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Dispute Resolution in Brazil: Important Trends

By Mauricio Gomm Santos and Quinn Smith, Miami

From the outside looking in, dispute resolution in Brazil has evolved rapidly over the last decade. As the economy has grown and Brazilian companies have become major international players, the legal market has changed and a new framework for dispute resolution has developed. In the same way that Brazilian business has emerged from the protective cocoon of the 1980's to a new era of sophistication and

profitability, Brazilian law firms have likewise prospered. This has created a world of dispute resolution that is quickly changing—requiring the constant attention of international practitioners, scholars and businesses. As discussed below, the new paradigm undoubtedly presents a number of future challenges relating to litigation, arbitration, investment arbitration, and other

See “Dispute Resolution,” page 2

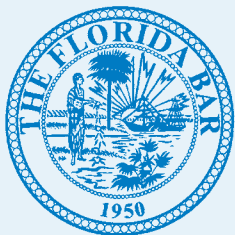
Beyond the World Cup and the Olympic Games: Business and Investment in Brazil as a Consolidated Economic Power

By Cristiano Rabelo, Miami and Rio de Janeiro

Within the international business community, little doubt remains about Brazil's present economic success and attractiveness. Boasting a 200 million-strong consumer market and a GDP growth of 7.5% in 2010,¹ the South American giant seems to have long left behind the economic moroseness and uncertainty that plagued its development in the '80s and '90s. Relying on its expanding middle-class market, Brazil emerged relatively unscathed from the 2008/2009 global economic crisis, while developed economies in Europe and North America suffered through a costly recession.² Brazil's commendable performance during this period seems to have finally and definitely brought the country to the center stage of world economy. Money-wise, Brazil is now the place to be.

See “Beyond the World Cup,” page 75





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Articles between 7 and 20 pages, double-spaced, involving the various disciplines affecting international law may be submitted via email in MS Word format (**with the use of endnotes, rather than footnotes**). Please contact Alvin.Lindsay@hoganlovells.com for submissions and for any questions you may have concerning the *Quarterly*.

**DEADLINE FOR NEXT ISSUE
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DISPUTE RESOLUTION, *from previous page*

er forms of dispute resolution. Practitioners should expect to see a uniquely Brazilian form of dispute resolution involving practice in multiple courts; different methods of taking and presenting evidence; attempts to use various kinds of dispute resolution; and new forms of investment arbitration through offshore entities, multilateral agreements and foreign investment laws.

Litigation: Turn a Blind Eye to Brazilian Courts at Your Own Peril

An honest Brazilian lawyer will tell you that a “typical” domestic litigation can take anywhere from seven to ten years to resolve due to a backlog of cases and numerous opportunities to appeal. At the sound of this, many U.S. practitioners shake their heads in disbelief and write off the Brazilian court system. Despite the delays, the Brazilian court system remains a robust, active judiciary that can play an important role in international investment and dispute resolution. When managing international cases, it is therefore important for foreign lawyers to understand and work with the Brazilian courts.

Many attorneys assume that the reputation for delay applies to all areas of the Brazilian court system. But the ability to get injunctive relief still exists, and with the right strategy, a party can use the court to secure injunctive relief (normally *ex parte*) quickly in aid of other litigation or arbitration proceedings. In other words, parties can take advantage of the relative speed of Brazilian courts in some matters while minimizing the risk of delayed litigation in others. A contemporary example illustrates this point.

The U.S. online game maker Zynga recently sued a Brazilian competitor, Vostu, for copyright infringement related to games Vostu was making and promoting in Brazil.¹ While the jurisdictional facts and history provide a broader understanding of the case, in sum, Zynga faced a difficult position from the standpoint of enforcing any future judgment. While Vostu’s games reached the U.S. through the Internet, Vostu’s games resided on servers outside the U.S. and competed with Zynga’s

games in the growing Brazilian market; any judgment against Vostu faced a long and arduous battle for recognition in Brazil. In response, Zynga filed a copyright infringement lawsuit in California and later sought a preliminary injunction in Brazil, asking the Brazilian court to force Vostu to remove its games or pay a hefty fine. The Brazilian court of first instance granted the request, forcing Vostu to file for an anti-suit injunction against Zynga in California, asking the court to stop Zynga’s Brazilian lawsuit.

After reviewing extensive legal briefing, the Northern District of California denied Vostu’s request for an anti-suit injunction prohibiting Zynga from pursuing interim relief in Brazil.² The court found the actions sufficiently distinct and ruled that Zynga had the right to pursue different remedies in different countries. From the docket report, it appears the Brazilian action is pending appeal, but the strategy remains noteworthy. Zynga has placed an enormous amount of pressure on Vostu in a relatively short period of time, obtaining an injunction against Vostu that strikes at the heart of Vostu’s business. Although Vostu has the ability to challenge that injunction on appeal, Zynga has quickly and substantially increased its bargaining power in any negotiations by using the Brazilian courts effectively, despite the initial prospect of long delays.

Brazilian courts can also show perhaps surprising sophistication when dealing with high-profile cases that have attracted media scrutiny. Brazilian courts follow an inquisitorial model where the judge plays a strong role in pushing the case toward decision. When faced with tens of thousands of cases, this inquisitorial function can slow the process; given the right kind of case, however, the judge can aggressively move it to a conclusion. This can take parties and their attorneys by surprise, a point illustrated by the following example from the wake of the 2008 financial crisis.

Some Brazilian companies rely heavily on exports, selling large amounts of products to foreign countries, receiving revenue in dollars but paying expenses in local currency—the Brazilian *real*. Some of these companies bought hedging contracts

See “Dispute Resolution,” page 5

Message from the Chair



N. Swerdloff

This issue of the *International Law Quarterly* focuses on Brazil, which is fast becoming a major player on the world legal stage and where, this month, we are taking one of the pillars of our annual programming—the International Business Transactions Conference.

Brazil's emergence as a legal player is no accident. Brazil's economy is booming, growing 0.8% in the second quarter of 2011 alone, up 3.1% from the same period the year before. This growth is fueled, in part, by the 2007 discovery of an estimated fifty to eighty billion barrels of oil off the country's coast—a discovery that some predict could result in Brazil becoming one of the world's largest oil producers within the next five years. In addition, the country's agricultural and mining industries are growing rapidly, due to high global commodity prices and China's investments in Brazil (described in this issue in an article written by Mikki Canton). Further, U.S. private equity investment in the country totaled US\$40 billion in 2011, eight times more than in 2004, and it is expected to hit US\$100 billion within five years.

Along with investments, law firms have also flowed into Brazil. As of the date of this issue, sixteen *AmLaw Top 100* law firms and three major UK law firms maintain offices in São Paulo, the financial center of Brazil. Brazilian law firms have likewise grown, both domestically and internationally, and are well represented in this issue with articles by attorneys from *Machado Meyer Sendacz e Opice Advogados* and *Veirano Advogados*.

With all this activity, it is only natural that our Section, with its rich tradition of outreach to other countries—stemming in part from our location as the “Gateway to Latin America”—take our show on the road to Brazil, where we will, in partnership with the International Centre for Dispute Resolution, hold a joint conference on “International Business Transactions and Conflict Management: The U.S. and Brazilian Perspectives” in São Paulo on November 29. We anticipate that this year's IBT conference will be our best to date!

We, of course, have a full roster of additional events planned for this year and next, including a series of webinars on such hot topics as: “Managing U.S. Discovery ‘Assistance’ in International Liability Exposure” (8 December 2011); “5 Ways Corporations Can Limit their International Liability Exposure” (15 February 2012); “Managing Criminal Exposure Under the FCPA and Other Laws Impacting International Trade” (15 March 2012); and “Ethics Considerations in International Dispute Resolution” (26 April 2012). In addition, the other pillar of our Section year—the 10th Annual International Litigation and Arbitration Conference (ILAC)—will be held at the J.W. Marriott Marquis in downtown Miami on 23-24 February 2012. This year, ILAC will be coupled with the Pre-Vis Moot Arbitration Competition, held on 25 February, where experienced practitioners help prepare law school teams for the annual Vis competition in Austria.

So, please enjoy this issue of the *ILQ*, and join us at the IBT in São Paulo and our other events.

Nicolas Swerdloff
Hughes Hubbard & Reed, LLP

From the Editor . . .



A. Lindsay

mies, Brazil.

The articles in this issue not only give a brilliant overview of the Brazilian economy, but also provide the nuts and bolts of handling commercial transactions as well as litigation and arbitration in this important country. And the articles we present were written by people who really know their subjects. In addition to authoring their excellent lead article on trends in Brazilian dispute resolution, **Quinn Smith** and **Mauricio Gomm Santos** put together this issue's exceptional lineup of authors.

Cristiano Rebelo, the head of the Brazilian Consulate General's Trade Bureau and the Deputy Counsel of Brazil in Miami, shares the cover page with an important overview of the current and future state of Brazil's economy.

Then **Fernando de Magalhães Furlan**, chairman of Brazil's antitrust regulator, the Administrative Council of Economic Defense ("CADE"), and **Paulo Burnier de Silveira**, who advises CADE, write on antitrust reform in Brazil and the anticipated new competition law.

Rio de Janeiro-based lawyer, **Mônica de Salles Lima**, explains the CVM, Brazil's equivalent of the U.S. Securities and Exchange Commission, and the mechanisms for controlling, supervising and regulating

Brazil's securities market.

Welber Barral, Brazil's former Secretary of Foreign Trade, and his partner **Luiza Kharmandayan** provide a valuable look at foreign trade in this massive world market.

Our International Law Section's Asia/China committee co-chair, **Mikki Canton**, continues her "new silk road" series with an insightful piece on the economic romance between China and Brazil.

Author and Curitiba-based lawyer, **Marçal Justen Filho**, discusses the Brazilian government's role in the nation's continued development, including the use of concessions to private special-purpose companies in order to foster investments necessary for the country's continued progress.

Brazilian and Florida Bar member **Julio C. Barbosa** then provides an overview on how foreigners can set up and operate business in Brazil, including a straightforward look at the *custo Brazil*, or the real cost of doing business in Brazil.

São Paulo attorney **George Augustus Niaradi** addresses a topic of great interest to many non-Brazilian lawyers: how foreign law firms can operate and practice in Brazil. It may be difficult, but it can be done.

Moving from business to dispute resolution, **Arnoldo Wald**, founding partner of *Wald e Associados Advogados* and member of the ICC International Court of Arbitration, explains the country's legal evolution to its current modern system for the recognition and enforcement of arbitral awards.

