfalls, mines and products from the subsoil are considered separate assets from the land. The exploitation of mineral resources and hydroelectric power are subject to authorization from the federal government, according to the Brazilian Federal Constitution.

In addition, although certain assets are physically movable (i.e., machinery and equipment used at industrial plants and ships), they are construed under the Brazilian Civil Code as immovable assets, by means of legal fiction.

The rights related to immovable assets (including real estate properties) are divided into the right of possession and the right of ownership.

The right of possession is the personal right arising from the ownership or dominion over the property.

The right of ownership is the right of an individual or entity to use, enjoy and dispose of the property as a whole or solely its superficial part particularly for plantation or construction. The concept of disposing of the superficial part of the land, or land surface law (direito de superfície), was recently brought into Brazilian regulation by means of the Brazilian Civil Code (Articles 1369 to 1377). Basically, it requires a definite term and a public deed duly registered in the relevant Real Estate Registry Office. Works at the underground level are not allowed, except if the work is in accordance with the
nature of the concession. It could be remunerated or free of charge. The land recipient is entitled to the right of first refusal in case of the sale of the property and once terminated, the owner obtains full title of the land, construction or plantation, regardless of indemnification, in case the parties have not agreed thereto otherwise.

Some restrictions may apply to the right of ownership, as in the case of the creation of easements, expropriation of the property by government authorities or the creditor’s composition, insolvency or bankruptcy. Restrictions may also apply in cases involving national interests, as in the case of sale or lease to foreign entities, as expanded below. In addition, the use of the property may be subject to zoning and construction limitations, as provided under the relevant laws.

Several individuals or entities may be jointly entitled to the right of ownership in relation to the same property. In this case, a co-ownership (or condominium) will be deemed construed among the different owners and each of them will be entitled to all rights associated with a specific ideal portion (fração ideal) of the property. The costs associated with the maintenance of the property (i.e., housekeeping and security) are shared among the members of the condominium.

In case of a condominium, any of its members may exercise all rights of ownership, except those that are not consistent with the indivisibility of the property. Therefore, the entire property cannot be transferred without the concurrence of all the condominium members. Brazilian Law 4,591, dated 16 December 1964, generally governs the rights and obligations attributed to the condominium members in edifices.

**Acquisition of properties**

In Brazil, the transfer of title to a property occurs only upon registration of the act that transferred the same or the rights thereto with the relevant Real Estate Registry Office. For registration purposes, every property must be registered at the specific Real Estate Registry Office having jurisdiction over the area in which the property
is located. Such registration is made under a specific enrollment (matrícula), which lists all data in respect of the property, including details of its current and former ownership and the existence of liens, mortgages and easements.

Typically, a property is transferred upon the registration of the purchase and sale agreement executed by the buyer and seller at the matrícula of the property at the Real Estate Registry Office. As a general rule, for purposes of transferring the title, the purchase and sale agreement must be executed in a public format by means of a public deed executed before a public notary.

A property may also be acquired by inheritance, usucapio or accession (the enlargement of the land arising from the conveyance of parcel of the soil through natural causes). In these cases, the court order granting the rights over the property is the instrument to be registered at the Real Estate Registry Office.

Provided that the matrícula of the property is the relevant document that details the relevant data of the property, any document, act or instrument which may modify, extinguish, transmit or create rights related to the property must also be registered. Hence, to be perfected and valid before third parties, a mortgage or a lien over a property must be registered.

The transfer of a property is subject to the payment of Real Estate Transfer Tax (“ITBI”). ITBI rates vary in accordance with the city in which the property is located and is calculated upon the actual value of the transaction or the appraised value of the property, whichever is higher. According to the Brazilian Federal Constitution, the ITBI does not apply to real estate transfers pursuant to corporate mergers or contributions to paid-in capital.

Securities

The most common form of securities used by lenders in Brazilian real estate transactions are mortgages and bank guarantees.
Mortgages are formalized through a public deed prepared by a public notary and registered with the relevant Real Estate Registrar to ensure validity of title and enforceability against third parties. There is no transmission of asset possession to the creditor under a mortgage. However, in the event of default by a borrower, the lender has the right to require judicial sale of the real property to recover the debt.

Other security options for financing real property transactions are recognized under Law No. 9,514/97 including the following “right in rem” guarantees:

- **Fiduciary assignment of credit rights deriving from real property sale and purchase agreements** – The title to credits is transferred to a fiduciary assignee to secure a debt until full payment is made.

- **Fiduciary transfer of title to real property ("Alienação Fiduciária")** – A borrower transfers title of its real property to a lender to secure payment of a loan (but the borrower retains actual possession), and upon payment of the loan, the borrower is entitled to receive the title in return. Such fiduciary agreements must be recorded with the Real Estate Registrar.

**Real estate lease and built to suit agreements**

Law 8,245, dated 18 October 1991, and its supplement, the Brazilian Civil Code, govern urban real estate lease agreements for both residential and commercial purposes (including the lease of premises located in shopping centers).

Under the law, upon execution of a lease agreement, the landlord, among other obligations, must deliver the leased property to the tenant in a condition of use for the purposes set forth under the agreement.

Moreover, the landlord is liable for any damages or defects in the leased property prior to the lease, and also for the payment of the extraordinary condominium fees charged during the lease term (in
other words, for the expenses necessary to maintain the structure and safety of the real estate).

The tenant shall be responsible, among other obligations, for the following:

1. The correct and timely payment of the rent, charges, duties and ordinary condominium fees, whenever applicable

2. The use of the real estate according to the purpose set forth in the agreement

3. The return of the real estate at the term of the lease in the same condition the tenant received it, with the exception of regular wear and tear

Furthermore, the tenant shall give the landlord notice of any damage or defect, which falls under the landlord’s obligation to repair.

The parties are free to negotiate contractual conditions with respect to the term of the lease, rent amounts and improvements. Notwithstanding, it is customary in Brazil to provide that the tenant shall be responsible for the payment of the property tax levied on the leased property during the term of the agreement.

According to price adjustment rules currently in force, the rent may be monetarily adjusted for inflation every 12 months from its effective date. Rent should be adjusted in accordance with one of the various Brazilian inflation indexes, such as the General Prices Index (IGP) published by the Fundação Getúlio Vargas. Regardless of the annual adjustment for inflation, according to Article 19 of Law 8,245/91, after three years of the lease term, any of the parties may request in court a revision of the rent, in order to adjust it to the prevailing market price.

When a commercial lease exceeds five years, the tenant: (i) has the right to apply for an automatic renewal of the lease (if some conditions are met, such as maintaining the intended use of the leased
premise) and (ii) cannot be removed from the leased property except for specific defaults. The rent for the lease extension is negotiable, and if the parties cannot agree on the amount, the rental amount will be determined in court.

In case of the sale of real estate, the tenant has the legal right of first refusal, as provided by law. If the tenant does not exercise such right of first refusal, the new owner of the real estate property shall only observe the effectiveness of the agreement under the following conditions:

1. If the agreement establishes that it shall continue in force in case of its sale to third parties
2. If the agreement was entered into for a fixed term
3. If it is registered before the relevant Real Estate Registry, in which case, the new owner of the real estate must comply with the agreement

The law also provides for different types of collateral that the landlord may request as a security for the tenant’s compliance with the agreement (unless the rent is paid in advance). Following are the most commonly requested securities:

1. A deposit equivalent to the maximum of three rents to be deposited to a savings account during the term of the lease
2. A personal guarantee extended by an individual or an entity (it may be replaced by a bank guarantee)
3. An insurance policy or a bank guarantee covering compliance with the tenant’s obligations

The law does not permit more than one type of collateral for the same lease agreement. Non-compliance to such rule is subject to the penalty of nullity.
During the term of the lease, the landlord may not demand repossession of the property except in the following instances:

1. Upon mutual agreement with the tenant
2. The tenant breaches any contractual or legal obligation
3. The tenant does not pay the rent and other duties
4. Urgent repairs in the leased property have been ordered by a public agent

The tenant, however, has the right to terminate the lease before its term, subject to the payment of the contractual penalty established by the parties on a pro rata basis, taking into account the elapsed term of the agreement. In the event of an expropriation of the property by public authorities, the landlord and the tenant may both seek indemnification from the expropriating authority, unless otherwise provided under the lease agreement.

Moreover, Law 8,245/91 has been amended to govern built-to-suit agreements.

According to the new rules, the landlord and the tenant may freely agree to waive their rights to review the rent amount after three years of the lease term among other business conditions that shall be valid and enforceable between the parties in view of the high investments involved in built-to-suit agreements.

However, to be construed as a built to suit for the purposes of the law, the agreement shall meet certain legal requirements such as: (i) the agreement must be executed for a definite term and (ii) the property to be purchased, built or retrofitted by landlord must be urban.

**Lease in shopping centers**

In Brazil, shopping centers are incorporated under a condominium arrangement ruling the following:
1. The use of private areas (or the leased premises)

2. The access of every shopkeeper or tenant to its common areas

Thus, subject to the comments above with respect to the obligations regarding ordinary and extraordinary condominium fees, both the landlord and the tenant shall bear the costs for the maintenance of the common areas of the center. Public restrooms, parking areas, entrances, exits, sidewalks, ways, alleys and trash bins should always be kept in good and safe condition.

Furthermore, there are four typical documents associated with the landlord-tenant relationship with regard to the ruling on the use of private and common areas in a shopping center. These are as follows:

1. The Declaratory Deed of General Norms Regulating the Function, Utilization and Lease of the Shopping Center

2. The Internal Rules of a Shopping Center

3. The Shopkeepers’ Association rules

4. The specific lease between the landlord and the individual tenant

The Declaratory Deed sets forth the development, construction and basic operating rules for the center. It is a registered document with the incumbent Real Estate Registry Office. Provided that the Declaratory Deed is registered, it has priority over all subsequent documents, such as individual leases, whether such leases are registered or not. If there is a conflicting clause between the Declaratory Deed and the individual lease, the clause in the Declaratory Deed shall prevail, unless the lease specifically references the conflicting clause and specifies the difference. It is not sufficient to state in the lease a general clause that in case of conflict between the two documents, the lease clause applies. Each conflicting clause must be specifically enumerated and referenced in the lease for the clause to apply.
Acquisition and Leasing by Foreigners

From a general standpoint, there are no restrictions on the acquisition of urban properties by foreign individuals residing in Brazil or by foreign-controlled Brazilian entities or foreign entities authorized to operate in Brazil.

However, certain restrictions apply to the acquisition and leasing of rural real property by foreigners under Laws No. 5,709/1971, 8,629/93 and Decree No. 74,965/74, and under the interpretation of such laws by the Attorney General’s Office, which have been in force since August 2010.

