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# Brazil

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# III. Brazil

## A. Foreign investment

### *i. Introduction*

Brazil is a federative republic divided into 26 states, a federal district (with Brasilia the capital since 1961) and 5,570 municipalities. With more than 200 million inhabitants, Brazil is the fifth most populous country in the world after China, India, the US and Indonesia. Brazilians share a common multi-ethnic and multiracial background, and due to Portugal's influence, Brazil is the only Portuguese-speaking nation in the Americas. Immigration from Europe, Africa and Asia (mostly Japan) was the primary source of Brazilian population growth up to the 1930s.

Inflation was a major problem in Brazil during the 100 years that followed the proclamation of the republic in 1889. The problem became more severe after the 1970s, and several measures were taken to control inflation in the 1980s and early 1990s. Over a period of 27 years, Brazil had seven currencies, and the inflation rate reached a historical high of 6,821.31 per cent in January 1990. After the failure of six monetary changes, Plano Real was created in 1994 by the then Finance Minister Fernando Henrique Cardoso, who would launch the plan as the basis of his presidential run a couple of months later. Plano Real's success was the hallmark of Cardoso's two terms as president, and the fight against inflation has also been a major theme under the presidencies of Luiz Inácio Lula da Silva, Dilma Rousseff and Michel Temer.

Brazil has moved up the ranks of the world's largest economies while achieving much more inclusive growth than in the past. Stable and predictable macroeconomic policies underpinned these gains. More recently, demand has been supported by a macroeconomic stimulus, which has encouraged the expansion of the non-tradable sector, while manufacturing is suffering from declining competitiveness, and supply-side constraints appear to be biting. Inflation has remained high, and has been allowed to drift momentarily above the tolerance band, and monetary policy credibility risked being undermined by political statements about the future trajectory of interest rates.

The Central Bank of Brazil (Banco Central do Brasil (the 'Central Bank')) started a tightening cycle in recent years. The fiscal rule has also been undermined, as the inflexible fiscal target – defined in terms of a primary surplus – has required unusual but legal measures to account for cyclical weakness and meet the target, reducing clarity. Fiscal challenges in the longer term are rising as the population will start to age fast in a decade from now, and pension expenditure is already rising.

In recent years, fiscal performance has deteriorated, and inflation has risen significantly. Consequently, rebuilding confidence in macroeconomic policies remains the priority. Continuous vigilance to ensure a return of inflation to the target is warranted. Recent government commitments for fiscal adjustment are welcome and also lay the ground for stronger growth. More specifically, recent adjustments of social benefits, lower support to public banks and cost-covering electricity prices are correcting past distortions, and are important initiatives on the supply side.

The planned launch of a new round of concessions, especially in transport, is fundamental to addressing bottlenecks and promoting higher growth. The recent decision to restart trade negotiations with the European Union and the start of a wide-ranging free-trade agreement with Mexico are welcome. Progress on a comprehensive reform of indirect taxes, lowering trade barriers and reducing administrative burdens could spur competition and accelerate the recovery significantly. The commitment to inclusive growth, including through further improvements in education and well-targeted social transfers, should be maintained. Recent labour reforms brought more certainty to the market, and full-blown pension reform is in order to address fiscal issues and improve the ability of the state to focus on investments.

At less than 20 per cent of gross domestic product (GDP), Brazil's level of investment has traditionally been low by international and Latin American standards. This partly reflects Brazil's relatively low domestic saving. Over the years, however, investment has been trending down due to policy uncertainties and lack of confidence. These factors have recently been compounded by years of recession, political uncertainty and a massive corruption scandal surrounding the national oil company Petrobras that has spread to every sector, and engulfed key politicians and business leaders. Business investment is projected to pick up in 2018 and 2019 as activity accelerates, and some of the previous risks will be addressed in 2019 (although the speed of economic recovery is uncertain mostly due to political uncertainty leading to high volatility in the markets). Despite not being a member, Brazil has been contributing actively to the OECD, and has been in negotiations to become a member of the organisation.

## *ii. General features*

Foreign capital in Brazil is governed by Law No 4,131, of 3 September 1962 (the 'Foreign Capital Law'), put into effect by Decree No 55,762/1965 and subsequent amendments, including those made within Law No 11,371, of 28 November 2006.

According to Law No 4131/62, 'foreign capital is considered to be any goods, machinery or equipment that enters Brazil with no initial FX disbursement, intended for production of goods and services, and any funds brought into the country for use in economic activities, provided that they belong to individuals or corporate entities domiciled or incorporated abroad'.

In the Brazilian financial and capital markets, investments by non-resident investors are regulated by the National Monetary Council (Conselho Monetário Nacional (CMN)), Brazilian Securities Commission (Comissão de Valores Mobiliários (CVM)) and the Central Bank. The main regulation governing such investments, Resolution 2,689/00, was replaced on 29 September 2014 by a new set of rules enacted by Resolution 4,373/14, which became effective on 30 March 2015.

## *iii. Registration of foreign capital*

During the last decades, Brazilian FX rules have been very strict, and remittances of funds from abroad to Brazil and vice versa can still only be effected in the specific situations set forth by the Central Bank. Due to this control, any cash entering Brazil must be registered at the Central Bank, including that within the scope of Resolution 4,373/14.

The registration of foreign capital with the Central Bank should be performed through the Central Bank Information System (Sistema de Informações do Banco Central ('Sisbacen')) using the corresponding Electronic Declaratory Registry (Registro Declaratório Eletrônico (RDE)) number, pursuant to Article 108-C of Circular No 3,752, issued by the Central Bank on 27 March 2015 ('Circular No 3,752/15'), which amended Circular No 3,689, issued by the Central Bank on 16 December 2013.

The initial RDE and its updates (eg, due to investments, redemptions, revenues, capital gains, dividends, interests on net equity, other forms of remuneration and transfers) are compulsory. The corresponding RDE number must be included in all FX transactions related to the remittance of funds from abroad to Brazil, and vice versa. All FX transactions must be classified and electronically reported to the Central Bank pursuant to specific codes set forth by applicable regulations.

#### *iv. Currency investments*

No prior official authorisation is required for investment in currency. To subscribe capital or purchase stock in an existing Brazilian company, the investor must only transfer the funds by means of a banking institution authorised to operate with FX. However, authorisation of the exchange contract is conditional upon presentation of an RDE-Investimento Estrangeiro Direto (IED) registration number for the foreign investor and for the Brazilian company receiving the investment. RDE-IED is the mode of RDE for foreign direct equity investments.

The investment must be registered through the RDE-IED system by the Brazilian company receiving the investment and/or the representative of the foreign investor within 30 days of closing the exchange contract. In the event that the registration of the foreign investment is to be paid from a non-resident account in Brazil, it can be made in Brazilian currency. All transactions relating to such investments must be carried out through the non-resident account, with the updating of the corresponding investment registration by means of the RDE-IED module.

For investments in securities (including publicly traded equity and equity-related securities), the FX procedures are similar, but the investments should be made under the regime of Resolution 4,373/14, under the RDE-Portfolio mode.

Finally, foreign credits in Brazil must be registered under the RDE-Register of Financial Transactions (Registro de Operações Financeiras) (RDE-ROF) mode, which is a specific system for cross-border debt registration.

#### *v. Investment via conversion of foreign credits*

The conversion into the investment of foreign credits duly registered in the RDE-ROF mode is not conditional on the Central Bank's prior authorisation. Conversion into foreign direct investment (FDI) is defined as 'transactions whereby credits eligible for transfer abroad, under current rules, are used by non-resident creditors to purchase or pay up holdings in a Brazilian company'.