Professor and Rio de Janeiro district attorney **Nadia de Araujo** with her Toronto, Canada, colleague, **Frederico do Valle**

Magalhães Marques, then explain the system for recognition in Brazil of foreign legal decisions and new legislation that will further enhance that process.

Top Brazilian immigration lawyer **Maria Luisa Souza Costa Soter da Silveira** and her colleague **Christel Estuardo Cunningham** describe Brazil's immigration laws and how the system works for foreign investors and workers.

University of Miami law professor and renowned expert on comparative law, especially the law of Brazil, **Professor Keith S. Rosenn**, addresses one of the difficulties of litigation in Brazil: the time it can take to secure a final appellate judgment. Professor Rosenn advocates a recently submitted constitutional amendment that would significantly shorten resolution.

Brazil native and U.S. law student, **Rafaela Vianna**, shares an intelligent piece about Brazil's trade with the United States, using ethanol as a model for how the countries can improve their relationship.

Finally, the Miami-São Paulo team of **José Samurái Saiani** and **Olavo Franco Bernardes** complete the issue with a valuable sector-by-sector discussion on the limitations of foreign investments in Brazil.

We thank all of our authors for their tremendous contributions. We believe this issue will be the ultimate reference guide on Brazil for years to come. Enjoy it, and please feel free to share it with others.

Safe travels,

*Alvin F. Lindsay
Editor-In-Chief
Hogan Lovells US LLP*

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to minimize this risk and when the value of the dollar versus the *real* moved dramatically, the hedging contracts resulted in large losses. One Brazilian company with a sizeable presence in poultry processing and food products chose to blame its CFO for the resulting losses and sued the individual in Brazilian courts. Simultaneously, U.S. plaintiffs brought a class action against the company in New York, naming the CFO as an individual defendant. The Brazilian media followed the Brazilian proceedings closely, and business journals ran lengthy articles on the CFO alleged to be at the center of the misdeeds.

Based on the typical court delays mentioned above, one might expect the Brazilian proceedings to move much more slowly than the U.S. proceedings. Quite the opposite resulted. The Brazilian proceedings moved much more quickly, resulting in a finding of no liability against the CFO of the company.³ The company appealed, and the appellate court affirmed, bringing the proceeding to a fairly swift conclusion. The class action in the U.S. has not moved with the same speed. Although the two cases involved somewhat different elements, the Brazilian court resolved complex factual issues regarding the liability of the CFO much more rapidly than the U.S. court.

Practitioners should follow this type of high-profile case because it shows the possibility for Brazilian court proceedings to speed ahead of U.S. proceedings and perhaps impact cases moving in U.S. courts. Brazilian courts are learning how to move complex cases quickly, especially when there is strong media attention in Brazil. Despite the criticism that sometimes comes from other corners, this facet of Brazilian court proceedings can play an important role in other litigation.

Another area of innovation in Brazilian litigation is the growth and change of cases involving individuals and consumers. For the international practitioner, this may seem relatively unimportant, but the decisions of Brazilian courts in these matters can have significant impact on investment decisions in Brazil, as well as international cases involving individuals.

Almost any company opening operations

in Brazil must consider the impact of labor law and the Consumer Code. Labor-law issues usually go to labor courts, where judges have the freedom to reach different conclusions on similar facts. The text of the labor law, which dates back to the 1930's, gives the employee broad rights to sue an employer; the result is potentially large liability for companies with Brazilian employees. Further, a failure to manage labor lawsuits adequately can lead to significant losses in labor courts, where judges have the freedom to rule against companies and potentially disregard any sort of choice of law or arbitration clause.⁴ Labor courts continue to adapt and change, and the application of the law to the employer-employee relationship can have significant monetary impacts on workers from the top to the bottom of the wage scale.

The same is true of cases arising under the Consumer Code, which can affect a company's strategy from both an investment and a dispute resolution perspective. The Consumer Code provides a remedy plus fee-shifting for individuals complaining of defective goods and services. For example, companies such as airlines can face monetary liability for things like losing bags and failing to book passengers correctly on available flights. Other companies selling consumer goods, like telephones, can expect thousands of lawsuits per year arising under the Consumer Code for defective goods. Similar to cases involving labor law, courts have the power to knock out choice of law, forum selection, and arbitration clauses in cases implicating the Consumer Code. Clever plaintiffs can turn these cases into big fines and damages, when the cases are not handled correctly. These consumer lawsuits need careful management to limit liability and prevent unpleasant surprises in relatively small cases, especially because liability can reach both domestic and foreign manufacturers.

These four areas of Brazilian litigation touch on a core theme: the litigation landscape is changing and provides both opportunities and challenges for practitioners. This article looks only at a slice of Brazilian litigation; many other areas of the law—such as tax law, construction law,

sports law, and regulation of certain industries—are also changing. In these different areas of litigation, Brazilian courts are reaching decisions readers may not expect but should be prepared to face.

Arbitration is Not Just International

For years, Brazil has held a lofty position in the statistics of the Court of Arbitration of the International Chamber of Commerce, with a large number of arbitrations. But Brazilian companies have also started using other arbitral institutions increasingly for domestic cases. Now, many complex transactions will include arbitration clauses mentioning the Arbitration and Mediation Center of the Chamber of Commerce Brazil-Canada, the Arbitration and Mediation Chamber of the Center of Industry for the State of São Paulo,⁵ and the Arbitration and Mediation Chamber of the Commercial Association of Paraná, among others. These changes in arbitration practice will impact the terms of foreign investment and the method of resolving disputes through arbitration.

In addition to anecdotal evidence of an increase in domestic arbitration, studies of arbitration by third parties have noted a general rise in domestic arbitration; that is, the resolution of disputes in arbitration of issues arising under Brazilian law with Brazilian parties. Parties have turned to arbitration because it is generally faster for the typical commercial dispute, and the private nature of arbitration helps sophisticated players keep their disputes out of the public eye. In addition, Brazilian companies feel comfortable inserting an arbitration clause that uses a local institution with local language and rules in joint venture, distribution, and consortium agreements. In the past, foreign investors could prevent this selection, but the strength of Brazilian companies—combined with the growing expertise of local institutions—has enabled a shift in the arbitration culture.

Many of the attorneys who are handling these domestic arbitrations were trained in the field of international arbitration, learning about cross-examination, document

production, and other ways of proving a case that draw on U.S. and common law influences. Now, a domestic arbitration can have a panel of Brazilian lawyers receiving evidence in Portuguese but with a form of cross-examination involving different types of questioning. The procedure has not reached the dimensions found in U.S. courts, and domestic Brazilian arbitrations frequently have a Brazilian style.

It is difficult, if not impossible, to marshal hard evidence to support this shift in the customs and mores of domestic arbitration in Brazil, but practice speaks to the development of a distinctly Brazilian method for arbitrating these disputes. Discussions with Brazilian lawyers and arbitrators indicate a shift in the arbitral process, which has grown more sophisticated and complex as the size and composition of domestic arbitrations has changed.

These changes will likely continue as domestic arbitration in Brazil keeps growing. Practitioners should expect to see different kinds of arbitration proceedings in Brazil as the number of arbitrations rise. While the ICC has a strong foothold, the numbers speak to a consistent increase in the administration of domestic arbitrations by local arbitral institutions, a process that will further shape the practice of arbitration in Brazil.

Alternative Dispute Resolution on the Rise

For years, Brazil had little or no alternative dispute resolution in either theory or practice. This changed dramatically with the passage of the Brazilian Arbitration Act in 1996; the decision by the Supreme Court of Brazil to uphold the constitutionality of the Act in 2001; and the explosion of the practice of arbitration in the decade that followed. Still, mediation, conciliation, dispute resolution boards, and other forms of alternative dispute resolution have not necessarily seen the same growth, a trend that will likely change in the coming decade.

Brazilian practitioners, scholars, and businesses have a renewed interest in other forms of dispute resolution. The Brazilian Congress has moved slowly to pass a new

mediation law, and the courts are attempting to alleviate their workload through mediation, especially in family law. Courts in the State of Amazonas have developed a family law mediation program that claims a success rate of 90%. Other courts have developed programs called *mutirão* where a judge oversees a conciliation process that attempts to resolve small claims against banks and disputes over the amount of government benefits. These clearly do not reach the level of complex commercial disputes, but they refute arguments that Brazilians are incapable of mediation and conciliation. These programs also lay the foundation for further advances in the fields of alternative dispute resolution, incorporating and training the judiciary in the process.

Brazilian practitioners have taken other steps to build a culture of alternative dispute resolution. Numerous courses are launching to equip and train mediators for commercial disputes, and arbitral institutions are adopting mediation rules for use by parties. With the prospect of massive public works projects in the upcoming years due to the 2014 World Cup and the 2016 Olympics, Brazil's legal and professional community has taken a strong interest in dispute resolution boards. Recently, São Paulo was the site of a multi-day conference aimed at training companies and individuals to participate on dispute resolution boards. While there are few reports of active dispute resolution boards, there is a strong interest in the legal and business community, and their use is only a matter of time.

In addition, the courts of appeal and the Superior Court of Justice have taken a more active role in encouraging conciliation. In the last few years, these courts have begun calling upon parties to a dispute to schedule a conciliation hearing. This initiative is discretionary, and there is no law requiring the courts to take this proactive stance. But reports from Brazilian lawyers indicate this discretionary step has produced good results. Parties have shown a willingness to agree, which has considerably shortened the length of some proceedings.

A decade ago, most attorneys handling

complex commercial matters could have pointed to few, if any, experiences with alternative dispute resolution. This has changed with the growth of arbitration, and the expansion of alternative dispute resolution to include mediation, conciliation, dispute resolution boards, and other forms of dispute resolution is on the horizon.

Investment Arbitration in Brazil? Not a Paradox

In many ways, investment arbitration remains in the most nascent state of all forms of dispute resolution in Brazil. For a variety of reasons, Brazil has not signed or ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "Washington Convention"), which establishes one of the primary methods of investment arbitration. Brazil has signed but has not ratified a number of bilateral investment treaties ("BITs"), so there are no arbitration clauses binding the Brazilian government. And in the multilateral agreements to which Brazil is a party, there is no mechanism for a private individual or company to sue the Brazilian Republic directly. In the eyes of many, this has excluded Brazil from the realm of investment arbitration, but recent events and legislative changes have turned the prospect of investment arbitration from myth into reality.