In summary, these restrictions are as follows:

1. Individuals residing and companies headquartered abroad are generally prohibited from acquiring rural property (except for succession acquisition by individuals and also for the first acquisition by individuals, depending on the size).

2. The Ministry of Agriculture and INCRA (Governmental Agency in Charge of Redistribution of Rural Land in Brazil) must approve the proposed acquisition/lease of rural properties by foreigners residing in Brazil and by local subsidiaries with more than 51 percent of its stake held by foreigners or controlled by foreigners.

3. The prospective foreign acquirer has to prove to the competent ministry and INCRA that the land will be used to implement agricultural, livestock, industrial or colonization projects.

4. The prospective foreign acquirer may purchase limited extensions of rural property, according to a certain percentage of the national territory, which varies in each municipality.

5. Congress approval is required for the acquisition of a rural land with an area larger than 100 modules of land. The length of the
modules is defined by INCRA and varies according to the location of the land and the activity to be developed on it.

6. Approval from the National Security Council is required if the land is located in areas considered to threaten national security (usually within 150 km of the country’s borders, including the territorial sea).

7. In cases where this acquisition is important for the development of projects of national interest, the President may authorize the acquisition by means of a presidential decree.

The acquisition of rural land must be made by execution of public deed, duly registered with the relevant Real Estate Registry Office.

Restriction on foreigners is not applicable in case of collateral of rural properties, but some real estate registrars have denied the registration, even when the deed provides that actual title to the property is not transferred and only a security interest is created for the benefit of the foreign creditor.

[Revised as of April 2016]
Oil & Gas

Introduction

According to Article 1 of the 1988 Federal Constitution (“CR/88”), the Federative Republic of Brazil is formed by the indissoluble union of states, municipalities and the Federal District.\(^{25}\) The jurisdiction of each member of the Brazilian Republic is either defined by CR/88, member states’ constitutions or by municipalities’ organic laws. As a result, Brazil has three different spheres of legislative power: federal, state and municipal.

In addition, Article 20 of CR/88 vests ownership of all minerals, including the natural resources found on the continental shelf, in the federal government. Consequently, legislative power over most matters relating to energy and mineral resources is granted to the federal legislator. In some cases, however, other areas like environmental protection and taxation may be subject to state or municipal jurisdictions.

From the promulgation of CR/88 up until 1995, the Brazilian petroleum sector was under a strict state monopoly. This scenario changed radically with the approval of Constitutional Amendment No. 9/1995, which made profound changes to CR/88. It was only after this amendment that private investment in hydrocarbon activities was allowed in Brazil, creating for the first time in the country’s history competition to Petróleo Brasileiro S.A. – Petrobras (the state-owned company established in 1953 to run the aforementioned monopoly).

The Brazilian legal framework had to adapt to this new “open market” reality. In 1997, a series of institutional bodies were put in place to oversee all oil-related activities and enforce national regulations. More importantly, the government chose a concession regime as a vehicle to involve its new industry partners. All these innovations were introduced by the enactment of Law No. 9.478/1997, which is now widely known as the Petroleum Law.

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\(^{25}\) The city of Brasilia is the Federal District and also the capital of Brazil.
The concessionary regime was beneficial from an industry perspective. The country’s indigenous production jumped from 1,268,000 barrels daily in 2000 to 2,400,000 bbl/d in 2015. Moreover, ANP’s Statistical Yearbook 2016 states that, at the end of 2015, 790 areas were granted to national and international oil companies. These areas are currently divided as: 348 blocks under exploration; 71 fields under development; and 371 fields already in production.

As expected, opening the market resulted in an increased flow of public and private funds to the sector and several breakthroughs have been made since then. The most important was the discovery of the so-called pre-salt reserves in 2007. The allegedly low exploratory risks and huge profitability potential of these “pre-salt” areas led the government to suspend all concession rounds until the new findings were better studied.

Enactment of Law No. 12.351/2010 was based on the premise that the government should have more control over the wealth generated by the “pre-salt” exploitation. It accordingly amended the Petroleum Law to create a production sharing regime, in parallel with the concession structure. All previous contracts were respected and Brazil now has a mixed system whereby production sharing agreements will regulate E&P activities in “pre-salt” and other strategic areas, and the remaining territory will still be managed through the granting of concession rights.

Production Sharing Agreements

PSAs In Brazil: PSAs will only apply to “pre-salt” and other strategic areas. The 1st Bidding Round under a PSA regime occurred in October 2013, when the Libra field, in the Santos basin, was awarded to a consortium between: (i) Petróleo Brasileiro S.A.; (ii) Shell Brasil Petróleo Ltda.; (iii) Total S.A.; (iv) CNPC International Ltd; and (v) CNOOC International Limited, having Petrobras as operator. The 2nd and 3rd Bidding Rounds are scheduled for November 2017.

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Most of the “pre-salt” province is already defined by the Annex to Law No. 12.351/2010 but new sites may be included in these categories by federal government order. The intended control improvement was achieved through various provisions that, amongst other things, i) designate Petrobras as the mandatory operator, with at least 30% participation, of all “pre-salt” and strategic areas, which has recently been changed, as per below; ii) allow the government to award PSAs directly to Petrobras, without a formal bidding process; and iii) reserve to the new national oil company (Pré-Sal Petróleo S.A. – PPSA), created to represent the federal government, the right to nominate at least 50% of the seats, including the chairman, of the operating committee of all joint ventures under a PSA. In relation to the operating committee, note that it will have powers to define exploration and production plans, determine annual work programs for submission to ANP and generally supervise all joint operations. The operating committee’s chairman, appointed by PPSA, will have special veto and voting rights. In addition to the members appointed by PPSA, the other half of the committee will be appointed by Petrobras and the other contractors, in accordance with their respective shares.

Aside from PSAs awarded directly to Petrobras, all others must be preceded by a public bidding process. The winning bidder will be the one that offers the biggest share of profit-oil to the federal government. In addition to profit oil, the successful candidate must also pay a signature bonus and royalties over its hydrocarbon production. The customs and tax incentives that already apply to the Brazilian oil industry will also apply to activities under the PSA regime.

Due to Petrobras’s financial difficulties, on 29 November 2016 President Michel Temer sanctioned bill of law No. 4567/2016 cancelling the requirement that Petrobras be the sole operator and hold at least a 30 % participation interest in all pre-salt fields.

The law approved by Brazilian Congress provides that, at the time of the bidding round, Petrobras shall have a preferential right, and must determine whether or not it wishes to be the operator of the relevant area.
Concession Regime. The Brazilian concession regime has evolved since it began in 1997. All companies interested in acquiring rights to explore, develop and produce hydrocarbons in areas outside the “pre-salt” and strategic categories must participate in a transparent public bidding process. The rules of this process are defined either by the Petroleum Law, by the applicable bid invitation or by other associated regulations.

Once enrolled to participate in the bidding round, a company may elect to offer bids individually or jointly with other qualified companies. In joint bids, the group of companies awarded with a concession must organize a consortium (i.e., a non-incorporated joint venture). Foreign companies may also qualify to participate in the bidding process. However, if a concession is granted to a foreign company, it must establish a Brazilian subsidiary or branch, with a head office and administration in Brazil.

The companies which win the bids must submit to ANP all qualification documents set forth under the Bid Invitation, which aims at qualifying companies from a technical, legal and financial standpoint. Each member of a consortium must qualify individually, but specific requirements apply to operators and non-operators.

The last bid invitation used the following criteria to award marks to the candidates: i) signature bonus, equivalent to 40%; ii) local content, equivalent to 20%, of which 5% is reserved to the exploratory phase and 15% to development phase; and iii) minimum work program, equivalent to 40%. Thereafter, the marks awarded to the successful applicants are published, as are short particulars of the concession agreements signed with the winning candidates.

For the upcoming bid rounds under the concession regime, the Government is expected to implement several improvements to the draft bid invitation and concession agreements to boost attractiveness for investors, such as removing the local content as an awarding criteria, reducing the minimum net worth requirement for non-operators and differentiating royalty rates for mature areas.
**Government Takes.** The Petroleum Law created four different instruments for each government to receive its revenues from petroleum activities. There are four different charges in the form of signature bonus, royalties, special participation and payment for occupation and retention of areas. All these fund collection mechanisms are regulated by Decree No. 2.705/1998. This structure was envisaged for the concession system and, under the PSA regime, an oil company is released from the special participation and the payment for occupation and retention of areas.

**Signature Bonus.** The signature bonus is the amount offered by bidders during ANP's public bidding process, and its minimum value is established in the bid invitation. This government take must be paid by the execution date of the concession contract or the PSA. Under the PSA, the successful candidate is not allowed to include the expense incurred by the signature bonus in the oil cost and in the 1st Bidding Round under the PSA regime the signature bonus was fixed at BRL 15 billion. For the 2nd and 3rd Bidding Rounds under the Production Sharing Regime specific signature bonuses were set for each area.

**Royalties.** Royalties must be paid monthly and in domestic currency by the oil company, from the starting date of the production of crude oil and natural gas in a given field. Pursuant to the Petroleum Law, such amount is fixed at 10% of the oil and natural gas produced in concessions. However, considering the geological risks, ANP may reduce it to 5%. In the PSAs, the royalties’ rate is 15% of the production. As with the signature bonus, under a PSA the royalties amount paid by the oil company may not be deducted from the oil cost.

**Special participation.** Special participation is an extraordinary financial compensation due only by concession holders in cases where large volumes of production or high profitability occur. It is payable on a quarterly basis, in connection with each field of a given concession area. The concepts of “large volume” and “high profitability” are regulated by Decree No. 2.705/1998 and vary pursuant to the number of years of production, the location of the
production area and the quarterly production volume. There is no such charge under the PSA scheme.

**Payment for occupation or retention of area.** The bid invitation and the concession contract specify the amounts payable for the occupation or retention of an area, to be assessed every calendar year, on a square kilometer basis. Pursuant to ANP’s criteria, if the relevant block is onshore, the concessionaire must also make a monthly payment to the surface owner of the property, which may vary from 0.5% to 1% of the oil or natural gas production.

**Local Content.** The Brazilian Government is currently reviewing the local content policy applicable to upstream activities. The former policy was extremely complex and generated several fines in past years, due to companies' inability to meet the high percentages committed.

Based on the new policy outlined in National Council of Energy Policy's recent resolutions, local content will cease to be a criteria for awarding concession agreements in the upcoming bidding rounds. Also, a global local content percentage has been set for each contract phase, as opposed to the previous regime which provided for both global and per item requirements. The new percentages of local content applicable to the 14th Bidding Round are as follows:

Onshore: (i) exploration phase: 50%; (ii) production: 50%

Offshore: (i) exploration phase: 18%; (ii) construction of wells: 25%; (iii) collection and drainage systems: 40%; and (iv) Stationary Production Units (UEPs): 25%

Also, based on the new rules, the penalties for non-compliance with Local Content obligations contemplated by the relevant agreements were reduced from up to 100% to 75% of the value of the difference between the commitment made by the oil company and the actual local content percentage achieved. However, based on the new policy companies will no longer be authorized to request the ANP for
waivers of local content requirements in specific situations, which was possible under the previous regulation.