In order to effect registration, however, the investor and company in which the investment is to be made must provide: (1) a statement from the creditor and committed investor defining precisely the due dates of installments, the respective sums to be converted and, with respect to interest and other charges, the period they refer to, and the respective rates and calculations; and (2) a

binding statement from the creditor agreeing to the conversion. The conversion is effected by two simultaneous and symbolic FX transactions: one to 'pay' the credit and the other to 'effect' the investment.

*vi. Investment via import of goods without exchange cover*

Investment in the form of import of goods without exchange cover (applicable only to tangible goods), made as a means of acquiring paid-up stock, does not require prior approval from the Central Bank. Registration of FDI resulting from the import of intangible assets without coverage of an exchange contract requires prior approval from the Department of Financial Compliance and Financial Information Treatment (Departamento de Combate a Ilícitos Financeiros e Supervisão de Câmbio e Capitais Internacionais ('DECIC')). For tangible assets, the value recorded on the ROF Module of the RDE system, linked to the import declaration (declaração de importação (DI)); and the currency stated on the corresponding ROF may be used. Registration through the RDE-IED mode requires that both tangible and intangible assets be exclusively intended for the paying-up of capital.

Registration of foreign capital that enters Brazil in the form of assets must be made in the currency of the investor's country or, at the express request of the investor, in another currency, with exchange parity preserved. Foreign capital is defined as any goods, machinery or equipment that enter Brazil with no initial disbursement of foreign currency, intended for production or marketing of goods, or provision of services. Imports of used goods are conditional on the absence of similar goods in Brazil. Used goods must be employed in projects that foster the country's economic development. Once the tangible goods have been cleared by customs, the Brazilian company has a 90-day deadline to register the investment with the Central Bank.

*vii. Capital market investments*

Non-resident investors, whether individuals or corporate entities, are allowed to invest in the Brazilian financial and capital markets individually or collectively. Non-resident investors can now use the same registration to invest in the fixed and variable income markets, and can migrate freely from one type of investment to another. As mentioned above, the registration is made via the RDE-Portfolio mode, more details of which are presented below.

According to Resolution 4,373/14, to access these markets, foreign investors must appoint: (1) a legal representative; (2) tax representative; and (3) custody agent in Brazil.

Pursuant to Article 5, I, of Resolution 4,373/14, a non-resident investor interested in operating in the capital markets may adopt the following structures to invest in Brazil: (1) be the owner of a proprietary account; (2) owner of a collective/omnibus account; or (3) 'passenger' of a collective/omnibus account. For a collective/omnibus account, the participating non-resident investor (ie, passenger) will adhere to the agreement executed by and between the driver and local representative.

Before beginning operations and after filling in the identification form, each non-resident investor must be registered at the CVM. The registration number (code) assigned by the CVM must be included in all 'non-cash' asset transactions performed in the name of each 'passenger' participating in a collective/omnibus account or holder of an individual account.

Bonds and securities belonging to foreign investors must be kept in custody by entities authorised by CVM or by the Central Bank or, as appropriate, registered with the Special Settlement and Custody System (Sistema Especial de Liquidação e de Custódia (SELIC)) or in the registration and financial settlement system managed by the Clearing House for Custody and Financial Settlement of Securities (Central de Custódia e de Liquidação Financeira de Títulos Privados ('CETIP')).

*viii. Remittance of profits*

No restrictions are applied to the distribution and remittance of profits abroad. Dividends or profits distributed to shareholders or partners of companies headquartered in Brazil, even when remitted abroad, are not taxed, except those derived from profits booked before 1 January 1996. Profit remittances must be registered as such through the appropriate RDE module, considering the stake held by the investor in the total shares or stock as a proportion of paid-up corporate capital in the company.

*ix. Reinvestment of profits*

Reinvestments are profits of companies established in Brazil and paid to persons or companies residing or domiciled abroad that are reinvested in the company that produced them or in another sector of the domestic economy. Reinvested earnings are registered in the currency of the country to which such earnings are to be remitted, while reinvestment derived investments in Brazilian currency are registered in Brazilian currency. Foreign investor profits to be reinvested in Brazilian companies (even if the companies in question are other than those in which the earnings were obtained) for the purpose of paying up or purchasing shares and/or stock must be registered as investments in the RDE-IED system. The mechanics for RDE portfolio profit reinvestment is simpler because of the feature of a local account that will congregate all the profits and allow for redirection of such profits to the same or other investments available in the capital or financial markets.

Such reinvestments must be registered as foreign capital (in the same manner as the original investment) and thereby increase bases for tax assessment on any future repatriation of capital. In cases of reinvestment of profits, interest on net equity and profit reserves, the stake of foreign investors vis-à-vis the total amount of paid-up capital stock in the company in which the earnings were generated must be observed.

*x. Repatriation*

Repatriation of foreign investments in Brazil is conditioned on such investments being registered with the Central Bank. A foreign investment made without proper registration is known as 'tainted capital', and may face restrictions with respect to repatriation.

*xi. Transfer of foreign investments*

Acquirers, whether they are individuals or legal entities residing or domiciled in Brazil, or their attorney in fact, in the case of acquirers residing or domiciled abroad, are responsible for withholding and paying income tax on capital gains earned by individuals or legal entities residing or domiciled abroad that transfer property located in Brazil. Foreign purchasers are entitled to register capital in

the same amount as the registration previously held by the selling company, regardless of the price paid for the investment abroad. Nonetheless, the registration number on the RDE-IED module of the Central Bank should be changed to reflect the name of the new foreign investor, which is essential to allow the new investor to remit/reinvest profits and to repatriate capital.

#### *xii. Restrictions on remittances abroad*

As mentioned above, the remittance of funds abroad is restricted when such funds are not registered on the RDE system because the remittance of profits, repatriation of capital and registration of reinvestment are all based on the amount registered as foreign investment.

#### *xiii. Restrictions on foreign investment*

##### A. PROHIBITIONS

Foreign capital investment is prohibited for the following activities: (1) activities involving nuclear energy; and (2) mail and telegraph services.

##### B. LIMITATIONS

The acquisition, operation or lease of rural land by a Brazilian company under foreign control, an alien residing in Brazil or a foreign-based legal entity authorised to operate in Brazil is subject to certain conditions provided for in the law, as well as to congressional authorisation, in certain cases. For national security reasons, limitations are applied to the acquisition of property alongside border areas. Acquisition of land in such areas is conditional on prior authorisation from the Secretariat General of the National Security Council. Restrictions are also applied to the participation of foreign capital in financial institutions, although these restrictions may be waived in the national interest.

A concession is required for operating regular public air transport services. By law, such a concession can only be granted to Brazilian legal entities (those incorporated and managed in Brazil) in which at least 80 per cent of the voting capital is owned by Brazilians; this limitation also applies to increases in capital stock. Moreover, such companies must be exclusively managed by Brazilians. Finally, foreign capital participation cannot exceed the authorised limit of 20 per cent of voting capital and requires approval from aeronautical authorities. Restrictions are applied to foreign ownership and management of newspapers, magazines and other periodicals, as well as radio and television networks. Brazilian companies, even if under foreign control, can request and be awarded permission to operate in the mining sector.

There are also certain restrictions on the participation of foreign capital in financial institutions; however, these restrictions can be lifted if the relevance of such foreign capital for the national financial system is evidenced. The national interest is attested to by presidential decree. When a foreigner intends to set up a financial institution in Brazil or acquire an equity interest in a Brazilian financial institution held by Brazilian residents, an application must be directed at the Central Bank for further review by the President of the Republic.