Starting in 1995, the Brazilian Congress adopted a number of laws creating the possibility of arbitrating claims against state entities. This trend started with the Concessions Law⁶ and continued in 1997 with the Telecommunications Law⁷ and National Energy Policies Law.⁸ Other major pieces of legislation followed this path in 2001 and 2002 with the Water and Land Transportation Law⁹ and the Electricity Law.¹⁰ The trend also encompassed one of the most important laws for foreign investors, the Public Private Partnerships Law¹¹ ("PPP Law") in 2004, which allows arbitration in contracts governed by the PPP Law.¹² Each of these laws allows arbitration claims by foreign and domestic investors, but the proceedings must be in Portuguese and located in Brazil. While claims brought

by domestic investors do not fall within the realm of public international law, the proper procedural and substantive facts could create a truly public international law dispute under these local laws. In fact, there is currently one dispute underway to decide issues arising from the expansion of the São Paulo Metro. With the building of other infrastructure projects in Brazil, these disputes can only continue to arise as a result of the investing process.

Brazilian companies have also increasingly found themselves in the role of capital exporters, investing in other countries in Latin America, Asia and Africa. These companies want the protection of a BIT or multilateral agreement, and Brazilian companies are now launching their international expansion through subsidiaries located in Holland, Spain, the United Kingdom and other countries that have a wide network of investment treaties. While there are many factors to consider when creating offshore subsidiaries, Brazilian companies are using these subsidiaries to acquire jurisdiction under the applicable international conventions. In addition, state-owned entities in Brazil are negotiating for arbitration of disputes arising from investments in other countries. For example, the Brazilian Economic and Social Development Bank ("BNDES") recently arbitrated a claim against the Republic of Ecuador under an ICC arbitration clause.¹³ While the details are unknown, the case illustrates the potential for further types of investment arbitration.

The issue has risen to the forefront of policy and technical discussions. Brazil is currently negotiating BITs with Chile, and there are reports of a multilateral free trade agreement involving Brazil, India and South Africa. In these agreements, some businesses are pushing for an arbitration mechanism allowing Brazilian companies access to an arbitral forum. The professional community has also started the process of educating itself. The recent conference

of the Brazilian Arbitration Committee (the most important professional group focusing on arbitration in Brazil) attracted over 400 people to Brasilia to spend two days discussing the role of the State in arbitration—a strong signal of interest among professionals.

With the legislation in place and the new investment structures pursued by Brazilian companies, the future undoubtedly will hold more investment arbitration in Brazil. The exact details will take time to emerge, but the outlines of an investment arbitration practice are forming.

Preparing for the Next Decade

These observations on dispute resolution in Brazil reveal a changing environment that is becoming more sophisticated and complex, much like the country's business environment. Practitioners, scholars, and businesses should understand and follow these changes, especially as Brazil adopts other forms and methods of dispute resolution that are distinctly Brazilian. This process will require foreign law firms to recruit and invest in Portuguese-speaking attorneys with a strong knowledge of Brazilian law. The legal teams necessary to handle these disputes will include practitioners with a deep appreciation for international practice and procedure as well as substantive knowledge in areas important to the current Brazilian scene, like concession agreements and valuations, international capital flows, and laws and regulations governing foreign investment.

From a U.S. standpoint, the complexity of Brazilian law further demands greater cooperation between U.S. and Brazilian law firms. The days of trying to handle a Brazil-U.S. matter without meaningful input from counsel on both the Brazilian and U.S. sides of an issue are no more. Cross-border practice will become more complex as the Brazilian economy grows, and dispute resolution will require commensurate levels of knowledge.



M. Santos

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Q. Smith

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Endnotes:

- 1 See *Zynga Inc. v. Vostu*, 11-CV-02959-EJD (N.D. Cal. Sept. 16, 2011) (order dissolving TRO and denying preliminary injunction).
- 2 See *id.*
- 3 See *Sadia Tem Mais uma Derrota na Justiça*, available at <<http://www.suino.com.br/MercadoNoticia.aspx?codigoNot=77498&SADIA+TEM+MAIS+UMA+DERROTA+NA+JUSTICA>>, last viewed 12 Oct. 2011.
- 4 This issue is the subject of much debate. There are conflicting decisions, and readers should be aware that advice from Brazilian counsel is necessary to understand fully the application of an arbitration clause to an employment contract.
- 5 See *Camaras de Arbitragem do eixo Rio-São Paulo movimentaram R\$2.5 bilhões em tres anos*, available at <http://www.fiesp.com.br/agencianoticias/2009/08/20/camaras_arbitragem_br_espaco_resolucao_conflitos.ntc>, last viewed on 12 Oct. 2011.
- 6 Law No. 8,987/95, art. 23, item XV.
- 7 Law No. 9,472/97, art. 93, item XV.
- 8 Law No. 9,478/97, art. 43, item X.
- 9 Law No. 10,233/01, art. 35, item XVI.
- 10 Law No. 10,233/02, art. 2º, para. 3º through 5º and Law No. 10,848/034.
- 11 Law No. 11.709/04, art. 11, item II.
- 12 See Mauricio Gomm Santos, *Brazil—A Brief Overview of Arbitration in Contracts Entered as Part of Public and Private Sector Partnerships [PPPs]*, 21 MEALEY'S INT'L ARB. REP. 6 (June 2006).
- 13 See *BNDES ganha disputa contra estatal equatoriana em corte internacional*, available at <<http://oglobo.globo.com/economia/mat/2011/01/19/bndes-ganha-disputa-contra-estatal-equatoriana-em-corte-internacional-923567361.asp>>, last viewed 12 Oct. 2011.

Antitrust Reform in Brazil: The Future Role of CADE

By Fernando de Magalhães Furlan and Paulo Burnier da Silveira, Brasilia

Introduction

A new competition law was approved by the Brazilian Congress in October 2011 and will take effect six months after the pending presidential final approval, expected in November 2011. The new legislation will bring substantial changes to the Brazilian competition system. This article analyses these changes, which primarily concern the structure of the Brazilian Competition Policy System (“BCPS”) and the adoption of an *ex ante* merger control system. The BCPS is still one of the few competition systems based on *ex post* merger review. Some remarks are made about the future role of the Brazilian Administrative Council for Economic Defense (“CADE”), in view of this imminent new antitrust framework and its consequent and natural challenges, before a brief conclusion.

New Brazilian Competition Structure

Currently, the BCPS is composed of three agencies: CADE; the Secretariat of Economic Law (“SDE”) of the Ministry of Justice; and the Secretariat of Economic Monitoring (“SEAE”) of the Ministry of Economy. While CADE holds the administrative jurisdiction over anticompetitive practices and merger control, SDE is the chief investigative body in matters related to anticompetitive practices and issues non-binding opinions in merger cases. SEAE primarily issues non-binding economic opinions in both anticompetitive practices and merger reviews.

The new legislation brings important changes to the current structure of BCPS. All competition powers from SDE will be transferred to CADE. The same will happen to most of the competition powers from SEAE, since the latter will retain only those powers related to competition advocacy. As a result, CADE will unify powers on almost all matters related to competition in Brazil. Within the new CADE, an administrative

tribunal and an investigative body named “*superintendencia*” will be created. This means that adjudicative and investigative powers will be unified in a single antitrust authority (CADE) but separated internally into two different bodies (an administrative tribunal and a superintendence). In a way, the future Brazilian competition structure is similar to the current French competition system, which is unified in a single, strong competition agency (*autorité de la concurrence*) with two main autonomous bodies—one with adjudicative powers (*collège*) and the other with investigative powers (*instruction*).

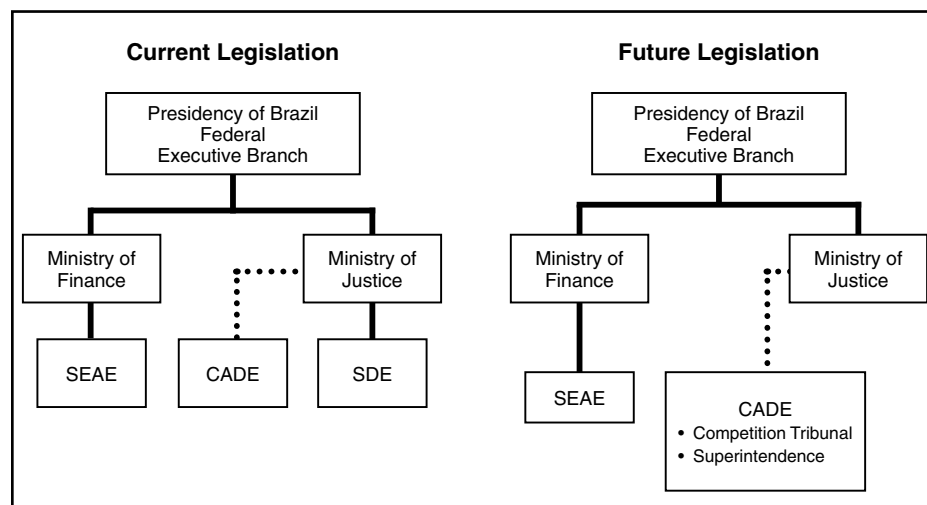
The diagram below summarizes the structural changes occasioned by the new legislation.

The administrative tribunal will be composed of a chairman and six commissioners, which mirrors the current make-up of CADE. A difference, however, concerns their terms. While the current system defines a two-year term, renewable once, the new legislation establishes a four-year term that is non-renewable. The new general-superintendent, whose functions replace those of the current secretary of economic law—with reinforced powers—enjoys a two-year term, renewable once. The office of the chief economist, already existent in

the current system, has its importance and staff/structure increased.

New Brazilian Merger Control

Pursuant to current Brazilian legislation, CADE has adjudicative authority for merger reviews, while SDE (Ministry of Justice) and SEAE (Ministry of Economy) are primarily responsible for providing legal and economic recommendations. With regard to the notification criteria, any merger that may limit or otherwise restrain competition must be disclosed to the BCPS and submitted to CADE for review. The notification is mandatory if any of the merging parties had at least R\$400 million (approximately US\$250 million) in Brazilian revenues in the previous fiscal year, or if the market share of the resultant company, in the relevant market as defined by the parties themselves, is equal to or in excess of 20%. There is no exception to the notification requirement where the thresholds are met. This would also include foreign-to-foreign transactions. The existing Brazilian merger control system may be considered as a *posteriori* because mergers may operate before CADE final approval and even before the notification to the competition agencies. Nevertheless, con-



sidering the nature of this merger control system, the risk of denying approval and consequently reverting mergers that were already implemented does exist, as was the case with the merger between Nestlé and Garoto in 2002.