Currently, the following ANP Resolutions apply to local content: ANP Resolution No. 19/2013 formalizes the adoption of the Local Content Booklet and provides rules regarding compliance with Local Content commitments undertaken by the concessionaires on each bidding round. ANP Resolution No. 25/2016 introduces provisions for the qualification of companies to act as certifying entities. Under the new regulation, oil companies are obliged to obtain Local Content Certificates issued by these accredited certifying entities in order to evidence the compliance with their Local Content undertakings. The resolution also defines ANP’s auditing procedures of the certifying entities. Finally, ANP Resolution No. 27/2016 provides the format on which the oil companies must submit annually reports regarding their investment on the acquisition of goods and services in Brazil.

In view of the recent changes to the local content policy it is possible that ANP will revise its current regulation, for the contracts to be awarded in the 14th Bidding Round onwards.

**Unconventional resources.** To date, Brazil’s shale potential has not been analyzed in detail, but according to ANP's initial studies, shale gas deposits could even exceed the pre-salt gas reserves.

In November 2013, ANP promoted the 12th Bidding Round, when 240 blocks were offered, including shale prone areas.

In April 2014, ANP enacted Resolution No. 21/2014 which sets forth the technical and environmental requirements for concessionaires authorized to explore and produce unconventional Natural Gas resources using the horizontal fracking technique.

Even though Brazil’s potential for unconventional resources seems promising, there are significant environmental, infrastructure and legal challenges to overcome, such as the four (4) Civil Public Actions that intend to declare null the effects of the 12th Bidding Round, in which shale-prone areas in Parana, São Paulo, Bahia and Piauí were awarded
to concessionaires. Currently, all courts have accepted the injunctions requesting suspension of exploration activities.

**Calendar for Bidding Rounds.** The National Council of Energy Policy announced in April 2017 a calendar that foresees, until 2019, ten (10) Bidding Rounds of exploratory blocks in onshore and offshore basins, both under concession and production sharing regimes. Thus, in addition to the bidding rounds previously announced for 2017 (4th Bidding Round of Areas with Marginal Accumulation, 3nd and 2nd Pre-Salt Bidding Rounds, involving unitizations, and 14th Bidding Round), the following rounds were approved:

- **4th Pre-Salt Bidding Round,** scheduled for May 2018 (prospects of Saturno, Três Marias and Uirapuru, in the Santos Basin, and blocks C-M-537, C-M-655, C-M-657 and C-M-709, in the Campos Basin);

- **5th Pre-Salt Bidding Round,** scheduled for the second semester of 2019 (prospects of Aram, Lula Southeast, Júpiter South and Southwest and Bumerangue, in the Santos Basin);

- **15th Bidding Round of Concessions,** scheduled for May 2018 (offshore blocks in Foz do Amazonas - sectors SFZA-AP1, AP2, AR1 and AR2 - Ceará - sectors SCE-AP2 and AP3 - and Potiguar - sectors SPOT-AP1, AP2 and AR2; ultradeep waters outside the Pre-Salt of Campos Basin - sector SC-AP4 - and Santos Basin - sector SS-AUP1; onshore basins in Paraná - sectors SPAR-N and CN - and Parnaíba - sectors SPN-SE and N, as well as other onshore sectors from the Sergipe-Alagoas, Recôncavo, Potiguar and Espírito Santo Basins);

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- 5th Bidding Round of Areas with Marginal Accumulation, scheduled for May 2018 (areas to be defined); and

- 6th Bidding Round of Areas with Marginal Accumulation, scheduled for the second semester of 2019 (areas to be defined).

**Midstream**

Gas field exploration and production is also regulated by ANP and must follow the same regime applied to oil corresponding activities. The federal government enacted Decree No. 7.382/2010, which regulates Law No. 11.909/2009 ("Gas Law"). Since enactment, natural gas transportation activities are to be generally performed under a concession regime, always preceded by a public bidding process.

In some exceptional cases, the Decree allows for a more simple authorization regime. These cases are: i) transportation gas pipelines involving international treaties, as defined by MME; ii) pipelines existing as of 5 March 2009; iii) pipelines whose construction has been authorized by ANP on or prior to 5 March 2009 but has not yet been initiated; and iv) extensions of the abovementioned pipelines.

The Decree also states that MME is responsible for identifying the transport gas pipelines that must be built or expanded. In order to fulfill this responsibility, the minister must prepare, with the support of the Energy Research Company (EPE) and ANP, Brazil’s Decennial Plan for Expansion of the Transport Gas Pipelines.

Regarding exclusivity, the decree secures initial carriers a 10-year exclusivity period for new pipelines. After this period, carriers must open their infrastructure to third-party transportation, pursuant to future regulations yet to be enacted by ANP. The exclusivity period may end before the due term when operations reach maximum
capacity or if there is evidence of abusive practices by the initial carriers.

Third party access to the infrastructure is allowed only after the exclusivity period ends. The decree expressly allows the following types of access: swap, operational exchange of natural gas, and extension of transportation capacity. ANP has authority to regulate how this access will be performed and to establish the criteria to define the third parties’ volume that will enter the pipelines.

Although it was expected that the decree would clarify some aspects of the Gas Law, it left many aspects under ANP’s regulatory control. Some worth mentioning include: i) the definition of delivery point and reception point; ii) the end of the exclusivity period due to the pipeline reaching its maximum capacity; iii) the regulation of the operational exchange (swap) and new fees resulting from it; iv) fees to be paid by loaders; v) evidence of technical capacity for foreign companies to participate in public bids; vi) performance indicators of the concession contract; vii) authorization to expand the capacity of existing pipelines; and viii) requirements and conditions for granting and transfer of ownership of the authorization of processing units or treatment of natural gas.

Due to such regulatory gap, on 18 March 2016, ANP launched Resolution No. 11/2016, which consolidated Brazil's legal framework for natural gas. The resolution regulates the transportation through gas pipelines, emphasizing swap operations and open access to gas pipelines.

On the other hand, the industry is still waiting for the 1st Bidding Round for construction of gas pipelines in Brazil, since ANP, after TCU's decision in December 2015, suspended the process for allegedly overpricing the project. Subsequently, in August 2016 ANP decided to cancel the auction to choose a company to construct a gas pipeline between the cities of Itaborai and Guapimirim.

Abengoa, Alupar, Celeo Redes Brasil, Construtora Elevação, DM Construtora de Obras and Exactum Consultoria e Projetos were
registered to participate in the bidding and were refunded the registration and access to technical data fees.

**Perspectives for the Natural Gas Market.** In April 2017 the National Council of Energy Policy published a resolution establishing new directives for the natural gas sector in Brazil (Resolution No. 10/2016). The Government's declared objective is to create conditions to attract investments and increase competitiveness in a scenario of Petrobras' reduced participation and low oil prices. This same resolution also created the Technical Committee for the Development of the Natural Gas Industry in Brazil (CT-GN), which is expected to present a proposal within 120 days with measures necessary to improve the sector's legal framework.

Amongst the 19 directives that will guide the new natural gas policies, we highlight the stimulation of competition, the removal of economic and regulatory barriers, the development of short-term and secondary markets, and the promotion of integration between the sectors of natural gas and electric energy, targeting a balanced allocation of risks, adequacy of the natural gas supply model for thermoelectric generation and the gas integrated planning-electricity.

The CT-GN will be coordinated by the Ministry of Mines and Energy (MME) and will be represented by agents of the Chief of Staff Ministry, Ministry of Science, Technology, Innovation and Communications, Ministry of Planning, Ministry of Finance, Ministry of Industry, Foreign Trade and Services, Energy Research Company (EPE), National Oil, Natural Gas and Biofuel Agency (ANP), National Energy Agency (ANEEL), National Forum of State Secretaries of Mines and Energy (FME), Brazilian Association of Regulatory Agencies (ABAR), and representative associations of agents that act in the various chains of the natural gas sector.

**Downstream**

Any company may submit a proposal to ANP to operate or to construct refineries or natural gas processing units. It is important to highlight that this authorization may only be granted to companies or
consortia organized in compliance with Brazilian legislation and with a head office and administration in Brazil, subject to other conditions provided for by ANP’s specific regulations.

Establishing a distributor in Brazil also requires prior authorization and registration from ANP. ANP has issued several specific ordinances regulating and explaining in detail all the necessary documentation and information to be provided so as to obtain said authorization.

In order to obtain both the registration and the authorization, the prospective distributor must meet several conditions, among which is the minimum stated capital, and the necessary infrastructure for storing the by-products.

**Exportation and importation**

In order to receive authorization to export or import crude oil and its by-products, the exporter or importer must provide ANP with all the necessary information and documentation related to the business to be rendered. Such information must be updated by the company every 18 months, subject to cancellation of said authorization.

According to specific ordinances issued by ANP which regulate this business, both the import and export of crude oil, its by-products and condensed gas, must be performed in strict compliance with certain objectives and principles set forth by the Petroleum Law, such as protection of consumers and the Brazilian Treasury, foreign trade rules, national energy policy, principles of transparency and legality, rules for protection of the economic order, and environmental regulation.

To carry out import and export transactions, Brazilian companies must be registered with the *Registro e Rastreamento da Atuação dos Intervenientes Aduaneiros* (“RADAR”), which will allow such company to access the Brazilian Electronic Foreign Trade System (Siscomex - *Sistema Integrado de Comércio Exterior*).
The Siscomex is the Brazilian foreign trade management system that integrates the activities of the Foreign Trade Secretary (Secretaria de Comércio Exterior – SECEX), the Federal Revenue Agency – SRF and the Brazilian Central Bank - BACEN, in registering, following and controlling all steps related to import and export operations.

Requirements for companies enrolling with the RADAR may vary depending on the specific circumstances under which the Brazilian entity will operate.

**Environmental aspects**

Brazilian environmental policy is implemented at federal, state and municipal levels. The Federal Environmental Protection Agency is the Brazilian Institute of the Environment and Renewable Resources (Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis - IBAMA). IBAMA is responsible for implementing environmental policy at the federal level, which includes issuing certain rules (to specify general rules enacted by the National Council of Environment), inspecting environmental activities and conducting environmental licensing proceedings. States and some Municipalities have their own environmental protection agencies which are competent to enact laws and rules that must be observed within their respective territories. Environmental licensing may also be conducted by State and Municipal environmental agencies, as established by law.