An unnumbered presidential decree dated 9 December 1996 already states that foreign equity investments in financial institutions (in the form of non-voting stock, for listed financial institutions) are in the national interest.

#### *xiv. The Brazilian FX regime*

##### A. GENERAL FEATURES

Historically, the Brazilian FX regime has been defined by the Brazilian Government through exchange control measures. Exchange controls in Brazil are applied not only through FX rules and regulations, but also by means of tax and foreign trade rules and regulations for the purpose of either encouraging or discouraging inflows of foreign capital and investments of Brazilian capital abroad.

In this regard, Brazil has undergone consistent liberalisation in FX rules and regulations. The current status of FX regulations allows any Brazilian entity (excluding financial institutions) or individuals to freely remit funds abroad, maintain them abroad and use them to pay any type of obligation provided all necessary tax rules are observed and payment of taxes are made.

Brazil, however, does not allow the entering into transactions or obligations within Brazil in any currency other than the local currency (the real). This means that for every inflow or outflow of currency, there is a need to convert hard currency into local currency, and vice versa. This conversion is the preserve of financial institutions with special authorisation to deal in exchange.

The Central Bank assigned to these financial institutions the obligation to verify, for every remittance, the validity and legality of these transactions; request the payment of any taxes due; and enter into an FX agreement with a client willing to send or receive funds from abroad. When entering this FX agreement the bank responsible for the FX has to classify each transaction under a specific code provided by the FX regulations.

Failure to observe these regulations, however, subjects the party contracting the FX transactions, and in some cases, the financial institution rendering the FX services, to certain penalties. In addition, failure to collect any taxes due by a client at the time of the inflow or outflow may bring full liability to the bank dealing with the FX transaction.

##### B. FX CONTROL

Exchange control in Brazil is closely linked to the regulation of foreign capital flows. Historically, such regulation has imposed barriers on the outflow of funds to protect Brazilian currency. In the 1930s, following sharp reductions in the price of basic products that accounted for a high percentage of Brazilian exports, Brazilian authorities issued the first rules designed to structure an exchange market in Brazil.

For this purpose, rules were issued to establish the obligation that funds from Brazilian exports should be brought back to the country, such as Decree No 23,258/1933, which has been revoked, and the Brazilian Government began to apply strict controls on exporters to avoid funds from exports from being kept abroad. Such exchange controls were justified because, back then, funds

from exports constituted the main source of funds to ensure equilibrium in the Brazilian balance of payments.

It was only in the 1960s that the two main legal instruments applied to foreign capital and FX markets were issued in Brazil: Law Nos 4,131/1962 and 4,595/1964. Law No 4,131/1962 provided key rules for defining foreign capital in Brazil, listed categories of foreign investments and required that foreign capital must be registered with the Central Bank upon entering Brazil. Law No 4,595/1964 set out general rules for the Brazilian financial system and created the CMN and the Central Bank.

After this law was passed, the CMN and Central Bank began to control and regulate the Brazilian FX market. The CMN is in charge of drawing up the general FX policy, and according to its guidelines, exchange controls, regulations affecting foreign capital and the management of international reserves fall under the Central Bank's jurisdiction. Law Nos 4,131/62 and 4,595/64 changed the legal environment of the FX market and foreign investments in Brazil, and are fundamental legal instruments regulating these areas that are in force to this day.

At the regulatory level, the most recent rules dealing with the FX market are set forth in Circular No 3,691 of 2013 of the Central Bank, which regulated in detail CMN Resolution 3,568 of 2008.

## **B. Rendering of public services**

### *i. Introduction*

Brazilian law does not have a definition for the expression 'public services'. Yet, the Brazilian Constitution uses this expression in several articles, as do many laws and regulations. In this guide, we will refer to 'public services' as those services rendered directly by the public administration or by a party appointed by the public administration, under the regulations and controls set forth by the state in order to satisfy certain collective needs.

Article 175 of the Brazilian Constitution allows federal, state and municipal authorities to provide public services either directly or indirectly. In the latter case, the engagement of private parties to render public services under a regime of concession (*concessão*) or permission (*permissão*), as the case may be, must be preceded by a public tender (*licitação*).

Federal Law No 8,987/1995 sets forth the general regime for these concessions and permissions. It establishes: (1) the basic rights and obligations of public services' users; (2) general rules about tariffs; (3) the framework for the public tender for concessions and permissions; (4) the essential rules for concession contracts; (5) duties and obligations that must be borne by the public administration, and by concession and permission holders; (6) hypothesis of governmental intervention on concessions; and (7) rules about termination of concessions.

Federal Law No 8,666/1993 provides the general framework for public tenders and contracts with the public administration. The rules set forth in this law apply to tenders related to public services as far as they do not conflict with Federal Law No 8,987/1995.

The competent entity within the government structure regulates and controls the rendering of public services, even when concession or permission holders render them. Starting in the 1990s,

the Brazilian Government created regulatory agencies (*agências reguladoras*) to serve as the key bodies for regulation and oversight of the rendering of different types of public services. There are regulatory agencies for power and energy (Agência Nacional de Energia Elétrica ('ANEEL')), telecommunications (Agência Nacional de Telecomunicações ('ANATEL')), oil and gas (Agência Nacional do Petróleo, Gás Natural e Biocombustíveis ('ANP')), mining (Agência Nacional de Mineração (ANM)), land transport (Agência Nacional de Transportes Terrestres (ANTT)), waterway transport and ports (Agência Nacional de Transportes Aquaviários ('ANTAQ')), civil aviation (Agência Nacional de Aviação Civil (ANAC)) and sanitary surveillance (Agência Nacional de Vigilância Sanitária ('ANVISA')), among others. As a rule, each of these agencies has administrative independence (their officers have fixed-term mandates), financial autonomy (they can decide how to allocate their financial resources) and regulatory power (they have the authority to enact rules within the respective legal framework approved by Congress and sanctioned by the President of Brazil). Indeed, each of these agencies has issued a complex set of specific rules over the years, and exercised its authority to apply sanctions on the private parties whose activities are within its scope of oversight.

Some public services are rendered by the public administration throughout state-owned enterprises (SOEs). Federal Law No 13,303/2016 regulates the general framework of SOEs in Brazil, establishing rules of both corporate governance and procurement matters.

## *ii. Concessions and permissions to render public services*

A concession entails a formal administrative contract, awarded to the winner of a public tender, upon which the delegation of responsibility for providing a public service is transferred by the public administration to a company or consortium that, for its part, assumes the risks inherent to the business for the duration of the contract, and is remunerated by tariffs charged from the services' users. A concession is the most stable regime for the rendering of public services by private parties, given the more limited possibilities of the Brazilian Government to resume directly rendering public services subject to the concession.

A permission, on the other hand, is similar to a concession – as it allows a private party to render public services in exchange for tariffs – but less stable. It is a discretionary and ephemeral act of unilateral delegation by public authorities through a contract of adhesion that can be revoked at any time or to which the public authorities can add new conditions to be observed by the permission holder. Typically, permissions are used when the permission holder: (1) does not need to allocate considerable sums of capital to render the services; (2) can easily put the equipment in use to render the public service to a different use; and (3) agrees to take the risks of the lack of stability in exchange of high returns.

The public administration is not free to award concessions or permissions for the rendering of public services; instead, prior legislative approval is necessary to allow private parties to render public services.