The new legislation will radically change the merger control system in Brazil since it adopts the a priori (or ex ante) merger control system. Mergers and acquisitions that meet the new notification criteria will be suspended until a final ruling is rendered by CADE. Of course, rigorous deadlines for CADE are set by the new legislation in order to ensure the system works timely. Thus, the general-superintendency has twenty working days, counted from the reception of the notification of the merger, to render a recommendation or to demand additional information or documents. In the case of approval, the administrative tribunal has fifteen working days to review the first recommendation. Third parties may also contest the first recommendation and demand a review by the administrative tribunal. If neither occurs (a review

by the administrative tribunal or a demand by a third party), the merger is considered approved. This corresponds to a fast-track merger filing, expected to be the vast majority of merger cases submitted to CADE. Other deadlines and procedural rules apply to cases that require a more in-depth analysis by CADE. In any case, however, a maximum deadline is set for CADE's final decision (240 days, with a possible short-term extension). If no decision is reached, the merger will be automatically approved.

In addition, the notification criteria will suffer important changes. The market-share criteria will be eliminated. The turnover/revenue criteria will adopt a double-threshold system, which considers both the acquiring and the acquired companies—not just one of them. This change is important in the sense that the current system determines that any merger involving a big company shall be disclosed to CADE, even if the acquired company is economically irrelevant to the market. The smaller threshold will be R\$30 million (approximately US\$18 million), taking into consideration

the Brazilian revenues in the previous fiscal year. The second threshold is still the subject of discussions in the Brazilian congress (either R\$1 billion or R\$400 million)

Main Challenges for CADE

The reform will require a great effort from CADE, particularly in implementing the new system. The challenges include the unification of SDE and CADE and meeting important new deadlines for merger control. In addition, the new legislation provides for a considerable and gradual increase of CADE's staff, in order to meet these challenges. With this in mind, CADE has anticipated final congressional approval of the new law and has created five transition committees to facilitate the transition to and implementation of the new system. Hence, the committees are working to analyze and adapt the internal rules, review the internal structure, adapt internal IT systems, review internal procedures related to merger control, and find and rent bigger headquarters for the new CADE.



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Conclusion

The Brazilian Law No. 8.884 of 11 June 1994, considered to be the cornerstone of the Brazilian competition system, is expected to be replaced shortly by new legislation that will result in substantial changes. One important change concerns the current structure of the system, since the reform concentrates almost all competition powers into a single agency—the new CADE—eliminating SDE and minimizing SEAE's role. Another relevant reform is the adoption of an *ex ante* merger control system, which does not exist in the current legislation. This means that Brazil will join ICN's and OECD's recom-

mendations with regard to merger control. Among other changes occasioned by the new legislation two—in particular—usher in a new era for competition law and policy in Brazil. The CADE will face new challenges in order to assure adequate implementation of the reform and will thus certainly play a very important role in the future of competition law and policy in Brazil.

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Brazil's National Congress.

The Role of CVM (*Comissão de Valores Mobiliários*): What Foreigners Should Know

By Mônica de Salles Lima, Rio de Janeiro

This article provides an overview of the *Comissão de Valores Mobiliários* (“CVM”), which is the Brazilian equivalent of the U.S. Securities and Exchange Commission (“SEC”), and is particularly aimed at potential foreign investors interested in the Brazilian capital markets, which have grown significantly in importance over the last twenty years.

Recent Brazilian economic growth, resulting from the economic stability achieved with the success of the Real Plan (the governmental economic plan responsible for monetary stabilization), has highlighted the attractiveness of the local market, drawn much attention from foreigners and accelerated investments in the country. Therefore, it is important that foreign legal consultants are made aware of the mechanisms for controlling, supervising and regulating the securities market, which is done generally by the CVM.

The basic framework of the Brazilian financial system is established in four different statutes: (1) Law No. 4595/64, which created the Central Bank of Brazil (“BACEN”), responsible for the supervision and the regulation of the banking, monetary and credit financial systems; (2) Law No. 4728/65, which organizes and governs the capital market; (3) Law No. 6404/76, the Brazilian Corporations Law; and, (4) Law No. 6385/76, which created the CVM, responsible for the regulation of the securities market. The full and updated text of all statutes referred to here can be found at the website of the Presidency of the Republic (www.planalto.gov.br), in the original Portuguese.

As the top deliberative body of the National Financial System, the National Monetary Council (“CMN”) is also noteworthy. Composed of the Minister of Finance, the Minister of Planning, and the President of the Central Bank of Brazil, the CMN is responsible for setting policy for the orga-

nization and guidelines for the securities market and the CVM.

The CMN, together with the CVM, each within their respective powers, exist to stimulate the process of building up savings and investment in securities, promote the growth and efficiency of the stock market, and encourage permanent investments in stock of publicly held companies under the control of national private capital. In short, the joint action of these bodies ensures the regular and efficient operation of the stock market and the over-the-counter market.

The role of the CMN is policy driven in nature, setting broad guidelines for the national financial system, while the CVM is a technical and politically independent body, endowed with monitoring, controlling and sanctioning mechanisms, specifically focusing on the securities market.

Indeed, there is a growing concern with guarding and building up individual savings, so that the emphasis of these agencies has increasingly turned to protecting the ordinary citizen more effectively. New mechanisms, including legal ones, have been developed to confer more power on the agencies to prevent harmful behaviors in the market and punish wrongdoers.

Following this trend, Law No. 10411/02 has withdrawn the CVM from under the organization of the Ministry of Finance, adopting a special regime, equivalent to that of a regulatory agency; that is, an independent body that exercises regulatory functions and is managed by a board.

Actually, this change in CVM’s status benefits an increasing awareness that in areas where the public interest is clearly present, even though private relations are concerned, the state should act as a regulator, abandoning the outdated role of directly intervening in the economic order. Thus, it encourages useful results to society without immobilizing the market.

Currently, the CVM, with headquarters

in Rio de Janeiro, is run by a board composed of a chairman and four directors, all directly appointed by the President of the Republic, subject to approval by the senate, with a specified term of office. Its members are chosen from among persons of good reputation and proven experience in the capital market. The term is five years, with no possibility of reappointment. The members of the board may be dismissed only in case of a final legal judgment or administrative disciplinary proceeding, instituted by the Ministry of Finance, in which due process rights of defense are ensured. This model, in line with those of other regulatory agencies, provides greater independence and stability to the entities, protecting them from possible influences of the regulated economic sector or of political parties.

CVM’s role is to monitor and govern the following activities in the securities market: issuance; distribution; trades; brokerage; portfolio management; custody; audits of publicly held companies; and consultancy and securities analysis services. Likewise, the agency is also responsible for organizing the Brazilian stock, commodities, and futures exchanges. Categories of entities subject to its supervision include: publicly held companies; auditors; brokers and distributors; independent agents; securities analysts; investment funds; portfolios of non-resident investors; and portfolio managers.

As part of its supervisory role, the CVM exercises its so-called “police power” (notably, a concept originally articulated by the U.S. Supreme Court in *Brown v. Maryland* in 1827 and later adapted into Brazilian law). Under Brazilian law, the concept of “police power” is formally established in the national tax code and may be summarized as the possibility of restricting individual freedom in favor of a collective or public interest that overrides it. Nonethe-

less, the exercise of police power, by the agencies endowed with it, is limited by the provisions of the law.

The governing and sanctioning role of CVM is established by the Brazilian legal system, particularly the federal constitution, especially with regard to the application of penalties, even though administrative in nature. Thus, the recognized principle of due process of law, which ensures the parties are given an opportunity to be heard and to rebut each other's arguments, also applies to administrative proceedings—the so-called Sanctioning Administrative Proceedings (“PAS”)—instituted before the CVM. Administrative proceedings at the CVM, apart from being regulated by rules of the agency itself, must observe the provisions of Law No. 9784/99, applicable to administrative pro-

ceedings in federal public administration. Any decision rendered in an administrative proceeding must be fully reasoned, with facts sufficient to support any findings of violations in the securities market. The absence of a statement of reasons points to abuse of power, leading to a nullification of the proceedings that, in turn, can be judicially recognized.

This legislation also provides the forms of punishment that can be applied by the CVM. The CVM has the authority to sanction violators with warnings and fines, suspension, disqualification, or prohibition to operate in the market. CVM decisions that impose penalties may be reviewed in the second and last instance by the Appeals Council of the National Financial System, a collective body under the Ministry of Finance, based in the Brasília Federal District.

If in the public interest, it is possible to suspend the sanctioning administrative proceedings at the sole discretion of the CVM, provided the accused party or the party under investigation signs an undertaking (“*termo de compromisso*”) to cease the practice of the activities or acts that were considered unlawful by the CVM, or correct the irregularities indicated by it, including the compensation for losses. A consent to cease practice does not imply a confession to the facts nor an acknowledgment that the activity under investigation was or is wrongful. Upon full compliance with the obligations assumed, the sanctioning administrative proceeding is terminated. For example, in the notorious SADIA case, in which significant losses arose out of operations trading derivatives in the wake of the 2008 crisis, both the board members and the audit-firm partners signed an undertaking (“*termo de compromisso*”) with the CVM, and the case was closed. Similar administrative proceedings against the Brazilian pulp and paper company Aracruz Celulose, now known as Fibria, are pending before the CVM.

As part of its regulatory authority, the CVM also may issue rules and regulations to implement its legal objectives. In issuing such rules and regulations, however, the CVM is constrained by the limits of the law; that is, any regulatory or normative instrument issued by the CVM cannot transcend the limits contained in the legislation in force and, ultimately, the federal constitution itself. If there is any inconsistency between a normative instrument and a legal or constitutional provision, its validity may be questioned by the aggrieved party in court.

In addition to its supervisory, disciplinary and regulatory roles, the agency also plays an important preventive role by repressing behavior potentially harmful to the securities market and by providing guidance to market participants including investors. The CVM, motivated by an inquiry or complaint, may issue a “Statement of Understanding” containing a statement of opinion on violations in a concrete case, as well as upon the occurrence of a breach of a regulatory provision. Such statements are merely interpretative and seek to dis-

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close the views of the CVM on the subjects under its jurisdiction.

While there is some similarity, a “Statement of Understanding” issued by the CVM is not of the same nature as a “No-Action Letter” produced by the SEC in the U.S. In fact, CVM statements bind the government in the specific case but cannot be extended automatically to other cases, serving only as a source of information. The U.S. “No-Action Letter,” also motivated by an attorney’s inquiry in a concrete case, enables the market to know how the agency will respond in situations similar to the one considered, since the answers are made available to the general public.