As per Supplementary Law No. 140/2011 and Federal Decree No. 8437/2015, IBAMA is the competent agency to carry out environmental licensing proceedings for oil and gas activities conducted offshore and in transitional areas, which comprise both offshore and onshore areas and for production of unconventional resources both offshore and onshore (including drilling, fracking, implementation of production lines and flowlines).

Ruling No. 422/2011, enacted by the Ministry of Environment, regulates and establishes special procedures for environmental licensing of offshore conventional activities. These procedures vary depending on the type of activity in the oil and gas industry. The
The complexity of the proceedings vary depending on the sensitivity of the area, the existence of pre-existing regional environmental studies or studies conducted in previous licensing proceedings or in special reference proceedings conducted directly by IBAMA. The complexity depends upon the need for more or less detailed environmental studies to be prepared by the applicant during the first phase of each proceeding. As a general rule, the licensing proceedings comprise the following activities and steps:

1. License for Seismic Research – a license issued to conduct seismic research, which complexity varies depending on the depth of the area in which the research will be conducted or the environmental sensitivity of the area, as defined by IBAMA;

2. Operating Drilling License – a license issued to conduct drilling activities, which complexity varies depending on the depth of the well area, the distance of such area from shore and the environmental sensitivity of the area, as defined by IBAMA;

3. Licensing proceedings involving the issue of preliminary, installation and operating licenses for production and outflow of Oil & Gas – a proceeding that concludes with the issue of an operating license for the production and outflow of hydrocarbons. The first step of the proceeding is generally the most complex and time consuming as it requires environmental studies and public hearings to be prepared, as the case may be. The Preliminary License is granted to attest the viability of the project, while the Installation License authorizes the commencement of the facilities installation and the Operating License enables the commencement of such activity; and

4. Licensing proceedings involving the issue of preliminary, installation and operating licenses to conduct long-term tests – an administrative proceeding that concludes with the issue of an operating license to conduct long-term tests, provided that in certain cases, the proceeding may be simplified and only require the issue of both Installation and Operating Licenses or the issue of an Operating License only, if the test: (i) involves one well, (ii) has a validity of less
then 180 days, (iii) is located at a distance of more than 50 meters from shore, and (iv) is conducted in areas deeper than 50 meters.

Environmental licenses are always issued based on the premises and information provided during the proceeding and contain conditions to be followed while the license is valid. If the conditions are breached, the licensed company may be subject to administrative penalties and criminal penalties, which may include cancellation of the environmental license.

As to timing, Brazil has been reviewing its licensing proceedings in an attempt to reduce the time required to obtain a license. Ruling No. 422/2011 provides for terms of 6 or 12 months for IBAMA to issue a final opinion on the granting or denial of each of the Licenses abovementioned, but such deadlines may be suspended if IBAMA requires the applicant to present further clarification or conduct additional studies. In this way, the length of a proceeding may vary depending on the specific case.

The Ruling also contemplates the possibility of conducting public hearings during the proceeding, but the need for such hearing will depend on the specific case and/or upon request by the Public Attorney’s Office or other legitimate party, including the relevant stakeholders or the society involved. The rules concerning public hearings are stated in CONAMA Resolution No. 9/1987 (which is currently under review).

Also with respect to environmental licensing proceedings, it is important to mention that except in certain cases, onshore oil and gas exploration and production, as well as activities of midstream and downstream are conducted by the State in which the activity is developed. The environmental licensing proceedings for such activities vary depending on the legislation of each State, but generally comprise three phases, each of them concluded with a Preliminary License, an Installation License and an Operating License. Also in general terms, the first step of the proceeding will be preceded by environmental studies prepared by the applicant and public hearings, as the case may be.
Environmental liability includes three types of liability: civil liability, administrative liability and criminal liability. Civil environmental liability obliges a party causing environmental damage to recover the environment or indemnify the community for such damage. Environmental legislation also contemplates piercing the corporate veil whenever the existence of the legal entity is considered a barrier to recovering damages.

Causing environmental damage, operating without the proper environmental license or breaching license conditions, among other legal violations, may also trigger administrative and criminal liabilities.

Law No. 9,605, of 13 February 1998, and Decree No. 6,514, of 22 July 2008, define environmental crimes and administrative infractions, respectively, and establish the applicable penalties. Both administrative and criminal sanctions may be imposed on individuals and legal entities that cause environmental damage, including officers, partners, shareholders, members of the board of directors, managers and employees.

Criminal and administrative sanctions imposed on legal entities may vary from warnings to fines of up to BRL 50,000,000.00 and a suspension of the activity, a prohibition on obtaining public lines of credit or a prohibition on contracting with Public Authorities. Criminal sanctions over individuals may include imprisonment. It is important to note that the threshold is set per infraction/typified crime. In some recent cases, authorities were able to identify one pollution event in different infractions/crimes, resulting in multiple fines which significantly exceeded the threshold.

In addition to those statutes, there are several other supplementary rules regarding mandatory environmental audits, implementation of environmental impact evaluations, preparation of emergency and contingency plans in case of accidents, restrictions and rules on the use of chemical dispersants, and communication of accidents, among others.
Tax Aspects

a) General Overview

Companies engaged in the oil and gas industry must pay all mandatory Brazilian taxes applied to any other industry.

This section aims to summarize the most significant tax aspects that may particularly affect oil and gas companies.

b) Special Custom Regime for Export and Import of Goods Used on Activities of Research, Development and Production of Oil and Gas – REPETRO

In order to develop the oil and gas industry, the Brazilian Government enacted Decree No. 3,161 of 2 September 1999, providing a special customs regime known as “REPETRO.” This regime was intended to provide oil and gas exploration and production companies with access to listed equipment with a reduced tax burden, provided that the customs value of the equipment exceeds USD 25,000 per item. It also aims to offer local suppliers favorable conditions vis-à-vis foreign equipment.

REPETRO is currently ruled by Decree No. 6,759/09 and by Brazilian IRS Normative Ruling No. 1,415/2013, as amended by IRS Normative Ruling No. 1.601/2015, Customs Management General Coordination (COANA) Ordinance No. 3/2014 and No. 45/2014. Note that REPETRO will remain in force until 31 December 2020. However, REPETRO's extension is being considered under the National Council of Energy Policy (CNPE) Resolution No. 2/2016.

The REPETRO regime is available for equipment listed above USD 25,000 under IRS Normative Ruling No. 1,415/2013 (“REPETRO assets”). In a nutshell, the following assets may qualify for the REPETRO regime: (i) vessels used for activities related to research and production of oil and gas fields and those used for storage and the support of relevant activities; (ii) machines, apparel, instruments, tools and equipment used for activities related to oil and gas research and
production; (iii) oil and gas drilling and production platforms and platforms destined to support such activities; (iv) automobiles assembled with machines, apparel, instruments, tooling and equipment destined for activities of research and production on oil and gas fields; and (v) structures created to support platforms.

In addition, REPETRO also applies to machines, apparel, instruments, tooling, equipment and other parts and pieces intended for: (i) operating equipment listed under the abovementioned Normative Ruling; (ii) rescue, accidents prevention and fire fighting; and (iii) environment protection.

Note that goods subject to finance leasing agreements cannot be imported under the REPETRO regime, according to Article 3, paragraph 4th, - of IRS Normative Ruling No. 1,415/2013.

Brazilian legal entities may qualify for the REPETRO regime if: (i) they hold the rights to explore and research oil and gas fields (“concessionaires”); or (ii) they were contracted by an oil and gas concessionaire, or its subcontractors, to perform services or to time-charter vessels for the execution of such activities. If the service contractor or the charterer is domiciled abroad, it can appoint a Brazilian legal entity to act as importer of record for REPETRO purposes.

Brazilian legal entities must obtain a REPETRO license (habilitação) before entering into any REPETRO transaction. This first phase, i.e., the REPETRO license application, consists of an application submitted by the oil and gas concessionaire to the Brazilian IRS, under which the concessionaire indicates the contractors, subcontractors or third parties designated for the import of the REPETRO items.

The REPETRO allows the importer to benefit from three different special customs regimes: (i) Drawback; (ii) Notional Export; and (iii) Special Temporary Admission.
• Drawback is governed by Ordinance SECEX No. 23, dated as of 14 July 2011, and allows the importer to import inputs with suspension or exemption of federal customs duties (i.e., import duty, federal excise tax, PIS and COFINS) provided that inputs are used in the manufacture of goods destined to export.

• Notional Export is the sale by the manufacturer or trading companies of goods produced in Brazil to companies domiciled abroad, with payment in convertible currency or national currency. Although delivery is made in Brazil, it is leveled to regular export for fiscal and exchange purposes, that is to say, exempted from federal taxes (Article 10 of IRS Normative Ruling No. 1,415/2013).

• REPETRO Temporary Admission allows the importer to import listed equipment valued at USD 25,000 or above with full suspension of federal customs duties (i.e., import duty, federal excise tax, PIS and COFINS) for their length of stay in the country. A REPETRO applicant must provide the Brazilian IRS with, amongst others, the following documents: (i) Request for the Concession of the Regime (Requerimento de Admissão Temporária or RAT); (ii) Term of Responsibility (Termo de Responsabilidade), through which the applicant undertakes to pay the value corresponding to the suspended taxes if it fails to comply with REPETRO’s conditions; and (iii) instrument of guarantee, if the value of the suspended taxes is more than BRL 100,000.

To qualify for REPETRO’s temporary admission, a given asset must: (i) belong to a legal entity domiciled abroad; (ii) be imported without exchange coverage; or (iii) come directly from abroad or have been submitted to export customs clearance or have been transferred from another special customs regime. In case of vessels, REPETRO's grant will also be subject to the Brazilian Navy’s authorization to operate in Brazilian waters.
REPETRO’s assets may stay in Brazil, under temporary admission, for the length of the period conceded in the respective Declaratory Act (“Ato Declaratório Executivo - ADE”) which granted the regime request and of the relevant supporting contract (i.e., concession agreement and services agreement executed with the concessionaire or its subcontractor). If the temporary admission was granted under an operational lease, rental or free loan agreement, the regime will be granted for the term of such agreements. The temporary admission of vessels must observe the term granted by the Navy authorities for the vessel’s operation within the country.

In order to extend the validity of REPETRO, its beneficiary must request an extension of such regime to the Brazilian (Requerimento de Prorrogação do Regime or RPR) before it terminates.

The temporary admission regime will be extinguished and the related Term of Responsibility will be cancelled if the beneficiary adopts any of the following measures: (i) re-exports the asset abroad; (ii) delivers the asset to the National Treasury, free of any expenses, if the Customs authority agrees to receive it; (iii) destroys the asset, at the beneficiary’s sole expense; (iv) transfers the asset to another special custom regime; or (v) forwards the asset for consumption.

c) Convenio ICMS No. 130/07

State Value-Added Tax (“ICMS”) is a tax on sales and services, payable upon import of an asset into Brazil, or upon its sale or transfer within Brazil, or as to certain communications and intra and interstate transportation services, at the time when the service is provided.