### *iii. Users' rights and obligations*

Among the users' rights set forth by Federal Law No 8,987/1995 is the right to 'receive adequate services'. A service is considered 'adequate' in Brazil when it 'satisfies the conditions of regularity, continuity, efficiency, safety, generality, courtesy and modesty of tariffs' (Article 6, paragraph 1).

Recently, Congress passed Federal Law No 13,460/2017, which establishes basic rules for the participation, protection and defence of rights of the users of public services provided directly or indirectly by the public administration. This law regulates the provisions of Article 37, paragraph 3, of the Brazilian Constitution and is applicable to the public administration and, to a certain extent, private parties that render public services. Among other issues, this law:

- establishes guidelines that must be observed by public agents and public service providers, including: (1) the prohibition of the requirement of notarised documents, except in cases of doubt as to the document's authenticity; and (2) the elimination of formalities and requirements 'whose economic or social cost is greater than the risk involved';
- sets forth the user's basic rights, which include: (1) accessibility; (2) participation in monitoring the execution and evaluation of public services; (3) protection of personal information; and (4) an integrated framework for issuing formal certificates to the user; and
- creates 'user councils', which will have the following attributions: (i) to monitor the provision of services; (2) participate in the evaluation of services; (3) propose improvements in the provision of services; (4) contribute in the definition of guidelines for the appropriate customer service; and (5) monitor and evaluate the ombudsman's performance. The user councils shall be regulated by a specific regulation issued by each power and sphere of government, but: (1) the composition of the user councils shall observe 'criteria of representativeness and plurality of the interested parties, with a view to the balance in their representation'; (2) the choice of members shall be made in a public process, differentiated by type of user to be represented; and (3) participation in the board shall be without pay.

### *iv. Tariffs*

As a rule, public service providers are rewarded with tariffs paid by service users. The concession or permission contract may establish alternative sources of income in addition to tariffs, but this additional income should be used in order to lower tariffs.

Tariffs are set by the price of the winning bid in the public tender (Article 9, Federal Law No 8,987/1995) and should be preserved throughout the term of the contract. Usually, concession and permission contracts contain provisions for the readjustment and review of tariffs. In short, tariff readjustment occurs in pre-specified periods in order to keep the tariff's price updated vis-à-vis inflation and other costs incurred by the public service provider. Tariff review, on the other hand, is a more complex procedure that aims to maintain the financial-economic balance of the concession contract when certain unpredictable acts outside the scope of control of the service provider (eg, new taxes) affect its ability to generate the anticipated profit.

Service providers and the public administration often litigate over tariff reviews, as there are common divergences between what acts or events influence the concession or permission contract to the point that would justify a tariff review.

#### v. *Possibility of intervention*

Exceptionally, the public administration may intervene in a concession with the goal to secure that the public service is adequately rendered and to guarantee that the contractual, regulatory and legal rules are complied with. As an exceptional measure, an intervention requires that the Brazilian Government issues a decree specifying the person in charge of the intervention, the term of the intervention, and its objectives and limits, within the legal framework set forth in Federal Law No 8,987/1995.

Once an intervention is declared, the public administration has 30 days to initiate an administrative proceeding to prove the determinant causes of the intervention, and to verify who is responsible for such causes. This administrative proceeding must be concluded within 180 days, otherwise the intervention will be considered invalid.

#### vi. *Termination of concession contracts*

A concession contract may be terminated by: (1) the expiry of the contract term; (2) a decision of the competent entity of the public administration to take over the direct rendering of the public services (*encampação*), which requires statutory authorisation and a public interest motivation, with the obligation by the public administration to compensate the private party that was terminated; (3) a breach of contract by the private party (*cessionaire*), demonstrated in a specific administrative proceeding; (4) a breach of contract by the public administration, recognised by a decision of a competent judge or court; (5) annulment of the concession contract due to illegality; (6) bankruptcy or extinction of the private party; or (7) agreement of both parties to terminate the concession contract (*distrato*).

Upon the termination of the concession contract, all reversible assets, rights and privileges return to the public administration in accordance with the applicable terms and conditions of the concession contract.

## C. **Real estate**

### i. *Introduction*

Under Brazilian law, issues relating to property are subject to the law of the country where such property is located (*lex rei sitae*). Essentially, issues relating to real estate property in Brazil are governed by the Brazilian Civil Code. The Brazilian Civil Code classifies assets into two broad categories: movable assets and immovable assets.

Immovable assets (land and buildings) are, by nature, immobile or fixed to the soil, naturally or artificially, and cannot be partially or totally removed without causing their own destruction or devaluation, that is, without substantially altering or destroying them. Immovable property encompasses land, and anything that has been naturally or artificially incorporated thereto. Brazilian

law further confers certain rights with the status of immovable assets for legal purposes. This is the case of in rem rights over real estate properties and inheritance rights to property through succession, even when inheritance is comprised only of movable assets.

As a general rule, owners of land also own the subsoil. Therefore, a landowner may excavate to a reasonable depth for construction of basements or subterranean garages. The landowner cannot, however, prevent third parties from engaging in activities at depths that do not put his/her property at risk, provided that such activities are carried out in the public interest (eg, excavation of subway lines and passages for conduits). Land ownership rights, according to the Brazilian Civil Code, do not encompass mineral deposits, mines and mineral resources, potential hydroelectric power sources, archaeological sites, or other assets referred to in specific laws. It thus makes a clear distinction between land ownership and rights to such elements of the subsoil (mineral and hydroelectric resources), which are considered Brazilian Government property.

Thus, a Brazilian Government authorisation or a licence is required for exploitation of mineral and hydroelectric resources. Air space is subject to similar rules. A landowner may build vertically on its land, provided it attends to the limitations provided in law (eg, zoning rules). The built-up area cannot interfere, for instance, with activities taking place above a certain height, and must pose no risk (aircraft routes, installation of power lines at a safe height, etc). Also, the landowner may refuse construction by third parties on its land, or block the building of structures that may place the landowner in jeopardy.

Foreign individuals or foreign-owned companies may acquire real estate in Brazil under the same conditions as Brazilian individuals or companies. However, according to Internal Revenue Service Orders (*Instruções Normativas*) No 1,634/2016 and No 1,548/2015, non-resident individuals or organisations must be registered with the General Register of Corporate or Individual Taxpayers (Cadastro Nacional da Pessoa Jurídica (CNPJ) or Cadastro de Pessoas Físicas (CPF)) prior to purchasing any real estate in Brazil. Furthermore, special conditions and restrictions apply to the acquisition by foreign individuals or companies of property located in rural areas, as well in coastal or frontier zones, and in certain specifically designated national security areas. Foreign individuals or foreign-owned companies may acquire rights in rem relating to immovable property.

Real estate in Brazil is also subject to a Land Registry System governed by federal law and organised at state-level. Each property must have a record file (*matrícula*), which corresponds to an enrolment with the local Real Estate Register Office. The property record file must identify and provide a precise description of the real estate, its location, boundaries, area and information regarding the owners and previous transactions.

Any modification, creation, encumbrance or transfer of real estate rights is conditioned to registration acts at the Real Estate Register Office. Generally, a public deed is required for implementing a real estate transaction. In addition to public deeds, other acts can also be recorded, such as: (1) court decisions enabling undivided land to be divided among various owners; (2) court orders winding-up the estate of a deceased person or division of property for composition with creditors; (3) public auctions or adjudications; (4) rulings on separation, divorce and annulment of marriage, when settlement of rights in rem to immovable properties is involved; and (5) all in rem rights and other acts related to real property, as encumbrances, existence of lawsuits involving the property, corporate acts (in the case in which the current or previous owner was an entity).