In general, CVM decisions are made by a board of directors, and the chairman and directors act with equal authority regarding the matters submitted to them. Nonetheless, the chairman is responsible for coordinating the activities and providing the legal representation of the agency, largely through a technical staff divided into specialized sectors.

The CVM can act in court in defense of its interests as a party (whether plaintiff or

defendant), and also can act as *amicus curiae* in cases in which issues of corporate law and the capital markets are discussed. The role of the *amicus curiae* originated in U.S. constitutional law and involves the intervention of a third party authorized by law to act in a private lawsuit in the interest of society as a whole. Given the expertise of the agency’s technical staff, the cooperation of the CVM with the judicial branch represents a significant advancement, so that the decisions rendered are well grounded in all technical respects. Article 109 of the Brazilian federal constitution establishes that cases in which CVM is a party are litigated before the federal courts of Brazil. CVM’s mere intervention as *amicus curiae* does not necessarily confer federal jurisdiction, and these cases may be litigated before state courts if there are no other federal entities involved. Foreigners can invest in Brazil in the same products available to resident investors, relying on the above-mentioned structure of control and supervision. The regulation of such investments will follow, in principle, the provisions of Resolution 2689 of the National Monetary Council,

and an institution should be hired to act as a legal representative, responsible for submitting all registration information to the Brazilian authorities; a fiscal representative, responsible for taxes and fiscal issues on behalf of the investor before the Brazilian authorities; and a custodian, responsible for keeping documents updated and for controlling the foreign investor’s assets before the authorities. The financial assets and securities traded, as well as other forms of financial investments must be registered, held in custody or maintained in deposit accounts at an institution authorized by the CVM and the central bank.

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Foreign Trade: What to Expect From Brazil

By Welber Barral and Luiza Kharmandayan, Brasilia and São Paulo

A reasonable analysis of Brazil's trade requires an evaluation of many economic and social indicators. Therefore, besides exploring how Brazilian trade has recently developed, this article discusses where Brazil stands in the current international context; the foundations of the country's economy; the opportunities presented by its prosperity; and the some of the obstacles Brazil still must overcome before realizing its potential.

Recent Evolution of Brazilian Trade

A starting point to understanding the Brazilian macroeconomic situation is its response to the 2008 financial crisis. Measures adopted by the Brazilian government, such as massive tax cuts, made it possible for Brazil to emerge from the crisis smoothly and, compared to other countries, without significant impact. This is borne out by data on Brazil's net exports over the last four years.

In 2008, despite a decline in the trade surplus—a result of the appreciation of its currency (*real*) and an evidence of the need for modernization of the domestic industry—Brazil recorded a growth of 23.2% (US\$24.9 billion) in exports over the previous year. In 2009, despite negative expectations regarding the world economy and international trade, Brazil's trade balance totaled a surplus of US\$24.615 billion. In 2010 Brazil's international trade resumed its growth and approached the pre-crisis levels. The trade flow reached US\$383.5 billion, and the trade balance showed a surplus of US\$20.278 billion. In August 2011, a surplus of US\$28.5 billion was reported. In addition, the government increased the export target of 2011 from US\$245 billion to US\$257 billion.

Although Brazil has recovered—or even increased—the volume of business transactions that had decreased during the crisis, the latter contributed to Brazil's trend of exporting more commodities than manu-

factured goods. This is primarily due to the weaker performance of countries, such as the United States, who are Brazil's main importers of manufactured goods. Fierce competition in the world market also affected its performance. Large inventories of industrial products pushed their prices down, making them more suitable to take over new markets. Between 2003 and 2007, manufactured goods accounted for 52% to 55% of Brazil's exports. While in 2008 these products represented 46.82% of exports, in the partial estimate of this year (January-August) their share fell to 36.06%. The competition faced by Brazilian manufactured goods is not limited to the international market. The threat of recession in rich countries and the strength that Brazil's economy has shown during the peak of the crisis turned the Brazilian domestic market into a priority for companies around the world.

This scenario is reinforced by the appreciation of the Brazilian currency, which not only affects the export capacity of the industry, but also increases the competitiveness of foreign products in Brazil. According to official data from seventy governments, Brazil experienced the greatest expansion of imports in 2010 among members of the G20 and among all economies that have their data compiled by the World Trade Organization.

While, on the one hand, Brazil is facing difficulties in exporting its manufactured goods and in competing with these products in its own territory, on the other hand, commodity trade has been thriving. The current weakness of the rich economies, coupled with the boom in commodity prices in recent years (driven by the demand from Asian countries), explains the concentration of Brazilian exports on commodities.

China, more than any other country, has played a key role in this process. In fact, since 2009 China has been Brazil's main trading partner, taking a position his-

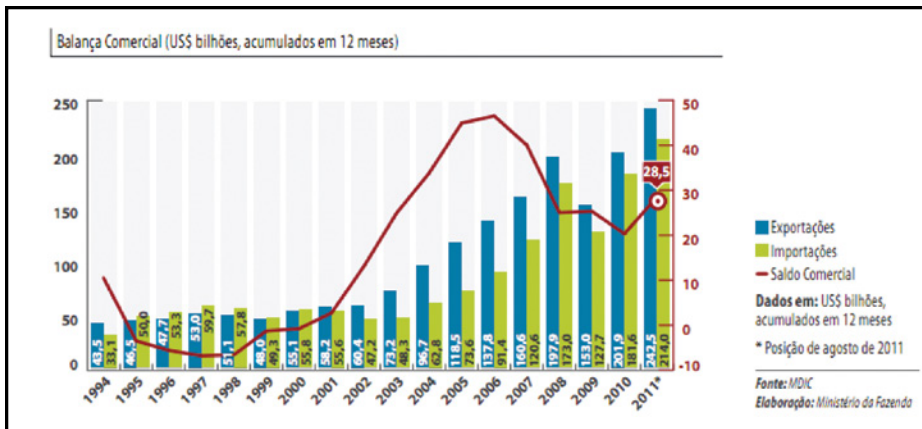
torically occupied by the U.S. While China has become a major supplier of industrial products, its demand is concentrated in the mining, energy and agribusiness sectors. Indeed, Brazil and other Latin American countries have been profiting from the Chinese hunger for commodities. This becomes clear if we consider the evolution, in recent years, of the share of commodities in Brazilian exports. In 2006, commodities accounted for 43.50% of total exports by Brazil. In 2008, this rose to 50.57%. Finally, in the partial evaluation of 2011 (January-August), commodities represented 61.76% of total exports by the country.

Another fact that must be stressed is that sales of only five commodities—iron ore, crude oil, soybeans (beans, meal and oil), sugar (raw and refined) and meat—account for 39% of this amount. The highlight is iron ore, whose share rose from 8.36% in 2008 to almost 16% this year. The importance of China to this trade is evident. This Asian country alone currently demands 46.83% of the iron ore and 68.79% of the soybeans exported by Brazil.

The impact of international commodity prices on Brazilian trade can be traced through data. From January to August 2011, the total value of Brazilian exports (US\$166.7 billion) was 32.2% higher than the total value of Brazilian exports in the same period last year. Commodities accounted for 73.3% of this increase.

Nevertheless, the pivotal role that these products play in Brazilian trade and, consequently, in the Brazilian economy, also poses risks. Should the Asian countries—particularly China—encounter economic downturns, Brazil will face difficulties to keep surpluses from sales abroad. Such an event could be damaging to Brazil's economic status. A decline in investment in those countries would cause a fall in international prices of commodities.

Thus, on one hand, the appreciation of commodities appears to be a very positive element for the purpose of keeping Brazil's



greater, but also that their growth rate is, and is likely to continue to be, considerably lower than Brazil's.

Finally, it is worth mentioning that although Brazil (and the world) may face an imminent new crisis, the deterioration of the global expectations is due, primarily, to the worsening situation in the developed countries. The reduction in the recovery pace, combined with a large increase in fiscal and financial uncertainties in these advanced economies, pulled down the expected growth rate worldwide.

Solid foundations of the Brazilian economy

Among the factors that sustain Brazil's economic expansion, two should be highlighted: the country's sound financial system and the strength of its domestic market. The soundness of the Brazilian financial system is underpinned by three elements: the amount of international reserves; the volume of foreign investments; and the stability of the monetary policy. The strength of the domestic market, on the other hand, is based on the rapid rise of the Brazilian middle class.

In 2010, Brazil's international reserves totaled US\$288.57 billion. In the partial estimate of 2011, this value increased significantly: the country's international reserves amount, at present, to US\$353 billion. This volume puts Brazil seventh in the ranking of major international reserves in the world. Such reserves are crucial in the current economic climate, when a new international recession is looming. International reserves

trade surplus. On the other, the dependence on commodity prices and on the demand for raw materials of a few emerging economies can become a weakness. This is why a strategic priority for the country is to diversify and create a more balanced source of growth.

Prospects and Opportunities

Three topics are important in understanding the primary opportunities today in Brazil. First, we must address Brazil's situation in the global economic context. Second, we focus on the main factors underpinning Brazil's economic expansion. Finally, we discuss the investment opportunities engendered by two major events that will occur in Brazil in the next five years: the FIFA World Cup and the Olympic Games.

Brazil in the global economy

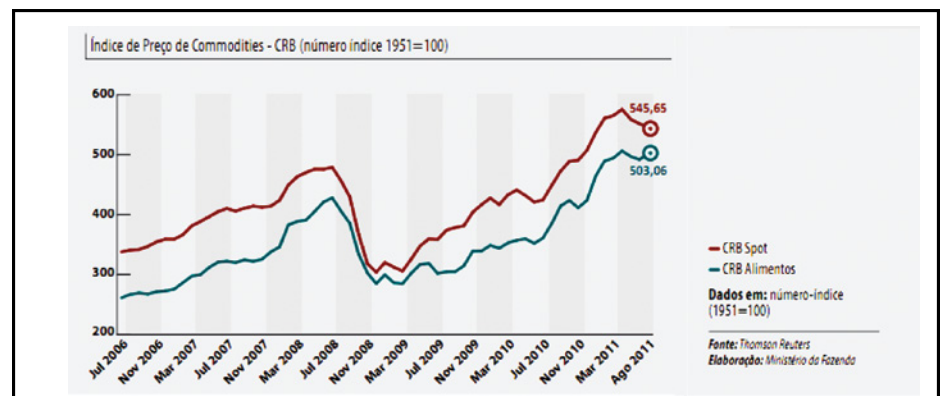
Not only is the Brazilian economy booming, but the world itself is experiencing an economic rearrangement and moving toward a new balance that strongly increases the presence of dynamic emerging countries such as Brazil.