Under the Brazilian Constitution, ICMS benefits must be created by agreement of all Brazilian States and the Federal District through a specific legal act called Convenio ICMS. Convenio ICMS works as a general authorization under which each state (or the Federal District) shall enact its own provisions.
From a state tax standpoint, the REPETRO regime is governed by Convenio ICMS No. 130/07,26 as amended by Convenio ICMS 163/10 and Convenio ICMS 04/13 which authorizes the states and the Federal District to exempt and reduce the ICMS tax basis on imports, under the REPETRO of listed assets destined for oil and gas activities.

The following are among the benefits granted by Convenio ICMS No. 130/07:

(i) ICMS tax basis reduction on imports of listed assets applied to installations destined for oil and gas production so that the total ICMS tax burden would be 7.5% under the non-cumulative system, or 3% under the cumulative system, as elected by the taxpayer. This tax treatment is also granted to imports of inputs, accessories, parts and pieces destined to guarantee the operation of the listed oil and gas assets.

(ii) ICMS exemption or tax basis reduction on imports of listed goods applied to installations destined for oil and gas exploration so that the total ICMS tax burden would be 1.5% without the accrual of the corresponding ICMS credit.

(iii) ICMS exemption on imports of equipment destined to be exclusively used for the provision of services during the exploration phase and to imports of equipment of interconnected use in both exploration and production phases which has entered the country to provide services for a period equal or longer than 24 months.

(iv) ICMS exemption on transactions preceding the exit of assets and goods manufactured in Brazil, destined to entities domiciled abroad, and subsequently followed by the import of the same assets and goods under REPETRO to be used in oil and gas activities.

26 Convenio ICMS No. 58, of 28 October 1999, authorizes the Brazilian states and the federal district to grant ICMS reductions or exemptions levied on imports of assets into Brazil under the temporary admission regime in general.
exploration and production installations, within or outside the state territory in which the manufacturer is located.

To date, the States of Amazonas, Alagoas, Bahia, Maranhão, Rio de Janeiro Rio Grande do Norte, Rondônia, Santa Catarina and Sergipe have fully incorporated the benefits of the relevant Convenio. The states of Espírito Santo, Paraná, Rio Grande do Sul and São Paulo have partially incorporated such benefits.

More recently, however, the Federal District has been excluded from Convenio ICMS No. 130/0727, and the State of Rio de Janeiro suppressed all ICMS benefits granted to the oil and gas industry through the enactment of Legislative Decree No. 2/2016.

d) Bonded Warehouse Special Customs Regime

IRS Normative Ruling No. 513 of 17 February 2005 and its amendments, allows the operation of a bonded warehouse regime, applicable to the construction and conversion of listed offshore oil rigs and rig modules, inside the rigs under construction or conversion, in quaysides or in any other industrial seashore or port facilities, intended for the construction of maritime structures, oil rigs and rig modules.

The bonded warehouse regime may apply to materials, parts, pieces and components used to construct and convert listed offshore rigs and modules in Brazil, intended for the exploration and production of oil and gas, and contracted by foreign companies. In order to qualify for the regime, a Brazilian company must be contracted by a foreign company to construct or convert an offshore oil rig or module. This regime provides for the suspension of the federal taxes levied on imports (i.e., import duty, federal excise tax, PIS and COFINS). It also applies to the taxes levied on the local acquisition of goods (i.e., federal excise tax, PIS and COFINS), provided that such goods are incorporated into the oil rig or rig module to be exported. As a matter of fact, the “suspension” of federal taxes means that no taxes will be

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27 Convenio ICMS 100/16.
due, provided the oil rigs or rig modules being constructed or converted are intended for export.

The bonded warehouse regime also applies to oil rigs and rig modules that are notionally exported from Brazil - i.e., whenever these assets are acquired by a foreign buyer, without leaving the Brazilian territory, and are delivered by order of such foreign buyer to the legal entity contracted to carry out their construction or conversion, the payment must be made in convertible currency.

On the other hand, if a rig or module is not exported – notionally or physically – the taxes suspended must be effectively paid with a late fine and interest. In addition, if a given asset has not been incorporated into the rig or module being exported, the suspended taxes corresponding to such asset will also be due.

e) Withholding Income Tax on Charter and/or Rental of Vessels

Brazilian Withholding Income Tax (WHT) is generally levied on income paid, credited or remitted abroad by Brazilian residents at a 15% rate, if the recipient is domiciled in a regular tax jurisdiction, and at a 25% rate, if recipient is domiciled in a low-tax jurisdiction (Article 685 of the Brazilian Income Tax Regulation).

Nevertheless, the Brazilian WHT rate is reduced to zero on amounts paid, credited or remitted abroad, in consideration for the charter and/or rental of vessels, as provided by Article 1 of Brazilian Law No 9,481 of 13 August 1997, amended by Law No 13,043 of 13 November 2014.

To qualify for the zero rate reduction, however, the relevant charter/rental agreement must be duly registered with the Brazilian authorities. In addition, if the charter/rental agreement was entered together with a service agreement for the provision of activities associated with the research and exploration of oil and natural gas, the charter/rental fees must not exceed the following percentages of the overall revenues arising from both relevant contracts, as follows:
(i) 85% in case the charter/rental involves a Floating Production Systems – FPS;
(ii) 80% in case the charter/rental involves a drilling rig vessels; and
(iii) 65% in case the charter/rental involves other vessels, such as seismic and/or support vessels.

f) Contribution for Intervention in the Economic Domain (CIDE) on Fuels

Law No. 10,336 of 20 December 2001, created CIDE which is the contribution levied on the import and sale of certain types of fuel (i.e., gasoline and its chains, diesel and its chains, aviation kerosene and other types of kerosene, fuel-oil, liquefied petroleum gas (including derived from natural gas and naphtha) and ethyl alcohol fuel, as per its Article 3), at the rates fixed in Article 5.

However, Decree No. 5,060 of 30 April 2004, and its amendments, including the Decree No. 8,395/15, which increased the CIDE rates levied on gasoline (and its chains) to BRL100/m³ and levied on diesel (and its chains) to BRL50/m³. The relevant decree has also maintained the CIDE rates at zero for other listed products. CIDE taxpayers are the producers, formulators or importers of liquid fuels. Note that the CIDE amounts paid may be deducted from PIS and COFINS levied on the sales of liquid fuels in Brazil.

Note that according to Article 10 of Law No. 10,336/01, CIDE does not apply to sales of goods to commercial export entities (e.g., trading companies), with the sole purpose of exportation.

g) Municipal Service Tax (“Imposto sobre Serviços de Qualquer Natureza – ISS”)

Federal regulations list specific services to which a municipal services tax (ISS) applies. Rates vary from 2% to 5%, depending on the type of
service and the particular municipality in which the party rendering the services is located. Therefore, each municipality may set forth in the relevant municipal law that the recipients or agents of the services in Brazil are responsible for collecting the tax due.

In this regard, some Brazilian Municipalities, such as Macaé, in the North of the State of Rio de Janeiro, offer reduced ISS rates for oil and gas related services provided that the taxpayer organizes itself and/or performs the services within their territories.

[Revised as of April 2017]
International Trade Regulation

International trade relations are regulated by a set of rules and agreements negotiated in bilateral, regional and/or multilateral forums, aimed at promoting the transparency of such relations and the continuous liberalization of international trade within the context of the global economy.

In this context, it is worthy to note the activities of the World Trade Organization (“WTO”), which was created in 1994, and is made up of more than 147 members, including Brazil. Moreover, trade relations in Brazil are also heavily influenced by the rules of MERCOSUR, which includes Argentina, Uruguay and Paraguay\(^{28}\) as founding members, and Venezuela (since 12 August 2012). Bolivia,\(^{29}\) Chile, Peru, Colombia, Ecuador, Guyana and Suriname\(^{30}\) are associate members.

The international trade system, established under the WTO and other international agreements, has a direct impact on: (i) virtually all trade in goods; (ii) the international provision of services, including distribution, telecommunications and financial and professional services; and (iii) the protection of intellectual property rights.

These rules provide businesses with access to new markets, improved competitive conditions in existing ones and a framework in which to plan investments and within which to rely upon the enforcement of international obligations.

Brazil is a founding member of the WTO. Thus, the Brazilian government is responsible for ensuring compliance with WTO Agreements on the national level, for safeguarding the Brazilian industry against unfair trade practices implemented abroad and for affording the commercial viability of foreign companies. The WTO Agreements were incorporated into national law in December 1994,

\(^{28}\) Paraguay’s membership has been suspended since June 2012.

\(^{29}\) Bolivia is in the process of becoming an effective Mercosur member.

\(^{30}\) The membership of Guyana and Suriname is still pending ratification.
following the ratification of Presidential Decree No. 1,355 of 30 December 1994.

In addition, as a member of the Asunción Treaty, which established the Southern Common Market or MERCOSUR in 1991, Brazil is part of a free trade zone aimed at eliminating all tariff and non-tariff barriers for virtually all trade among the group’s founding members, thus guaranteeing a free transit of products, services and factors of production between and among the member states.

Moreover, the Asunción Treaty established a customs union with a Common Foreign Tariff (TEC) ranging from 0 to 20 percent for 85 percent of products, applicable to imports from non-member states. It also put in place a common set of rules of origin and the gradual coordination of macroeconomic policies among member states.

Additional protocols to the Asunción Treaty, such as the Protocol of Brasilia, the Protocol of Ouro Preto, the Protocol of Fortaleza and the Protocol of Olivos, provide MERCOSUR with, inter alia, the following:

- A dispute settlement system based on three alternatives: (i) negotiation; (ii) conciliation; and (iii) arbitral procedures, with the possibility of an ad hoc arbitration tribunal and/or a permanent tribunal of review
- The status of a legal person, which allows MERCOSUR to respond as a single entity with rights and obligations, and to enter into international negotiations as a bloc
- An institutional structure, in which decisions are taken under a consensual and intergovernmental basis, and subsequently incorporated by each member state in its own legislation
- A common set of rules for a competition regime under a regional approach
Brazil is also a founding member of the Latin American Integration Association (“ALADI”), which was created in 1980, with the view of establishing an economic preference zone that would provide favorable conditions to the growth of bilateral enterprises, as a prelude to the institution of multilateral relationships in Latin America. Under the auspices of ALADI, Brazil signed several trade agreements with other Latin American countries, granting and receiving a large number of tariff preferences.