## ii. *Possession and ownership*

### A. RIGHT OF POSSESSION

The right of possession can be assigned to an agent that is not necessarily the land owner. Possession implies the right to exercise certain powers typical of ownership, such as the right to claim, maintain or recover the possession of property; the right to its fruits (including rents and other incomes therefrom); the right to be compensated for necessary improvements effected; and the right to retain possession. Possession can lead to adverse possession acquisition of real estate, with the exception of government-owned properties, which cannot be acquired by adverse possession.

Possession ceases when, by voluntary or involuntary means, power is no longer exercised over the asset. This may occur when the property is forfeited by abandonment, transference, loss or destruction; if it becomes ineligible for purchase or sale; if possession is lost to a third party; in the event of failure to maintain a claim or reinstate possession; or when the party legitimately in possession transfers his/her right to another, maintaining the asset in his/her power in the name of the acquirer (*constitutum possessorium*).

### B. RIGHT OF OWNERSHIP

The right of ownership is the most relevant of all property rights and is defined by the Brazilian Civil Code as the right of an individual to use, enjoy, dispose of and recover the property from whoever may unlawfully have taken possession of it. Full right of ownership implies that all the legal powers (to use, enjoy, dispose of the asset and recover it from whoever unlawfully possesses it) are concentrated in the same hands. Limited right of ownership implies that some such powers are in the hands of, and may be exercised by, another person. However, in cases of joint ownership, or condominium, in principle, full ownership rights, rather than limited ownership, apply. Under a condominium, each co-owner has the right to an undivided fraction of the asset. As a rule, powers deriving from ownership can be exercised simultaneously by all co-owners.

## iii. *Acquisition and loss of ownership*

### A. GENERAL PROVISIONS

Under Brazilian law, ownership of real estate property is only constituted upon the registration of the public or private instrument of acquisition/transfer in the real estate record file of the competent Real Estate Registry. In the case in which, the acquisition title has not been duly registered, it is binding only between its parties and, thus, it is not enforceable against third parties. Real estate property is acquired upon registration of the deed of transfer, which may be by: (1) a purchase and sale agreement, donation or payment in kind, among others; (2) accession (ie, expansion of a property as a result, eg, of a displacement of a land strip caused by natural forces); (3) squatters' rights (ie, acquisition of ownership rights by occupation and possession over a certain period of time, in law); and (4) inheritance.

One of the principles that governs the real estate registration system is the principle of priority, whereby the person who first registers a real estate property or presents deeds for registration has priority.

The main grounds for extinguishing real estate ownership are: (1) expropriation, ie, a unilateral act of public law whereby individual ownership is transferred to a government authority, upon prior payment of fair compensation, in the public interest; (2) transfer, meaning transmission to a third party, by an *inter vivos* transaction or as a legacy, for a payment or free of charge; (3) waiver (eg, when an heir renounces rights of inheritance); and (4) neglect, destruction or abandonment of the property.

#### B. GENERAL CONSIDERATIONS AND REQUIREMENTS FOR PURCHASING REAL ESTATE PROPERTY

In Brazil, if a real estate property is acquired in its totality by an individual purchaser, as opposed to ideal fractions in a joint ownership, then he/she has absolute title thereto. In cases of joint ownership, that is, a condominium, more than one individual and/or entity has the title to the same real property, each with its corresponding ideal fraction, and each owner can equally exercise any rights of ownership, provided that it is not compromised by the indivisibility of the real property (ie, one party to the condominium cannot sell the property without consent of all the other owners, and any revenues from the sale of the property must be divided among them). In this sense, a condominium can be *pro indiviso* or *pro diviso*. In a condominium *pro indiviso*, each co-owner has one ideal fraction that is not divided, and is determined specifically in the real property's area.

On the other hand, in a condominium *pro diviso*, each co-owner has its ideal fraction located in a certain and determined part of the real property. A very common example of condominium *pro diviso* is a condominium of apartments and/or offices, regulated by Law No 4,591/1964, being an autonomous and independent unit of property, on a single piece of land.

Aside from specific requirements relating to the transfer of immovable property, Brazilian law requires, for all types of contract, that parties to a sale agreement be capable of fulfilling the transaction. They must be of full legal age, in sound mental health, or duly represented. Despite the enactment of Law No 13,097 on 19 January 2015 (the 'Law of Acts Concentration'), it is also advisable that any real property acquisition be preceded by due diligence to analyse the situation of the real estate and of its current owners, in order to avoid facts not acknowledged by the purchaser jeopardising the transaction, and even resulting in the annulment or ineffectiveness of the transaction. The reason for this is due to the fact that, despite the determination of the acts concentration in the real estate record file by said law, there is a discussion about its applicability because of Law No 13,105/2015 (the 'New Civil Procedure Code') and the Brazilian Registry system.

The Law of Acts Concentration, in order to improve legal security and avoid conveyance fraud, determines that all legal business involving the constitution, transfer or modification of in rem rights over real properties will prevail over prior legal acts not registered in the real estate record file (eg, registration of summons, lawsuits, legal constraint and administrative restrictions, among others). The purpose of this law is to reduce bureaucracy in real estate properties transactions, especially from the purchaser's perspective, and provide comfort, with the concentration of all acts supposedly related to the real property in the record file.



However, the supervening New Civil Procedure Code, enacted on 16 March 2015, established that the transfer or constitution of in rem rights over real estate properties will be deemed as conveyance fraud when a lawsuit that could lead the seller to insolvency status was ongoing by the time of said transaction, even if the lawsuit was not registered in the real estate record file.

The New Civil Procedure Code conflicts with the Law of Acts Concentration because lawsuits in which the seller may become insolvent can cause the ineffectiveness of the real property acquisition, even if they were not duly registered in the real estate record files (unlike the provisions set forth in Law of Acts Concentration). Because the New Civil Procedure Code is subsequent to the Law of Acts Concentration, there is a discussion about the conflict of laws, such that the regulations of the first law supersede those of the second, leaving the solution on a case-by-case basis on judicial courts.

In addition, there is also the matter related to the Brazilian Registry System. Each state divides and organises the Brazilian Registry System according to local laws. The recording system of the Register Offices is not always centralised and integrated, nor does a synchronised recording system exist for all the Register Offices. This lack of communication among the Register Offices, therefore, jeopardises the potential registrations of lawsuits/acts that occur in a jurisdiction different than that of where the real property is located.

Still regarding due diligence, it is advisable to obtain and analyse: (1) the updated real estate record file and clearance certificate of liens and claims regarding the period of the last 20 years; (2) clearance certificates of real estate taxes (eg, Imposto sobre a Propriedade Predial e Territorial Urbana ('IPTU') for urban properties and Imposto Sobre a Propriedade Territorial Rural ('ITR') for rural properties); (3) tax clearance certificates relating to the owners of the real estate; (4) clearance certificates issued by the courts from the jurisdiction of the real property and the domicile of the owners in order to verify the existence of lawsuits involving disputes on the real estate or others that could compromise the owner's assets (hindering, as a result, the sale of the real estate or resulting in the reversal of the transaction); and (5) other documents based on the type of transaction and real property.

#### C. ACQUISITION OF RURAL LAND BY FOREIGNERS

Under Brazilian law (Law No 4,504/1964), a rural property is deemed as rustic buildings of continuous areas or land, regardless of location, devoted to agricultural, farming, livestock or agro-industrial activities, whether by the private sector or under public land tenure policies.