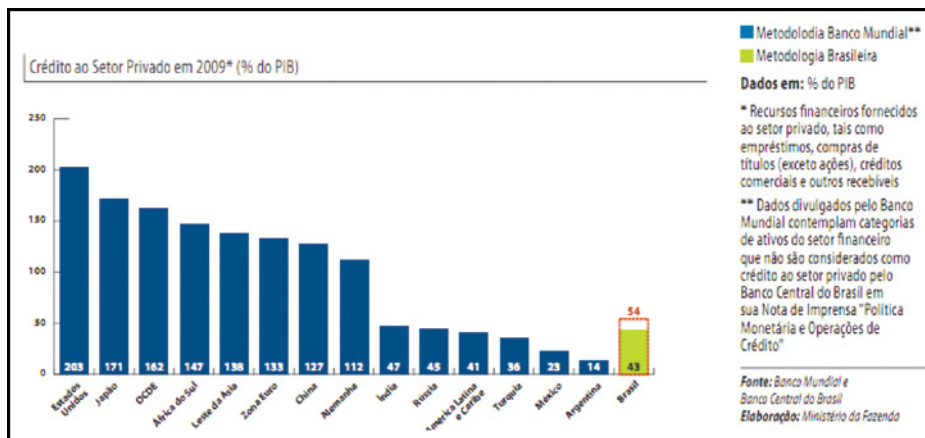
Besides its ranking based on GDP as the seventh largest economy in the world, Brazil is included in a group of six emerging economies that, according to the World Bank, will redefine the global economic structure in the near future. A report released by the World Bank estimates that by 2025 the economies of Brazil, China, Indonesia and South Korea will account for more than half of the global growth.

Advanced countries will continue to play an important role in the global economy. Yet, their average growth rate until 2025 may fall close to 2.3% per year. Emerging economies, on the other hand, are likely to grow, on average, 4.7% over the same period.

The recent revision of Brazil's 2011 growth rate from 4.1% to 3.8% by IMF is not unimportant. Nevertheless, one must make some observations that contextualize and qualify this reduction. The fact that this revision took place on a global scale is the first element that must be considered. The global growth rate estimate decreased by 0.3 of a percentage point and is likely to be 4% this year.

Second, it is noteworthy that the expected growth rate in advanced economies fell 0.6 of a percentage point and should amount to only 1.6% this year. This means that not only the decrease in the growth-rate estimate endured by these economies is





pinning Brazil's economic growth. Over 31 million Brazilians have ascended to the middle class (a stratum with a monthly income between R\$1,000 and R\$4,000) in the last decade. Currently, this class numbers 95 million, representing 52% of the population. This rapid rise is, as we shall see, the result of the resumption of Brazil's economic growth, its consequent employment increase, social protection policies and larger credit access in the country.

Brazil's growing economy raised opportunities in the labor market. From 2003 to 2010, the average 4.0% GDP growth was accompanied by the creation of 15.4 million formal jobs in the country. The 6.0% unemployment rate achieved in July this year is the lowest for the month since 2002.

The expansion of the middle class results also from the reduction of wealth inequality within the country. Although Brazil is still ranked as one of the most unequal countries, it is noteworthy that over the last decade the income of the poorest 50% in Brazil rose 67.9%, while the income of the richest 10% rose only 10.03%. This income redistribution becomes even clearer when we compare Brazil to other emerging markets. The income growth rate of the richest 20% in Brazil is lower than the same rate in all other BRICS countries. The income growth rate of the poorest 20% in Brazil is, on the other hand, higher than the same rate in all other BRICS countries.

As previously noted, credit expansion is another factor accounting for Brazil's strong internal market. Regarding this topic, however, some observations should be

protect the country from a possible capital flight and from the lack of foreign funding sources. In addition to helping the country meet its external commitments, international reserves also reduce the country's exposure to currency fluctuations.

Foreign investments also play an important role in Brazil's financial system. Between January and August of this year, foreign direct investments in industrial production and services reached US\$44.085 billion, versus US\$17.153 billion in the same period last year. According to estimates of a report recently released by the Central Bank of Brazil, the Brazilian productive sector will receive a total of US\$60 billion in foreign investments this year.

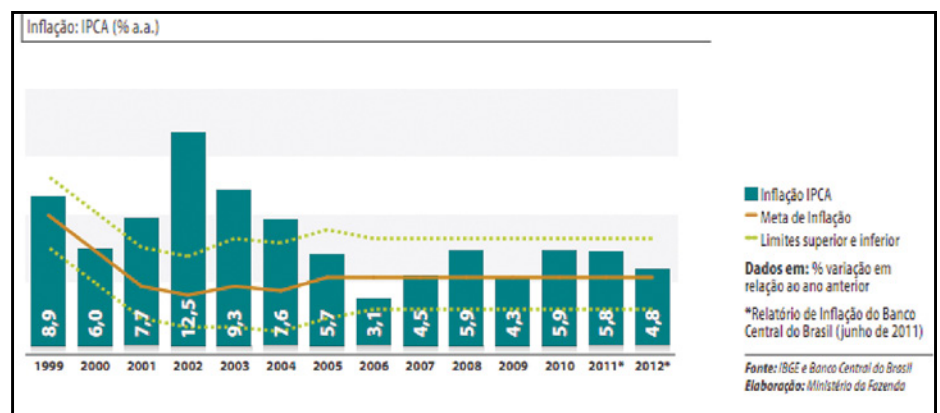
These predictions coincide with an analysis by the Institute of Applied Economic Research ("IPEA" in the Portuguese acronym). According to IPEA, Brazil was the fifth destination of foreign direct investment in 2010, falling behind only the United States, China, Hong Kong, and Belgium. The forecast is for Brazil to hold a similar position this year.

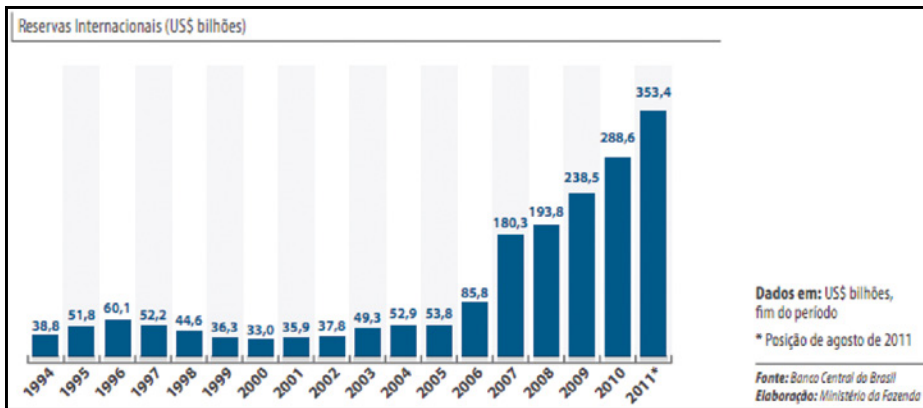
Brazil's stable monetary policy is the third element sustaining the soundness of the national financial system. Such a policy has at its center an inflation target regime that is based on the control of short-term interest rates. The announcements made by the Central Bank of Brazil concerning its monetary policy strategy and its assessment of economic conditions allow markets to understand how the bank tends to respond to economic fluctuations and shocks. Thus,

the targeting system provides not only transparency to the monetary policy but also price stability to the national economy.

Inflation control is borne out by concrete data. Since 2004 the Consumer Price Index ("IPCA" in the Portuguese acronym)—an index that measures changes in the purchasing power of the population—remains within the upper limit set by the Central Bank. In the partial evaluation of 2011 (January- August), inflation reached 7.3%, surpassing the limit of 6.5% set by the Bank for this year. Nevertheless, based on the forecasts of lower global economic growth and on a consequent fall in commodity prices, inflation is expected to decrease. Thus, if on one hand, a fall in commodity prices jeopardizes Brazil's trade balance, on the other, it softens the inflationary impetus caused by the appreciation of the dollar.

Besides a sound financial system, the robust domestic market is a factor under-





Opportunities

Of all the programs and events that stimulate and contribute to the strength of the Brazilian economy, the 2014 World Cup and the 2016 Olympics stand out. Since these events will generate many investment opportunities in the country, we will briefly address the most important figures concerning them.

According to data provided by Brazil's federal government, the World Cup will add R\$183 billion to the GDP of the country between 2010 and 2019. This value corresponds to an annual increase of 0.4% of the GDP. This increase will result from investments in infrastructure, an increase in household consumption, the recirculation of money in the economy, tourism, and the use of stadiums after the World Cup.

The investment in infrastructure alone is expected to amount to R\$33 billion (US\$18 billion). This value will be used to build or renovate stadiums, ports and airports; to improve urban mobility; and to develop telecommunications, energy, health, safety and hospitality.

The other major event is, of course, the 2016 Olympics. The state of Rio de Janeiro estimates that R\$11.39 billion will be invested in infrastructure and improvements in Rio de Janeiro. Out of the total investment in infrastructure, the public sector will account for R\$7.379 billion. Of this amount, R\$2.141 billion will be spent on road construction and repair, R\$890 million on environmental management and R\$732

made. On the one hand, there is considerable evidence that the credit supply in Brazil does not pose many risks. Besides presenting moderate growth, it is also backed by conservative banking regulations aimed precisely at mitigating risks.

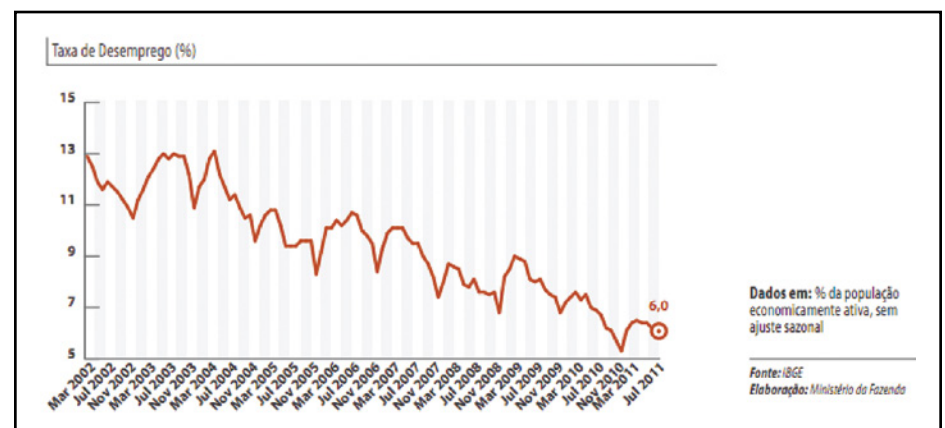
According to the Central Bank of Brazil, the rate of capital immobilization of the fifty largest banks within the country was only 24.7% in March 2011. This value corresponds to half of the maximum percentage allowed by the National Monetary Council. The solvency index of Brazilian banks is about 18%, exceeding international (the Basel Accord requires 8%) and domestic (Brazilian law requires 11%) requirements. Moreover, credit supply has been growing faster in other emerging countries than in Brazil. According to the IMF, in 2010, credit supply augmented 20.5% in Brazil, while it increased 27.8% in Turkey, 26.3% in India and 21.7% in China.