Aside from the free trade zone with its MERCOSUR partners, Brazilian imports and exports benefited from significant preferences contracted with Mexico, Bolivia, Cuba, Chile, Peru, Colombia, Venezuela and Ecuador, which provided Brazil with a privileged position among the best countries as the region to invest in the import-export business.

Over the past few years, MERCOSUR has been involved in several diplomatic initiatives toward the signing of relevant international trade agreements, such as the negotiations with the European Union, India and South Africa, aside from the hemispherical efforts to create a free trade zone in the Americas.

**An Overview of the Brazilian Regime for Trade Remedies**

Other than import restraints, a number of policies of firms or governments are designed to influence international trade. The use of discriminatory pricing or subsidies, in particular, may be used by both governments and enterprises to promote exports. For decades, many versions of these practices have been considered “unfair” by the international system and several national systems.

To such practices, the international rules have permitted certain responses from the importing nations, such as anti-dumping duties or countervailing duties.

To comply with its obligations under the WTO, Brazil adopted supplementary regulations in the fields of trade remedies, including subsidies, anti-dumping duties and safeguards. Law No. 9,019/95
provides for the application of anti-dumping duties and countervailing measures, while Decree Nos. 1,751/95, 1,488/95 and the recently issued 8,058/2013 regulate the administrative proceedings carried out to determine and eliminate the practices of subsidies, safeguards and dumping, respectively.

In brief, the administrative procedure for the investigation of alleged dumping or subsidy can be divided into three phases. The first entails the scrutiny of the petition filed by the petitioner(s) representing a domestic industry. This petition should include, *inter alia*, positive information to demonstrate the practice of dumping/subsidy, the harm to the domestic industry and the causal link between the dumping/subsidy measure and the injury to the same. The Brazilian authorities (“SECEX/DECOM”) will examine the petition, and they may ask for additional information during the second phase of the procedure, which will be concluded after a final hearing to be attended by the petitioner and interested parties. At this hearing, a technical note will be circulated, summarizing the main data that will be considered by SECEX/DECOM when evaluating the case.

The last stage encompasses the submission of the final opinion drafted by SECEX/DECOM for the review of the Trade Protection Technical Group (“GTDC”), a task force created under the auspices of the Brazilian Chamber of Foreign Commerce (“CAMEX”). CAMEX, which is in charge of formulating policies and coordinating activities related to foreign trade, will then issue a final decision as to whether or not a provisional or definitive anti-dumping duty or countervailing measure may be imposed.

In relation to anti-dumping duties, interested parties may request that the government initiate a “public interest” assessment, which is an instrument for interested parties in Brazil that may be negatively affected by the dumping duties (for example, those facing a potentially higher domestic price, or a threat of scarcity) to submit their views to the government in parallel to the anti-dumping investigation.
As a result of this proceeding, CAMEX may, in the same order that imposes the duties, “suspend” them for one year if they understand that the measures (normally imposed for five years) are not aligned with the public interest. If by the end of the one-year suspension, the authorities do not reinstate the duties, they are automatically terminated.

Trade remedies are efficient tools that may be used by the private sector in Brazil as a competitive advantage to hinder the increase in imports that jeopardizes its market share in the national market. Two of the benefits of trade remedies are: (i) guaranteeing market presence at a national level and (ii) protecting investments related to the entry into this market.

In this context, in 2010, Brazil issued a regulation aimed at avoiding the circumvention of trade measures applied by the Brazilian government (CAMEX Resolution No. 63/2010). This resolution provides for the extension of ongoing trade remedies to third countries as long as they are found involved in circumvention practices devised to thwart the effectiveness of trade measures adopted by Brazil. These measures can also be extended to parts and components of the products subject to trade remedies, provided that these parts are being exported to Brazil so as to evade the imposition of anti-dumping duties or countervailing measures on imports of the final product.

In terms of procedure, the administrative investigation of circumvention practices is very similar to dumping or subsidy investigations. However, the anti-circumvention investigation is devised to assess whether, in view of unreasonable changes in trade flows – as of the initiation of the investigation that resulted in the imposition of trade remedies – the remedial effect of these measures is being undermined. In Brazil, there are two anti-circumvention investigations currently being carried out by the authorities.

Given the frequent recourse to the abovementioned remedies by WTO members, such mechanisms have actually been applied as non-tariff barriers against imports. Therefore, participating and intervening in
the investigation of trade remedies undertaken abroad is of great importance to Brazilian exporters.

Likewise, foreign companies exporting to Brazil must be aware of possible investigations initiated at a national level, which may affect their commercial interests.

**International Trade Law in Brazilian Courts**

Presidential Decree No. 1,355 of 30 December 1994, incorporated the WTO Agreements into national law, thereby conferring jurisdiction to domestic courts to oversee claims of violations of such rules. The WTO offers importers and exporters a set of useful tools to open markets that would otherwise remain closed. To take advantage of WTO opportunities, a business must learn how to use the rules, understand and incorporate them into its strategies and monitor the country’s compliance with its obligations under the WTO.

In case of any violation of WTO agreements, a mechanism of dispute settlement may be set up as an alternative to guarantee international compliance to such set of rules and the adoption of practices compatible with the negotiated agreements.

Also under MERCOSUR’s framework, the ad hoc arbitration tribunal and the permanent tribunal of review were designed to resolve conflicts between member states and individuals/entities domiciled therein. Just as it occurs in the WTO, the referred courts are intended to maintain the objectives expressed in MERCOSUR agreements, which are sustained by the general principles of nondiscrimination, trade liberalization and regional integration.

When should a business use domestic courts in Brazil to enforce international trade rules? The following are some situations in which a government may violate its international undertakings, and a remedy may be available:

1. Internal laws and regulations are applied in such a manner as to protect domestic production vis-à-vis imports.
2. Government discriminates against imported or exported products, or services and service suppliers based on the country of origin, particularly when goods or services from distinct origins are treated differently.

3. Anti-dumping, countervailing or a safeguard investigations are conducted by Brazilian authorities in a manner not consistent with international agreements signed by Brazil and to the detriment of imports.

4. Environmental protection rules, sanitary measures or technical requirements are applied so as to block imports.

5. Import licensing regime or other acts undertaken by Brazilian customs authorities are inconsistent with WTO or MERCOSUR rules.

6. Government imposes export restrictions with respect to joint ventures that have foreign investment.

Private companies are increasingly presenting claims before domestic courts that question measures that are inconsistent with the WTO or MERCOSUR, especially in the fields of tax regulation, rules of origin and environmental law.

[Revised as of March 2014]
Corporate Criminal Law and Compliance

Criminal liability Individuals

Both the perpetrator and the abettor are subject to the same penalties in Brazil, since the Criminal Code provides that "whoever contributes to a crime is subject to its sanctions". Minor sentence balancing can be established for the abettor, in comparison to actual perpetrators. This subtle difference tends to be even slighter when it comes to so-called collective crimes, i.e. crimes perpetrated by a group of persons, each of them with an important, but individual role.

Considering this framework, every individual who engages in acts which lead to crimes are criminally liable, provided (i) they acted willfully (similar to mens rea); and (ii) they knew (or should have known, considering their role in the company) they were engaging in a prohibited activity.

For example, an employee who, while filling out a form, provides information he/she was given, is not criminally liable if the information appeared to be legal. The higher ranked employee who willfully provided the said employee with false data would be liable, in turn.

Thus, an officer, manager or legal representative of a company can only be held criminally liable if he/she directly or indirectly influenced the criminal harm or, having the duty to stop it, did not take the appropriate measures.

Legal entities and companies

According to the Section 3 of Federal Act 9,605/98, legal entities, such as companies, may face criminal sanctions only when involved in environmental crimes. However, to be subject to criminal sanctions, some requisites must be met such as: (i) when the crime was committed according to a decision by its legal representatives or board of management; or (ii) when committed for the company's own benefit.
There are different types of criminal penalties that the company may be sentenced if convicted: fines up to USD 1.5 million, restitution for damages, recovery of degraded areas, suspension of licenses, etc. The company may also be permanently dissolved if it is a constant recidivist of environmental crimes.

Main crimes related to corporate criminal law:

**Tax crimes**: A manager or legal representative of a company could be held criminally liable for tax evasion provided in Federal Act 8,137/90, if he/she deceives tax authorities, neglects to provide information or provides false information to tax authorities, issues fake invoices, provides incorrect or untrue data, or omits operations of any kind in a document or book required under tax laws.

Whenever tax authorities suspect that a taxpayer is involved in a scheme/fraud to avoid paying taxes, they are required to report it to the police.

If the tax, including its fines, is paid before the criminal lawsuit is initiated, or if the taxes are considered undue/improper, the criminal lawsuit will be immediately dismissed.

To avoid taxpayers giving up on challenging tax assessments because of fear of criminal prosecution, the Brazilian Supreme Court ruled that criminal investigations involving tax crimes can only be launched after an administrative proceeding on tax assessment, when the public authorities rule whether there is a tax debt is due and its amount.

**Money laundering**: The Brazilian Anti-Money Laundering and Financing Terrorism Federal Act No. 9.613/98, which was significantly amended in 2012, specifies that any act that conceals, dissimulates the nature, origin, location, disposition, movement or property of assets, rights or values originated, directly or indirectly, from any criminal offense, including misdemeanors, falls within the crime of money laundering.
The law is based on the Financial Action Task Force Recommendations which identifies three phases of money laundering crimes: (i) placement; (ii) layering; and (iii) integration of assets originating from crime.

Even if money laundering crimes are related to a prior criminal offense, the proper authorities may investigate money laundering acts and initiate a criminal lawsuit even before the prior criminal offense has received a definitive ruling from the courts.

It is important to stress that the money owners may be held criminally liable, as well as anyone who arranges to facilitate the use, acquisition or retention of criminal property on behalf of another person, or even an individual who works for an entity having knowledge that it is being used directly or indirectly for money laundering, may also be held liable.

On the other hand, some corporations and individuals, such as financial institutions, those dealing with currency or stock exchanges, insurance entities, credit card companies, leasing and factoring companies, gold, jewelry and luxury item dealers, real estate agents and several others, have a legal duty to establish anti-money laundering and terrorism financing policies and report all suspicious activity to the authorities.

**Environmental crimes**: Environmental criminal infringements are set out in Federal Act No. 9,605/98, which splits environmental protection into five categories of crimes: (i) against flora; (ii) against fauna; (iii) crimes of pollution; (iv) operating without proper licenses; and (v) against cultural and social heritage.

Most environmental crimes are considered misdemeanors, especially those activities which result in less offensive harms to the environment, such as operating without license or deforestation of small areas of flora. Misdemeanors such as these may result in the case being closed without trial by making a deal with the Public Prosecution Office.
On the other hand, more severe crimes may expose the company and its representatives to reputational damage and more severe penalties, because, as mentioned above, only legal entities may be held criminally liable for environmental crimes in Brazil.