A foreign individual residing abroad cannot acquire rural property in Brazil. This restriction is not applied only in the case of legitimate succession (ie, if the foreigner is called upon to acquire the rural property as a legal heir of the previous owner), and if the rural property is not located in an area essential to national security. On the other hand, foreigners who have permanent residence in Brazil, according to the laws currently in force: (1) are free to acquire or lease rural property not exceeding three modules for indefinite exploitation (*módulo de exploração indefinida* (MEI)); MEI is a unit of rural land established by the National Institute for Colonization and Agrarian Reform (Instituto Nacional de Colonização e Reforma Agrária (INCRA)) for geographic areas sharing the same socio-economic and ecological characteristics, according to the type of rural exploitation they are best suited for; and (2) cannot acquire or lease rural real estate exceeding 50 MEIs. Similar restrictions are applied to foreign legal entities.

Federal Law No 5,709 ('Law No 5,709') was enacted in 1971, and sets out the general rules and restrictions affecting the acquisition of rural properties by foreigners, which were extended to the lease of rural areas in 1993 by Federal Law No 8,629. In summary, Law No 5,709 provides that: (1) foreigners who have permanent residence in Brazil can only acquire or lease rural property for the purpose of implementing agricultural, livestock, agro-industrial or settlement projects. In addition, in the case of foreign entities, such projects must be contemplated in their articles of association. Depending on the type of project (agro-industrial, colonisation, agricultural, etc), it must be approved by the Brazilian Ministry of Agriculture, Livestock and Supply (Ministério da Agricultura, Pecuária e Abastecimento (MAPA)) or other federal government bodies in charge of the respective activities; (2) Congress must authorise the acquisition or lease of areas exceeding 100 MEIs; (3) the total area acquired or leased by foreign entities or individuals must not exceed 25 per cent of the total area of any given municipality; and (4) foreigners of the same nationality (including foreigners who control Brazilian entities) cannot hold more than 40 per cent of that 25 per cent of the area of the municipality. All the restrictions described above also apply to transfers of rural real estate as a result of transactions involving corporate restructuring (eg, mergers, spin-offs, acquisitions and changes in corporate control).

Any transaction made in violation of the foregoing restrictions is null and void. However, the President of Brazil may, by specific decree, authorise the acquisition of rural land beyond the provisions of the current law, in cases in which such property is connected with priority projects for national development plans. The acquisition of rural property by Brazilian companies with foreign equity control or foreign participation with power of deliberation in general meetings is a subject that has given rise to heated political and economic debate since mid-2010.

The Sixth Constitutional Amendment of 1995 revoked Article 171 of the Brazilian Federal Constitution, which provided for differential treatment to companies incorporated under Brazilian Law, that is, if they were Brazilian companies with Brazilian capital directly or indirectly controlled by individuals residing in Brazil or not, that is, with direct or indirect equity control held by foreigners. Since then, there has been no debate on the legality of Brazilian companies with foreign equity control acquiring rural property in Brazil. However, the Brazilian Government was worried about the acquisition of rural property due to a sentiment of national sovereignty, and the Federal Attorney General's Office issued an opinion in August 2010 arguing that Article 1 of Law No 5,709, which subjects Brazilian companies with foreign equity control to the same regime imposed on foreign companies, is consistent with the Constitution. After being approved by the President of Brazil, this opinion became mandatory for all agencies of the Federal Administration, which must comply with it strictly. In this new scenario, Brazilian companies with foreign equity control are subject to the same regulatory framework as that imposed on foreign companies.

#### *iv. Taxation*

The Inter Vivos Property Transfer Tax (Imposto de Transmissão de Bens Imóveis Inter Vivos ('ITBI')) is a tax assessed by the municipalities. It is due when a real property, rights in rem to any real property (except those in guarantee) and assignment of rights for the acquisition of the real property are transferred for remuneration. The rate established for the municipality of São Paulo, for example, ranges from 0.5 to two per cent, depending on the value of the transfer.

The ITBI tax is not assessed when the transfer of real property or rights to any such property takes place to pay up the capital of a company or when resulting from the merger, consolidation, spin-off or liquidation of the legal entity, unless if, in any of the aforementioned cases, the legal entity's main activity is the purchase and sale of such assets and rights, the lease of real property or the commercial lease of real estate property, in compliance with the applicable provisions of the municipal law.

#### V. *Real estate investment funds*

Real Estate Investment Funds were created to provide funds for developing real estate ventures for subsequent sale, letting or leasing. They began to be regulated by Brazilian law in the 1990s, more specifically, Law No 8,668/1993, which was updated by Law No 9,779/1999. Ruling No 472/2008 of the CVM (and its further amendments), regulates the establishment, management, operation, public offer of quotas and disclosure of information for real estate investment funds. Real estate investment funds are used for raising funds to build several shopping centres, and implementing large-scale infrastructure projects throughout Brazil. Previously, pension funds were the main source of direct investment in real estate projects, but, nowadays, such entities invest in this market indirectly, through the purchase of shares in real estate investment funds.

Both individuals and corporations domiciled or with headquarters abroad are entitled to acquire such shares, provided that the funds resulting from the investment are duly registered with the Central Bank, allowing for the investment and respective gains to be remitted abroad. According to the law in force, capital gains resulting from such investments are subject to income tax (*imposto de renda* (IR)) at a rate of up to 20 per cent, assessed upon disposal or withdrawing of real estate investment fund quotas.

### D. **Development of ample/integrated capital markets and joint activities between Latin American countries**

#### i. *Stock exchange*

Stock exchanges are in charge of organising, maintaining, registering and overseeing operations involving securities, among other responsibilities. For this purpose, stock exchanges can set additional rules to those issued by the CVM. The main Brazilian stock exchange is the BM&FBOVESPA, maintained by Brasil, Bolsa, Balcão SA ('B3').

A number of securities may be traded at BM&FBOVESPA: (1) securities; (2) rights; (3) indices; (4) derivatives; (5) government bonds; and (6) other negotiable bonds issued by private entities – provided previous authorisation is granted by the Central Bank and/or CVM, as appropriate. BM&FBOVESPA offers a 'home broker' system, allowing investors to deliver their orders through the internet to their brokers, who are in turn connected to the electronic systems of BM&FBOVESPA.

In December 2000, BM&FBOVESPA launched the New Market, Level 2 and Level 1, which are special listing segments of the stock market designed for companies that accept to abide by stricter corporate governance rules and disclosure standards than those provided for in Brazilian law. The New Market

is a listing segment that requires companies to comply with higher corporate governance standards than those applied to Level 2 and Level 1.

Under the New Market, companies (or their controlling shareholders, as the case may be) undertake, among other things: (1) to keep their capital stock represented only by common shares with voting rights; (2) keep at least 25 per cent of their shares in the free float; in case the average daily trading volume is up to R\$25m, the free float may be decreased to 15 per cent; (3) offer to all shareholders the same terms and conditions as those enjoyed by the controlling shareholders in the case of the sale of the controlling stake (100 per cent tag along); (4) launch a tender offer to repurchase their shares from all shareholders for at least the economic value, in the case of the delisting or cancellation of the agreement with BM&FBOVESPA that formalised the company's adhesion to the New Market; (5) keep a board of directors made up of at least five members, 20 per cent of whom are independent members, with a two-year mandate at most; (6) provide annual financial reports prepared in accordance with an internationally accepted standard; (7) issue more complete financial reports, including quarterly cashflow reports and consolidated reports reviewed by an independent auditor; and (8) disclose, on a monthly basis, the trading by its officers, executives and controlling shareholders in securities issued by it.