Likewise, the participation of the National Financial System in Brazilian private sector funding is still modest (54% of GDP). In South Africa and China, for example, this percentage is above 120% of the GDP. This comparatively low percentage shows that Brazil's credit supply is relatively less exposed to risk, decreasing the likelihood of the formation of bubbles.

On the other hand, although credit expansion in Brazil is lower than that of other countries, it is not negligible. From August 2010 until August of this year, the Brazilian credit supply augmented 19.4%,

amounting to R\$1.889 trillion. Because of it, the Central Bank estimates that the credit supply shall increase 17% this year (more than the 15% originally expected), reaching 49% of the GDP. Although such credit expansion indicates the willingness of the population to consume, as well as the expansion of the middle class, it can also represent a key challenge for Brazil's future stability.

Thus, despite the evidence that the Brazilian credit supply has a moderate and stable growth, the world economy's current situation makes more pressing the need for macro-prudential and conventional measures aimed at protecting countries against default and global shocks that can reduce their liquidity. The Central Bank of Brazil has therefore recently applied a series of measures to contain the level of indebtedness.



million on security. The private sector will be responsible for R\$4.018 billion. Of this amount R\$1.624 billion will be spent on the media village, R\$1.540 billion on electric infrastructure and R\$854 million on the Olympic Village.

The World Cup and the Olympics should together create three million jobs in Brazil. A study conducted by the British bank Barclays estimates that if the country manages to promote itself to the world, Brazilian exports may grow 30% after these events.

Based on these estimates and on the experience of other countries, it is evident that the World Cup and the Olympics are not only the largest sporting events in the world, but that they also have a major impact on the economy of the host country. The gains are not restricted to the multiplier effect of investments but extend to the legacy left by improvements in infrastructure around the country. Naturally, the promotion of these events poses challenges to Brazil. The lack of specialized professionals and skilled labor in areas such as engineering, project management

and construction is one of the problems that Brazil has to solve when preparing for these events. These challenges, however, can be turned into opportunities for the country to encourage the development of areas that, despite their importance, suffer from a lack of investment.

Challenges for Foreign Investors

While appearing as one of the world's leading economies, Brazil still faces significant obstacles that hinder economic activity in the country. Deficient logistics and excessive bureaucracy are major problems faced by entrepreneurs developing business in Brazil.

The bureaucratic hitches impairing trade in Brazil become evident in different situations: in starting and closing a business; in regulating real estate; in importing and exporting; in hiring and firing workers; and, especially, in taxpaying. Notwithstanding the various occasions in which bureaucratic hindrances can be detected, the complex

procedures that overburden economic activity have a common origin: intricate legislation that imposes an unreasonable number of requirements on business. To illustrate the challenges faced by the latter, we will address some of the difficulties mentioned above.

Starting a business in Brazil requires filing fifteen procedures that pass through fifteen distinct state bodies. Such a process is time consuming and costly, increasing business expenditures significantly. The delays and costs resulting from these procedures become obvious when we compare the situation in Brazil with that of other countries: the time required for starting a business in Brazil is twenty times greater than the time required in the United States; the cost of starting a business in Brazil is almost ten times greater than in China.

Closing a company in Brazil presents similar problems. Several documents proving the absence of tax, labor and other kinds of legal disputes must be filed in different state bodies. Gathering and updating these documents not only generates costs, but



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also extends the time required to close a business. While in Ireland it takes four months to close a business, in Brazil it takes an average of four years.

Procedures that must be carried out for the clearance of goods arriving at Brazilian ports are another example of paralyzing bureaucracy caused by outdated legislation. The first obstacle is the number of rules governing the process as a whole: 3,000 normative acts of different kinds (laws, decrees, ordinances, etc.). Even before disembarking the goods, one must file 112 documents at 28 state bodies belonging to 14 different ministries. According to a study conducted by the Special Secretariat for Ports, for each vessel that arrives in Brazil, 935 documents must be provided to different public entities. The competitive disadvantage that results from so many requirements is enormous. In Brazil, most of the importers and exporters take, on average, five days to meet the country's requirements, five times more than it takes in the Dutch port of Rotterdam.

In addressing the barriers to Brazilian competitiveness generated by taxes, two aspects must be broached: (1) the complexity of a tax system governed by thousands of laws from different governmental spheres; and (2) the burden that these taxes represent to business—raising costs and hindering investments in other important areas, such as R&D.

According to research conducted by Pricewaterhouse Coopers in collaboration with the World Bank, the average time spent, around the world, on complying with tax laws is 282 hours per year. In Brazil, however, businesses spend an average of 2600 hours per year. Among the 183 countries that participated in the survey, Brazil ranked last. In Bolivia—the country that ranked next to last—the time spent is more than two times smaller. The time, money and manpower spent on tracking and deciphering the maze of Brazilian tax rules are resources that businesses could instead invest, thereby increasing their competitiveness.

Infrastructure problems, especially those

affecting transportation, represent another obstacle for the Brazilian economy. According to a research conducted by the Institute of Logistics and Supply Chain, R\$983 billion would have to be spent on Brazilian ports, railways and roads in order to make Brazil's transportation system internationally competitive. The bulk of investments would be on roads. Of the 1.6 million kilometers of roads in Brazil, only 200,000 are paved. The country would have to invest R\$811.7 billion in order to equate their road network with that of the United States.

Rail transportation is also precarious in Brazil. While 29,000 kilometers of railroads have been built in Brazil, the United States has 227,000 km of tracks. According to the abovementioned survey, R\$130.8 billion is necessary to improve this type of transport, most of which would be dedicated to the restoration of existing tracks. Brazilian ports, on the other hand, require investments of R\$40.5 billion.

The facts and figures presented above make clear the country's need to reduce state bureaucracy and to improve logistics. Brazil's growth potential depends on simpler and less costly procedures. Measures such as the unification of accounting procedures and greater use of electronic systems are examples of how the country could improve its tax system. Investments in logistics have, on the other hand, increased as a consequence of events like the World Cup, the Olympics and other programs launched by the government. Yet, the great Brazilian deficit in this sector requires heavier and longer-term investments.

Conclusion

The figures presented above make clear that Brazil is one of largest economies in the world, and all indicators point to growing importance. The country's prosperity is not only the result of a favorable international climate that raised commodity prices considerably, but also of sound macroeconomic and social policies. The vast number of people moving out of poverty and into the middle class strengthens

Brazil's domestic market and invigorates the country's economy. While the unemployment rate and income inequalities are decreasing, foreign investments and credit supply are steadily growing. The country's economic—and also political—stability allowed it to navigate the 2008 financial crisis skillfully.

Brazil certainly has to work on many challenges that compromise its potential to grow. Deficient logistics and excessive bureaucracy are enormous problems impairing the country's development. The investments in infrastructure are still too small to put Brazil side by side with rich countries or even with some emerging economies. The burden posed by Brazil's complex regulations still has not led the country to cut red tape.

Nevertheless, there are reasons to be optimistic. Government initiatives attempt to make interstate taxes more rational. Online procedures unify the different procedures businesses have to comply with when paying their taxes. Recently, a simplified tax regime for mid-sized and small companies was implemented.

Like any other country, Brazil has several variables it must manage in order to assure its growth. Yet, unlike many other countries, Brazil has numerous aspects favoring its economic expansion. Hence, if it proves its ability to profit from opportunities and to deal with obstacles, we should have high hopes for the emerging giant.



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The New Silk Road: China and Brazil

By Mikki Canton, Coral Gables

Once upon a time, the headlines were bright and dazzling: “The Dance of Two Distant Strangers,” “A Burgeoning Relationship Bar None,” “A Marriage Made in Economic Heaven,” “Hot Flush,” “The Dragon Finds His Mate.” A splendid match was made as The Dragon traveled along the New Silk Road, aggressively looking for riches to satisfy his appetite. The headlines read like a best seller or a Hollywood movie starring two dashing characters—daring, hungry, impetuous, with latent energy that had been dormant for years. So began the story of China and Brazil.

The courtship started circa 2004, when Luis Inacio Lula da Silva, then the president of Brazil, and Chinese President Hu Jintao spoke excitedly and warmly of affinities between the two emerging powers and pledged to be equal partners in business opportunities, trade and key global issues. Brazil declared China a market economy and, with promises of multi-billion dollar commitments from China, hefty bilateral trade and almost unparalleled efforts in cooperation, the two proud patriarchs shook hands. This, undoubtedly, was to be the most magnificent strategic alliance of our time, destined for wedded bliss.

As time passed, the two seemed to be drawn into an even closer embrace. While Chinese investments in Brazil lagged in the early years of the budding relationship, primarily because the parties did not know each other well, China has since become Brazil’s number one trading partner. China continues to increase its investments in Brazil with US\$17 billion in 2010 and over \$7 billion so far in 2011. The majority of this investment is in oil, mining and agriculture. China’s state-owned gas and oil companies have acquired and developed assets in Brazil in order to meet the country’s projected future demands. Sinopec, China’s second largest energy company, paid over \$7 billion for 40% of Repsol, a Brazilian division based in Madrid, that holds more oil blocks in Brazilian basins than any other foreign operator.

China Development Bank gave a \$10 billion loan to Brazil’s Petrobras in exchange

for 200,000 barrels per day of oil. In May 2010, Sinochem, a petroleum company, announced the acquisition of a 40% interest in Brazil’s Peregrino oil field from the Norwegian firm STATOIL for \$3 billion. Both Bank of China and China Development Bank have opened representative offices in Brazil, and more will follow. Brazil’s trade with China is up to 40% thus far in 2011. Chinese exports to Brazil were up 61% from last year, and Brazil’s economy grew almost 7.5% last year, the fastest growth in more than twenty years. All this is particularly relevant as Brazil accounts for 40% of Latin America’s economy.