**IP and unfair competition crimes**: In accordance with the Brazilian Industrial Property Act No. 9,276/93, individuals may be held criminally liable for infringement of copyright, patent, industrial design, trademark, software, unfair competition, and money fraud.

Crimes against copyright are of a public nature, and are prosecuted by the Public Prosecutor's Office. Crimes of patent, industrial design, trademark and unfair competition are of a private nature, which means a private lawsuit must be filed by the owner of the right or through associations that represent him.

The private lawsuit must be preceded by a search and seizure of samples to be used as evidence. The proceeding must be authorized by a Court and accompanied by two experts, who will draft an official report to confirm whether there has been an infringement.

The victim cannot request that a company's activities, if operating legally, be suspended until the expert report has been completed. Aside from this, generally the victim is responsible for destroying the counterfeit goods.

Most infringements of IP and unfair competition are considered misdemeanors, making it possible to close the case without trial by making a deal with the Public Prosecutor's Office.

**Cartels and antitrust crimes**: Cartels are considered serious criminal offenses in Brazil, which may lead to the imprisonment of executives and employees involved in agreements among competitors, according to the Section 4 of Federal Act No. 8,137/90.

Agreements among competitors are subject of special offences provided by Federal Act 8,666/93, when they take place during public
procurement procedures in order to reduce, by any means, its competitiveness.

Until the Antitrust Authorities launch their an investigation into a cartel, it is possible to negotiate a leniency agreement that could lead to a reduction of administrative penalties and to the dismissal of the criminal liability against the officers and employees of the company involved in criminal activity.

Brazilian antitrust law also allows the possibility to negotiate a special agreement, called Leniency Plus, that allows the dismissal of the criminal liability by showing evidence of the existence of another cartel in which the company is involved.

**Crimes against the Financial System**: Running a financial institution fraudulently or recklessly, providing false information to the competent authorities regarding securities or accounting records, issuing fake bonds or without the proper issuing license, having and dealing assets without an accountancy register, and running a financial institution without licenses are some of the crimes that could put officers and managers in jail, because these infringements are considered felonies in Brazil.

Capital flight and maintaining a bank account abroad without the knowledge of the Brazilian Central Bank are also crimes that are generally committed by companies and individuals and are generally related to other crimes, such as tax evasion.

**Corruption**: It is considered corruption to offer or pay a bribe or any other type of advantage to any Brazilian or foreign authority in order to incite, omit or delay an official duty.

The investigation of acts of corruption in Brazil may also lead to the launch of other investigations abroad if the company's actions meet the criteria of those provided in the Foreign Corrupt Practices Act (FCPA) and UK Bribery Act, for example.
According to the Brazilian Anti-Bribery Act, besides the criminal liability of the individuals involved in corruption, the company involved may face other serious non-criminal consequences that are analyzed in the compliance chapter.

**Fraud:** Generally, companies may be victims of unlawful actions performed by its employees, clients and suppliers that may cause huge financial damages through the misappropriation of assets.

Brazilian law authorizes the freezing of assets that were gathered through the use of illegal funds in order to secure the reparation of the damages caused by the perpetrator to the victim.

**Crimes against the consumers:** Individuals may be held criminally liable for acts against the right to information (misleading information, absence of warning and information regarding harmful or unhealthy products and services, or not providing a product manual in Portuguese) and against fair advertisement (misleading advertisement).

To offer, display for sale or maintain products in warehouses, or render services under legal conditions, such as offering a counterfeit product for sale, is also considered a crime.

Counterfeiting related to pharmaceutical goods, or the production or sale of such goods without the proper licenses, are considered heinous crimes under the Brazilian Criminal Code, and the offender may be imprisoned for up to 15 years.

**Crimes against the rights of employees and occupational injuries:** A manager may be held liable if he/she fails to comply, through fraud or violence, with a labor right assured by existing labor laws.

According to the International Labor Organization, Brazil is one of the world leaders in occupational accidents, which generally occur because of noncompliance with safety rules by the employer and employees. In the case of fatal labor accidents or body injuries involving employees, a police investigation will be launched to assess
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**Bankruptcy crimes**: Federal Act No. 11,101/2005 provides for criminal liability in the event certain acts are performed to deceive creditors or evade legal obligations prior to bankruptcy, during the process or after bankruptcy is declared. In addition, the company managers and the judicial manager are deemed equivalent to the debtor or the bankrupt party for all criminal purposes provided in said law.

**Brazil's Anti-Corruption laws**

Brazilian authorities are closing ranks against corruption. The Brazilian Federal Police has conducted several special operations to combat corruption, money laundering and related crimes. As a result, thousands of individuals have been arrested, and a number of foreign multinationals - including U.S. and other companies subject to the FCPA or other similar foreign legislation - have been implicated. Often, information obtained by the Brazilian authorities is shared with foreign authorities.

In Brazil, in addition to the anti-corruption provisions of the Criminal Code, on 1 August 2013, Brazil's former President Dilma Roussef approved the country's Anti-Corruption Law (Law No. 12,846/2013), which came into force in January 2014. In March 2015, the federal government issued a decree with regulatory details for the application of Law No. 12,846/2013.

The main features of the law are the following:

(i) **Subjected Persons**

The Anti-Corruption Law provides that the following entities (legally or de facto organized, even if temporarily) will be strictly liable for prohibited acts committed in their interest or benefit, exclusive or not:
I. business organizations and sole proprietorships, incorporated or not, regardless of the type of organization or corporate model adopted;

II. any foundation or association of entities or persons; and

III. foreign companies with offices, branches or representation in Brazil.

(ii) **Prohibited Acts**

The Anti-Corruption law applies not only to corruption cases. It also applies to other illegal conduct committed against local and foreign public administration. The following conduct is prohibited by law:

I. promising, offering or giving, directly or indirectly, an undue advantage to a public agent, or to a third party related to him/her;

II. financing, defraying, sponsoring or in any way subsidizing, any wrongful acts provided by law;

III. making use of an individual or legal entity interposed to conceal or dissimulate its real interests or the identity of the beneficiaries of the acts performed;

IV. regarding public tenders and contracts:

   a) thwarting or defrauding, through an adjustment, arrangement or any other means, the competitiveness of a public tender procedure;

   b) preventing, disturbing or defrauding the performance of any act of a public tender procedure;

   c) removing or attempting to remove a tenderer by fraudulent means or by offering any type of advantage;
d) defrauding a public tender or a contract arising therefrom;

e) creating, in a fraudulent or irregular manner, a legal entity to participate in a public tender or enter into an administrative contract;

f) fraudulently gaining an undue advantage or benefit from modifications or extensions of contracts entered into with the Public Administration, without authorization provided by law or in the public tender invitation or the respective contractual instruments; or

g) manipulating or defrauding the economic and financial balance of contracts entered into with the Public Administration.

V. hindering the investigation or auditing activities of public agencies, entities or agents, or interfering with their work, including within the scope of the regulatory agencies and supervisory bodies of the national financial system.

(iii) **Sanctions**

The sanctions set forth in the Anti-Corruption Law are harsh and include:

**Administrative sanctions:**

1. fines ranging from 0.1% to 20% of the gross revenue of the legal entity in the fiscal year (which in Brazil is the calendar year) prior to the administrative proceedings being initiated, excluding taxes, which will never be less than the advantage obtained, using estimates when possible; and

2. publication of the decision condemning the acts.

If it is not possible to use the criteria of the value of the gross revenue of the legal entity, the fine will range from BRL 6,000.00
(approximately USD 1,920.00) to BRL 60,000,000.00 (approximately USD 19,200,000.00).

**Judicial sanctions:**

I. loss of assets, rights or valuables representing, directly or indirectly, the advantage or benefit gained from the infringement;

II. partial suspension or interdiction of its activities;

III. compulsory dissolution of the legal entity; and

IV. prohibition from receiving incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or institutions controlled by the Government, from one to five years.

The application of sanctions set forth in the Anti-Corruption Law does not affect the application of sanctions arising out of violations of the Improbity Law (Law No. 8,429/1992) or the Public Procurement Law (Law No. 8,666/1993).

**Strict Liability:**

Administrative and judicial sanctions under the Anti-Corruption Law, including loss of assets, rights or valuables will be applied on a strict liability basis. This means that the authorities only need to show that the illegal acts were committed for the benefit or interest of the legal entity.

**Successor Liability:**

The Anti-Corruption Law sets forth successor liability in the event of amendments to the articles of association, transformation, merger, acquisition or a spin-off of the company. In case of mergers and incorporations, successor liability will be limited to payment of fines.
and the full restitution of damages, up to the limit of the assets transferred.

(iv) **Factors to be taken into consideration in applying sanctions**

The Anti-Corruption Law sets forth a list of factors that will be taken into consideration in applying sanctions, which include: the seriousness of the offense; the advantage gained or sought; whether the offense was fully or partially completed; the level of damages; the negative effects produced by the offense; among others. Decree No. 8,420/2015 sets forth objective criteria, based on those factors, to determine the calculation of the fine - including aggravating circumstances and mitigating factors. For instance, if a company has an effective compliance program in place it may be entitled to a reduction of between 1% to 4% on the calculation of the applicable fine.

Specifically, it is important to note that the Anti-Corruption Law includes two factors that incorporate significant changes to Brazilian anticorruption legislation.

First and as mentioned above, a legal entity that has an effective compliance program in place will receive credit since "the existence of mechanisms and internal integrity procedures, audit and incentive denunciation of irregularities in applying the code of conduct and ethics within the legal entity" will also be taken into consideration when determining the sanctions to be applied.