Level 2 imposes similar obligations to those of the New Market, and companies adhering to it may have their capital stocks represented by common shares with voting rights and preferred shares with restricted or no voting rights. Under certain circumstances, preferred shares are granted with voting rights, such as for approval of M&A transactions involving the company, and agreements between the controlling shareholder and the company, whenever these decisions are subject to approval at a shareholders' meeting.

Level 1 requires adhering companies, among other things: (1) to keep at least 25 per cent of their shares in the free float; (2) disseminate more complete financial data; (3) issue annual financial reports prepared in accordance with an internationally accepted standard; and (4) disclose, on a monthly basis, the trading, by its officers, executives and controlling shareholders, in securities issued by it.

BM&FBOVESPA also created the BOVESPA MAIS and BOVESPA MAIS Level 2, special listing segments designed to make the stock market more readily accessible mainly to small and medium-sized enterprises. Overall, the BOVESPA MAIS listing rules are similar to those applied to the New Market, and companies adhering to the BOVESPA MAIS can have their capital made up of preferred shares, which cannot, nevertheless, be traded. BOVESPA MAIS Level 2 has similar rules to BOVESPA MAIS; however, this segment allows the company's capital stocks represented by common and preferred shares with special voting rights. In the case of selling the controlling stake, BOVESPA MAIS Level 2 companies assure a 100 per cent tag along to all shareholders.

Custody and clearance of transactions involving securities are carried out by a clearing house of BM&FBOVESPA, and are settled, as a general rule, on the second and third business days following the respective transaction date (financial and physical settlement, respectively).

## *ii. Going regional*

Back in the early 1990s, economists and policy-makers had high expectations of the prospects for capital market development in emerging economies. This led to significant reforms, including financial liberalisation, the establishment of stock exchanges and bond markets, and the development of regulatory and supervisory frameworks. These reforms, together with improved macroeconomic fundamentals and capital market-related reforms, such as the privatisation of state-owned enterprises and the shift to privately managed defined contribution pension systems, were expected to foster financial development.

In November 2014, BOVESPA expressed its intention to acquire up to 15 per cent of the main Latin American stock exchanges. Even though it cannot be considered as a merger proposal between both stock exchanges, it has prompted debate as to how important it is to move forward with regional stock exchange integration to improve their competitiveness.

## *iii. The organised OTC market*

The organised over-the-counter (OTC) market is a trading environment managed by institutions authorised by and subject to the oversight of CVM that offers a trading system and establishes self-regulatory rules and mechanisms. A number of securities may be traded in the organised OTC market: (1) shares; (2) debentures; (3) audiovisual certificates of investment; (4) quotas of closed-end investment funds, including private equity funds, real estate funds and credit rights investment funds; (5) warrants; (6) indices representing share portfolios; (7) put and call options over securities; (8) subscription rights; and (9) subscription receipts. CETIP is an organised OTC entity, also maintained by B3, that also operates as a custody and clearing house.

## *iv. Brazilian Financial and Capital Markets Association (ANBIMA)*

Associação Brasileira das Entidades dos Mercados Financeiro e de Capitais ('ANBIMA') is a private regulatory agent that currently represents around 300 institutions, including commercial, multiple and investment banks; asset managers; brokers; and dealers. Over the years, ANBIMA has approved a number of self-regulatory codes that discipline several matters regarding Brazilian capital markets, including public offerings (the 'ANBIMA Code for Public Offerings'). The ANBIMA Code for Public Offerings sets out certain disclosure standards to be followed by its members while coordinating public offerings of securities in the Brazilian market. The ANBIMA Code for Public Offerings establishes operational standards similar to those established in more mature countries in terms of capital market organisation.

The objective of the ANBIMA Code for Public Offerings is to establish full disclosure standards on which the activities of financial institutions in the Brazilian capital market must be based. Going beyond the requirements provided for in the Brazilian law, the self-regulatory regime regulated by the ANBIMA Code for Public Offerings is similar to those adopted in modern self-regulatory regimes throughout the world, and it creates uniform rules for the public distribution of fixed and variable income securities in the primary and secondary markets. According to the ANBIMA Code for Public Offerings, financial institutions acting as coordinators of underwriting syndicates (underwriters) are also responsible for the content of prospectuses and Brazilian 10-K-like forms

(*formulários de referência*). They are also required to conduct independent due diligence to verify all material information concerning the issuer's business, properties and financial status, relevant securities and other material facts that may have a bearing on an investor's decision with regard to offered or requested investment funding.

The ANBIMA Code for Public Offerings also establishes comprehensive rules for the minimum content of the prospectuses and Brazilian 10-K-like forms, among others: (1) information concerning risk factors, with no mitigations; (2) description of the issuer's main sector-related aspects; (3) description of the issuer's business and corporate governance, environmental protection and social responsibility policies; (4) management's discussion and analysis of the issuer's financial condition and results of operations carried out in the three previous fiscal years; (5) information about the issuer's existing securities and securities to be issued; (6) relevant administrative and judicial proceedings that affect the issuer; (7) description of operations with related parties and underwriters for the issuance of securities; and (8) description of operations with underwriters acting as coordinators of the offering.

#### v. *Financial and capital market*

Non-residents investing in the Brazilian financial and capital markets under the 4,373 Regime and not resident/domiciled in a 'tax favourable jurisdiction' (TFJ) (ie, '4,373 Foreign Investors') are subject to a more favourable income tax treatment (the 'Special Income Tax Regime'), as described below:

- income arising from swap transactions, whether or not registered in regulated exchange markets, stock investment funds and other derivative transactions performed in OTC future settlement markets are subject to taxation at a flat income tax rate of ten per cent;
- income arising from fixed income financial investments, investment funds in general (except for stock investment funds), structured transactions certificates (*certificados de operações estruturadas* (COE)) and financial transactions carried out outside the Brazilian stock exchange are subject to a 15 per cent income tax rate; and
- capital gains derived from transactions effectively traded in regulated stock exchanges, commodity exchanges, futures exchanges and others, as well as from transactions involving gold (as a financial asset) performed outside such regulated exchange markets are exempt from income tax.

The Special Income Tax Regime also provides other specific income tax 'exemptions' and 'zero rates' applicable to 4,373 Foreign Investors (eg, government bonds and private equity investment funds).

The Special Income Tax Regime is not applicable to TFJ 4,373 Foreign Investors, which are subject to the same tax rules applicable to Brazilian resident investors.

Although dividends arising from profits earned on or after 1 January 1996 are exempt from income tax – for both 4,373 and TFJ 4,373 Foreign Investors – interest on net equity (*juros sobre capital próprio* ('JCP')) is subject to a 15 per cent income tax rate, where paid to 4,373 Foreign Investors; and a 25 per cent income tax rate, where paid to TFJ 4,373 Foreign Investors.

## **E. Offshore vehicle providers in Latin American countries**

### *i. General features*

After the Second World War, Brazil played a major role in efforts to establish a free trade zone in Latin America, and was one of the founders of the Latin American Free Trade Association (LAFTA), created under the Montevideo Treaty of 16 February 1960, signed by Brazil, Argentina, Bolivia, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela. The main goals of LAFTA were the gradual establishment of a Latin American common market, and the promotion of integration efforts at regional level.

With the signing of the Montevideo Treaty on 12 August 1980, those same states founded the Latin American Integration Association (LAIA) ‘in order to advance the integration process and promote economic and social development, harmony, and balance throughout the region’. The 1980 Montevideo Treaty sets forth important principles regarding the integration process: (1) pluralism; (2) convergence; (3) flexibility; (4) differentiated treatment; and (5) multiplicity. Those principles significantly differ from the main contours of the trade liberalisation scheme set forth by the 1960 Montevideo Treaty that established LAFTA.