Decree No. 8,420/2015 provides guidance on what needs to be covered in an entity’s compliance program (referred to as the Integrity Program) in order for it to be considered effective. According to the decree, the Integrity Program must be customized and structured pursuant to the characteristics of each legal entity and the particulars of its activities. This provision is important and solidifies the understanding that there are no “off-the-shelf” compliance programs. Further, the decree establishes 16 parameters against which an Integrity Program will be evaluated:
I. Commitment by the legal entity’s senior management, including board members, proven by their clear and unequivocal support for the program;

II. Standards of conduct, code of ethics, policies and integrity procedures to be applied to all employees and administrators, regardless of their position or role;

III. Standards of conduct, code of ethics and integrity policies that are extended, when necessary, to third parties such as suppliers, service providers, intermediaries and other associates;

IV. Periodic training on the integrity program;

V. Periodic analysis of risks in order to implement necessary adjustments to the integrity program;

VI. Accounting records that precisely and completely reflect the transactions of the legal entity;

VII. Internal controls that assure that reports and financial statements of the legal entity are readily prepared and trustworthy;

VIII. Specific procedures to prevent frauds and illicit acts within tender processes, in the execution of administrative contracts or in any interaction with the public sector, even if intermediated by third parties, such as the payment of taxes, subjection to inspection, or obtainment of authorizations, licenses, permits and certificates;

IX. Independence, in structure and authority, of the internal department that is responsible for enforcing the integrity program and monitoring its compliance;
X. Channels to report irregularities, openly and broadly disseminated among employees and third parties, and mechanisms to protect good-faith whistleblowers;

XI. Disciplinary measures enforced against those found to have violated the integrity program;

XII. Procedures that assure the immediate suspension of irregularities or detected infractions and the timely remediation of the damages caused;

XIII. Proper due diligence conducted prior to engaging third parties and, depending on the circumstances, the monitoring of third parties such as suppliers, service providers, intermediaries, and other associates;

XIV. Verification, during a merger, acquisition or other corporate restructuring, of the occurrence of irregularities or illicit acts, or the existence of vulnerabilities in the legal entities involved;

XV. Continuous monitoring of the integrity program to ensure it remains effective at preventing, detecting and otherwise addressing the wrongful acts set forth in Article 5 of the Anti-Corruption Law;

XVI. Transparency surrounding donations to candidates and political parties made by the legal entity.

Another important factor that will be taken into consideration when applying the sanctions will be "the cooperation of the legal entity with the investigation of the offense". Decree No. 8,420/2015 sets forth that this could reduce the fine by 1% to 1.5%, regardless of a leniency agreement.
In this context, and in line with anti-corruption systems adopted in other countries, especially the United States and the United Kingdom, Brazilian law will now expressly recognize that companies with effective compliance programs in place and that cooperate with authorities in investigating offenses will receive more favorable treatment.

(v) **Enforcement authorities**

The highest authority of the relevant Agency or entity of the executive, legislative and judiciary has standing to prosecute and impose administrative sanctions under the Anti-Corruption Law.

The Office of the Federal Comptroller General ("CGU" / Ministry of Transparency, Supervision and Control) has authority to investigate, process and sanction illegal acts set forth in the law that are committed against foreign Public Administration. At the Federal Executive Branch level, CGU will also have concurrent authority to initiate administrative proceedings against legal entities as well as to audit the progress of proceedings handled by other authorities.

With respect to judicial sanctions, it will follow the same process as the Brazilian Class Action (Ação Civil Pública), set forth in Law No. 7,347/1985.

(vi) **Leniency agreements**

The Anti-Corruption law allows the public administration to enter into leniency agreements with legal entities that violate the Anti-Corruption Law, provided they effectively collaborate with the investigation, and that such collaboration results in: i) identifying those involved in the violation, when applicable; and ii) rapidly obtaining information and documents proving the illegal acts under investigation.

Leniency agreements may only be executed when the following requirements are cumulatively fulfilled:
I. the legal entity is the first to come forward and demonstrate its willingness to cooperate with the investigation of the illegal act;

II. the legal entity completely ceases its involvement in the investigated infringement as of the date of the proposed agreement;

III. the legal entity admits its participation in the offense and fully and permanently cooperates with investigations and the administrative proceeding, always attending, at its own expense and whenever requested, to all procedural acts, until finalized.

In addition, Decree No. 8,420/2015 specifies that implementing or improving an existing compliance program according to the 16 parameters mentioned above may also be included among the obligations of a company wishing to enter into a leniency agreement.

The leniency agreement does not exempt the legal entity from its obligation to redress damages caused. However, it will reduce the fine by up to two-thirds, and will exempt the legal entity from publication of the condemnatory decision and from prohibitions on receiving incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or institutions controlled by the Government, from one to five years.

According to the Anti-Corruption Law, leniency agreements may also cover violations under articles 86 to 88 of the Public Procurement Law (Law No. 8,666/1993).

(vii) How to Prepare for the Anti-Bribery Law

Companies should be alert to the impacts resulting from the Anti-Corruption Law. In order to mitigate risk, we have listed below some areas that require further attention.
Compliance programs

We recommend that companies create, maintain and update mechanisms and procedures to prevent, detect, and correct prohibited acts, the so-called compliance programs. More than ever, compliance programs will play a key role in the prevention and detection of possible wrongdoings. These programs will allow companies to decide on the convenience of making voluntary disclosures to local authorities, as well as to obtain credit in case of possible wrongdoing.

Compliance programs should be implemented and revised on a regular basis, considering the key risk factors related to the company and which may vary depending on the company's size, amount and nature of commercial operations, location where their activities take place and risk perception. However, the mere creation and revision of a compliance program is not sufficient. It is important to disseminate and apply such programs throughout the company.

The CGU has issued guidelines setting common grounds that compliance programs implemented by private companies should follow in order to be considered effective. The guidelines stress that the main elements of a compliance program are the following:

I. **Tone at the top:** According to the CGU, this means that top management should support compliance initiatives and include them into corporate culture;

II. **Body in charge of the Compliance Program:** The CGU highlights the importance of having a body that is in charge of compliance, and this body should have the appropriate financial, material and human resources to conduct its compliance activities. In addition, it is important that such body has autonomy to make decisions and implement required measures;
III. **Profile and risk analysis:** The CGU’s guidelines stress that a compliance program must be preceded by a profile analysis of the company, including assessing the market segments it operates in, the number of employees, the level of interaction with public agents, among others. The company should also proceed with a detailed risk assessment;

IV. **Structuring of rules and mechanisms:** Codes of conduct, rules, policies and proceedings should be revised and implemented based on the profile and risk assessment conducted. It is also important to develop mechanisms to detect irregularities and a communication plan to disseminate compliance culture; and

V. **Constant monitoring strategies:** The CGU’s guidelines also stress that it is important to have processes in place to verify if compliance procedures are being followed, combined with processes to improve the compliance program and remediate shortcomings.

**Training**

Companies should invest in training its employees (and third parties acting on their behalf before the public administration) on key anti-corruption laws applicable to them, codes of conduct, as well as internal policies and procedures. In addition to helping prevent wrongdoing, and in accordance with similar legislation adopted in other countries and CGU guidelines, training is one of the pillars of an effective compliance program.

Considering that most of the prohibited acts set forth in law are related to public tender and public contracts, to comply with the Anti-Corruption Law, companies should intensify training in those areas. These measures are important because often employees from companies commit wrongdoings not only because they are not familiar with the law but also because they do not know how to react in certain situations.
In this context, it is advisable to conduct interactive training, in the local language, with practical examples. The training should fit the audience and focus mainly on employees exposed to the greatest risks.

**Third-party due diligence and corporate transactions**

Anti-corruption due diligence on third parties and in corporate transactions is fundamental to mitigate risks caused by third parties with which the company does business. Furthermore, due diligence is imperative to avoid successor liability for the acts an acquired company committed before the acquisition.

As legal entities can be liable for prohibited acts set forth in the Anti-Corruption Law committed by any third party, perpetrated for their interest or benefit, exclusive or not, it is fundamental for companies to take the necessary precautions in order to assure that they have relationships with reputable partners. In this context, implementing of an effective anti-corruption due diligence process on third parties, as well as continual monitoring of their activities, is extremely important to reduce risk.

Likewise, since mergers and acquisition do not extinguish the liability for acts committed by the acquired company, companies must be aware of the implications of the Anti-Corruption Law in the context of corporate transactions (including joint ventures). Therefore, besides regular due diligence normally done in such transactions - that, as a general rule, include a review of tax, labor and environmental aspects, among others - companies must also conduct specific due diligence in order to identify any irregularities related to the Anti-Corruption Law.

**Internal investigations**

When receiving allegations or becoming aware of suspicious conduct, companies must act quickly and investigate the facts. Conducting robust internal investigations may result in real benefits for companies, since an adequate response to eventual allegations or occurrences of prohibited acts is considered an essential element for an effective compliance program by the main international
anticorruption legislation. Besides, by conducting a robust internal investigation, companies will be better positioned to decide on the convenience of making a voluntary disclosure or negotiating a leniency agreement.

For companies to promptly respond to allegations of wrongdoing, they should develop pre-approved and established internal investigation procedures. This may include general protocols to be followed in certain situations. It is important, however, that companies are careful with how investigations are conducted, in order to guarantee that they have credible results and that abuses are not committed.

(viii) **Comparison between FCPA, UKBA and Brazil's Anti-Corruption Law?**

The chart below compares the key features of the FCPA, UK Bribery Act and Brazil's Anti-Corruption Law:

<table>
<thead>
<tr>
<th></th>
<th>FCPA</th>
<th>UK Bribery Act</th>
<th>Brazil's Anti-Corruption Law</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Bribery of foreign officials</strong></td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Bribery of local officials</strong></td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Extraterritorial reach</strong></td>
<td>Yes</td>
<td>Yes</td>
<td>Yes, but only if the violation relates to the Brazilian entity</td>
</tr>
<tr>
<td><strong>Books and Records</strong></td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td><strong>Other prohibited acts</strong></td>
<td>No</td>
<td>No</td>
<td>Acts against the Public Administration (e.g., fraud in public tender processes, bid</td>
</tr>
<tr>
<td></td>
<td>FCPA</td>
<td>UK Bribery Act</td>
<td>Brazil's Anti-Corruption Law</td>
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<td></td>
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<td>rigging)</td>
</tr>
<tr>
<td>Exception for facilitation payments</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Corporate criminal liability</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Strict liability</td>
<td>No</td>
<td>Yes for &quot;failure to prevent bribery&quot;</td>
<td>No</td>
</tr>
<tr>
<td>Corporate fines</td>
<td>Anti-bribery violation: up to USD 2 million per violation / Accounting violation: up to USD 25 million per violation. Twice the benefit obtained or sought</td>
<td>Unlimited</td>
<td>Up to 20% of company's gross revenue of the previous year or up to BRL 60 MM (approx. USD 19.2 MM)</td>
</tr>
<tr>
<td>Other corporate &quot;sanctions&quot;</td>
<td>Debarment, monitors, etc.</td>
<td>Debarment</td>
<td>Prohibition to received incentives, suspension, etc.</td>
</tr>
<tr>
<td>Credit for compliance programs</td>
<td>FCPA</td>
<td>UK Bribery Act</td>
<td>Brazil's Anti-Corruption Law</td>
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<tr>
<td></td>
<td>Yes</td>
<td>Yes (can be full defense for corporate offense of &quot;failure to prevent bribery&quot;)</td>
<td>Yes (1-4% reduction in the fine)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Credit for self-disclosure /cooperation</th>
<th>FCPA</th>
<th>UK Bribery Act</th>
<th>Brazil's Anti-Corruption Law</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
<td>Yes, but limited</td>
<td>Yes (under the leniency program, fines can be reduced up to 2/3 and some sanctions are excluded)</td>
</tr>
</tbody>
</table>

[Revised as of May 2017]