Within the scope of limited trade agreements (enabled under the LAIA Treaty of 1980) Brazil and Argentina have signed important bilateral treaties, laying the groundwork for a fast-growing bilateral common market area. These include the Integration Development and Cooperation Treaty, signed in Buenos Aires on 29 November 1988; and 24 protocols, followed by other bilateral agreements on specific topics, including a Treaty for the Establishment of a Statute for Brazilian–Argentine Binational Companies, signed on 6 June 1990. Further efforts on the regional integration process led to the establishment of the Common Market of the South (‘MERCOSUR’) in 1991, according to the provisions of the Asunción Treaty, which was concluded between Argentina, Brazil, Uruguay and Paraguay on 26 March 1991.

### *ii. LAIA*

The main legal framework of LAIA specifies three mechanisms for the establishment of preferential trade areas in Latin America: (1) regional tariff preferences for products originating in a LAIA contracting party, regarding tariffs applicable to exports to third countries; (2) regional scope agreements to be negotiated and concluded among contracting parties; and (3) partial scope agreements between two or more LAIA contracting parties (see, eg, Resolution 2 of the Foreign Ministers Council of 12 August 1980 on partial scope agreements concluded under the LAIA umbrella).

Regional or partial scope agreements are designed to cover tariff relief and trade promotion, as well as other policy aspects concerning regional integration, such as economic complementation; agricultural trade; cooperation in financial, tax, customs and health matters; scientific and technological cooperation; environmental protection; pharmaceutical goods in transit; tourism promotion; technical standards; and other areas. Under the framework of LAIA, Brazil has also signed multilateral economic agreements with Argentina, Chile, Mexico, Uruguay and Venezuela

in 1995; bilaterally, Economic Assistance Agreements with Chile (1996 and 2006), Bolivia (1997 and 2005) and Mexico (2002); and a Limited Economic Assistance Agreement with Suriname (2005).

Particularly with regard to limited agreements, contracting parties may negotiate several matters related to the regional integration process, such as: (1) rules on trade conduct: subsidies and countervailing duties, unfair trade practices, licences and import procedures; and (2) other rules on non-tariff matters: payments, financial cooperation, tax cooperation, cooperation in animal and plant health, customs cooperation, transport facilitation and government procurement. In addition, within the context of LAIA, contracting parties have implemented several preferential systems comprised of market liberalisation lists and cooperation programmes, such as in the fields of business, investment strategies, and financing and technological support. LAIA contracting parties have also accorded preferential treatment to certain landlocked countries in the region (eg, Bolivia and Paraguay), by means of countervailing measures aimed at favouring their full participation in regional integration.

Because the Montevideo Treaty of 1980 is a ‘framework treaty’, the institutional and normative development of the integration process between Latin American countries is further complemented and shaped by other multilateral regional agreements, treaties and organisations, such as the Andean Community, MERCOSUR, the G-3 FTA and the Union of South American Nations (União de Nações Sul-Americanas (‘UNASUL’)). In this sense, LAIA has established a consensus as to the flexibility and convergence of principles guiding the regional integration processes in Latin America for the purpose of deepening and expanding a common economic area. This initiative was based on a market-orientated approach, but also on a gradual and open development of the integration process.

### *iii. MERCOSUR*

The Asunción Treaty signed in Paraguay on 26 March 1991 announced the creation of MERCOSUR, with the aim of establishing a common market between Brazil, Argentina, Uruguay, and Paraguay (the primary MERCOSUR state parties), wherein the following objectives were established:

- free circulation of goods, services and production factors among member countries by means of the elimination of tariff and nontariff barriers to trade among such countries;
- establishment of a common external tariff, and adoption of a common trade policy at the regional and international levels;
- coordination of macroeconomic sectoral policies among member countries, in such areas as foreign trade, agriculture, industry, tax issues, FX, capital, services, customs policy, transport and communications, and any other items that might subsequently be agreed upon; and
- commitment on the part of member states to harmonise their laws, with a view to achieving full integration.

The institutional framework of MERCOSUR is based on rules established under the Asunción Treaty and the Ouro Preto Protocol (Additional Protocol to the Asunción Treaty on the Institutional Framework of MERCOSUR of 1994), which stresses the objectives and principles of the organisation, particularly the implementation of a customs union as one of the stages for consolidating a common market.



This process, as previously mentioned, is characterised by the gradual elimination of the domestic tariff and regulatory constraints. Advances in the consolidation mechanisms of MERCOSUR are proof that the integration process in Latin America, or at any rate, in the Southern Cone, are no longer merely theoretical, but an important step towards regional integration and cooperation. After 20 years of existence, MERCOSUR has proven that its member states and associate members have actually achieved positive and concrete results.

*iv. Favourable tax jurisdictions and privileged regimes*

Law No 11,727/2008 introduced a new concept of the tax haven in Brazilian legislation, recognising the difference between favourable tax jurisdictions and privileged tax regimes. On 7 June 2010, the Brazilian Internal Revenue Service (Receita Federal) issued two separate lists: (1) the first lists countries and dependent territories/areas that do not tax income or tax it at a rate of less than 20 per cent at most, or whose law does not grant access to information about the corporate structure of legal entities or their ownership (also known as the 'Black List'); and (2) the second lists regimes that are considered privileged tax regimes under Brazilian law (also known as the 'Grey List').

According to Brazilian tax rules, the following jurisdictions fall under the classification of favourable tax jurisdictions: Andorra, Anguilla, Antigua and Barbuda, Dutch Antilles, Aruba, Ascension Island, Commonwealth of the Bahamas, Bahrain, Barbados, Belize, Bermuda, Brunei, Campione D'Italia, the Channel Islands (Alderney, Guernsey, Jersey and Sark), the Cayman Islands, Cyprus, Singapore, the Cook Islands, the Republic of Costa Rica, Djibouti, Dominica, the United Arab Emirates, Gibraltar, Grenada, Hong Kong, Kiribati, Lebanon, Lebanon, Liberia, Liechtenstein, Macau, Madeira, the Maldives, Isle of Man, the Marshall Islands, Mauritius, Monaco, the Montserrat Islands, Nauru, Niue Island, Norfolk Island, Panama, Pitcairn Island, French Polynesia, Qeshm Island, American Samoa, Western Samoa, San Marino, Saint Helena Island, St Lucia, the Federation of Saint Kitts and Nevis, the Island of Saint Pierre and Miquelon; Saint Vincent and the Grenadines, the Seychelles, the Solomon Islands, Swaziland, Switzerland (currently suspended from the list by Ato Declaratório Executivo Receita Federal Do Brasil (ADE RFB) No 11/2010), the Sultanate of Oman, Tonga, Tristão da Cunha, the Turks and Caicos Islands, Vanuatu, the American Virgin Islands and the British Virgin Islands.

According to Brazilian tax rules, the following jurisdictions fall under the classification of privileged tax regimes: holding companies incorporated under Danish law with no substantial economic activity; holding companies incorporated under Dutch law with no substantial economic activity (currently suspended from the list by ADE RFB No 10/10); international trading companies incorporated under Icelandic law; offshore companies incorporated under Hungarian law; limited liability companies (LLCs) settled under US state law, held by non-residents and not subject to federal income tax in the US; *entidad de tenencia de valores extranjeros* incorporated under Spanish law (currently suspended from the list by ADE RFB No 22/10); and international trading companies (ITC) and international holding companies (IHC) incorporated under Maltese law.





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