Yet today there is talk of trouble in China-Brazil paradise. The headlines have changed to “Euphoria Overdone,” “Brazil Is More Like a Concubine,” “Falling Out of Love,” “China Takes and Brazil Gives,” “Lots of Smoke and Little Fire.” Have there been too many illusions in this China-Brazil courtship, and is marriage even a possibility? Perhaps a new realism has emerged that casts doubt and calls for sanity and reason. More voices in and out of Brazil are suggesting that Brazil gave in too soon to China’s siren songs and its apparent sophisticated and strategic charm offensive and, in doing so, turned away from the somewhat distracted glance of the less attentive United States.

Some observers may dare say, to the horror of other emerging nations who bask, or seek to bask, in the glow of China’s financial largesse, that it now appears Brazil—the “darling” of economists, analysts and commentators worldwide—may be raising its voice in protest, demanding that there be more equality in the relationship. What if the suitor becomes upset? Will this cause China to retreat from further pursuit of Brazil? Will other countries be emboldened by Brazil’s vocal demands and, in turn, assert themselves more forcefully than they have in their relationship with China to date? Can a China-Brazil stand-off provoke a significant shift in the region’s economy, or can it be an unexpected source of energy for both countries? The question now becomes whether China and Brazil,

as adversaries, competitors or friends, will move on to more promising suitors.

In order to answer this complex question—and determine if, in fact, there is a credible reason for an appearance of thorns between these two “pledged strangers”—we must first take a walk down memory lane and see how it all started, what has gone right and gone wrong and where responsibility lies. Clearly, China and Brazil make—and have made and may continue to make—a formidable couple. To truly understand this relationship, however, we must examine how balanced the roles are, what each really means to the other, how much trust and long-term commitment there is, what economic give and take actually exists between the parties, how each seeks to gain from the enterprise, and finally, what “make-it-or break it” socio-political and cultural similarities and differences exist.

First, and most importantly, Brazil has a new president who appears to have different goals for Brazil than did her predecessor who joined forces with China in order to develop an East-West strategic alliance characterized by economic global ambition. President Dilma Rousseff, though a protégée of former president Lula da Silva, seeks to concentrate on internal objectives such as creating jobs, fortifying Brazil’s infrastructure, fostering the development of a more vital and engaged middle class, and strengthening commerce with the United States.

She seems to be heeding concerns—voiced both by Brazilian governments and businesses—that the country’s economy is being reshaped to fit what China needs it to be: that of a cooperative and compliant exporter of the commodities China wants. More and more, the Rousseff administration is seeking to hold China accountable for the imbalances that have resulted from lopsided economic policies, currency manipulation, dumping and anti-protectionism. Indeed, these have become matters of some urgency for this new president.

The trade relationship between China and Brazil is grounded in the latter’s natural resource abundance and China’s commodi-

ty-intensive growth patterns. With the trade relationship unbalanced in China's favor, bilateral trade, or lack thereof, has become a growing concern. China displaced the United States as Brazil's major trade partner, but Brazil did not rise in any substantial way as China's trade partner. In fact, it did not even make it to the top ten.

While China's market is open to Brazilian commodities, it is almost closed to Brazil's manufactured products. An example of this trend is how China buys unprocessed soy from Brazil, but it will not buy processed soy and therefore gives Brazil no chance to have any financial upside in the transaction. Brazil's partnership position, for the most part, is as an exporter of commodities and importer of Chinese goods. While it is true that commodity exports have catapulted Brazil's economic growth in the past decade, they have done little to help develop Brazil's long-term internal productivity and competitiveness, or to establish the promised technology transfer from China. In fact, to date, technology has been passing from Brazil to China in areas such as aircraft manufacturing and agriculture with little intra-industry trade.

Conversely, China's undervalued currency, coupled with the threat of cheap Chinese "like product" imports to Brazil, have caused local manufacturers, primarily in textiles and shoes, to suffer as they have difficulty competing with the cheaper Chinese products both at home and elsewhere. Thus, affected parties argue that industrial production has become flat and markets have begun to signal "de-industrialization."

The changing nature of the contemplated China-Brazil strategic relationship has come down to Chinese companies investing in Brazil's commodity sectors in order to gain access to a steady supply for China's consumption, and Chinese companies investing in Brazil to find export markets for Chinese goods and services. In large part, Chinese imports compete directly with Brazil's, and both China and Brazil are strong competitors for foreign investment.

To some policymakers, it is becoming clear that China regards Brazil as a source of natural resources and a possible entry into the U.S. and other markets rather than

as a true strategic partner. Raised expectations that Brazil would achieve high, long-term productivity growth as a result of the China-Brazil alliance have dimmed.

While China may be fostering growth in the region by simply absorbing commodity imports, sustaining their prices and driving the expansion of its commodity-based exporting industries, it plays a much more limited role in the diffusion of technology and knowledge. Some believe that sufficient red flags have been raised for President Rousseff's administration to undertake vigorous policies going forward.

Brazil's Congress has passed legislation, or is contemplating tightening existing legislation, to achieve a more balanced bilateral exchange with China through tax reform policy to include Chinese investments and targeted tariffs on Chinese manufactured goods, tighter enforcement of customs' regulations and increased complaints about dumping. Such necessary protectionist measures, they argue, will level the China-Brazil playing field, increase advantages to Brazil's local industries, and encourage China to purchase Brazil's value-added products while adding value to Brazil's exports. In addition, Brazil has taken numerous trade-related World Trade Organization actions against China.

One major area of continued focus has been China's ravenous appetite for and interest in directly acquiring land in Brazil for mining and soybean farming purposes. Though Brazil bans such large foreign purchases, Chinese investors have purchased land through local partners. How much land is presently owned by Chinese investors in Brazil is somewhat of a mystery even to Brazil's federal and state governments since the land was purchased by and through companies that are locally incorporated. Brazil argues that a very important part of the strategic plan with China focused on promoting Brazil's local efforts in infrastructure and services. There were high hopes that Chinese investment in Brazil would yield jobs and financial returns in these two areas of the economy.

In fact, Chinese governments and companies flush with cheap capital from Chinese banks are making substantial invest-

ments in Brazil to build power transmission facilities, soybean processing and transport plants, technology research and development centers, rail and other transportation projects, pipelines, telecommunications facilities and so on. Yet, none of this investment guarantees that a significant portion of the work will go to Brazilian service and infrastructure firms.

Chinese service companies are positioning themselves to win contracts directly from the Brazilian government and edge out the local teams. In order to accomplish this, Chinese service providers and infrastructure firms enter the market as supporting partners of the Chinese firms investing in Brazil, including petroleum service companies, and engineering and transportation companies, that build the infrastructure needed by the Chinese mining and agricultural companies making the investment. Hence, the local Brazilian companies find themselves competing with Chinese infrastructure and service providers.

Yet, is all this perceived trouble a "China problem" alone? Certainly, in any relationship there are two sides to every story. Why would Brazil complain when it has risen to a level of economic success and world prominence unheard of in decades, and the Chinese are doing nothing different than established multinational companies already conducting business in Brazil? The success of any type of long-term relationship is driven by domestic, institutional and regional variables.

The China-Brazil relationship may be strong economically, but it is fragile with regard to more nuanced issues that are a result, in large part, of very different domestic institutional structures in each country. Many argue that China is not at fault in not being able to live up fully to its pledge to engage more openly with local workers and firms. They point to the fact that Brazil's governance structure impedes progress; that corruption is a big deterrent to more interaction with local governments; that the tax system, labor costs, overvalued currency and infrastructure and governance issues are impediments; and that all of this makes local goods more expensive

to manufacture in Brazil, which opens the way for consumption of cheaper, like-quality Chinese goods.

Brazil is democratic, market-open and engaging while China is authoritarian and, true or not, perceived as an economically manipulative power. As a democracy, Brazil is open to debate on human rights and differs from China on this as well as other high-profile issues such as climate change, nuclear proliferation, and international security. That having been said, the bottom line for both of these countries is safeguarding their core economic interests.

Yet the relationship may become more complex as each tries to increase its profile in other regions. China has continued to establish itself solidly in most Latin American countries and the Caribbean and shows no sign of slowing down globally. Brazil is more and more interested in Africa as well as in nurturing its past relationships with the United States and Europe.

Not to be discounted are the cultural differences between the Chinese and the Brazilians. While the Chinese and Brazilians are similar in the way they engage one another in

the business-development process, China is more cautious and bases much of its strategy on trust and past success with an individual, government official and/or company. Brazilians and Chinese have not had a real opportunity to get to know one another.

While there is a solid community of Chinese-Brazilians in Brazil, the Chinese do not interact with Brazilians on a day-to-day basis to the degree commensurate with their level of economic investment. Thus, there has not been a bond created, and danger lurks when one party sees the other as dominant, especially when both cultures value proving success and saving face, nationally and globally.

While the economic relationship has grown by leaps and bounds, little or no personal connection has been cultivated to deal with problems when they arise, nor to evaluate the areas where China can truly foster growth in Brazil. Connections that are not accompanied by human capital formation, socio-economic investments, technological adoption and adaptation, and mutual learning will not spur productivity and growth.

For example, in spite of the significant monetary investment, there is little evidence to show that China is fostering productivity and growth in Brazil or the Latin American and Caribbean region as a whole. This is understandable as language, culture, distance and other variables are major impediments. Deeper institutional, structural, political and environmental factors must be in place to allow Brazil and China to develop a winning and truly workable plan. Many of these handicaps are related to lags in human capital, skills, structure and innovation capacity. Both countries need to develop a well-designed, growth-oriented policy agenda that can be systematically implemented—something that is currently missing.

Even if it is true that Brazil is beginning to recognize the global uncertainty and risk to such a deep engagement with China, it is a fact that the growth of Brazil and other Latin American countries appears to be more and more tied with developments in China than to other advanced countries. Additionally, countries with connections to China perhaps will more likely be able



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to maintain economic activity apart from associations with advanced nations. The question remains whether or not Brazil can leverage its relationship with China and turn it into an important—yet not the sole—source of long-term growth.

Brazil's robust growth over the last few years may enable Brazil and the region to begin a steady economic convergence toward the standard of living of advanced economies. While Brazil and China appear to have bright futures, both countries must first reexamine their trading relationship in light of the lessons learned during their short partnership. Brazil must seek a solution for concerns arising from the cheap intermediate imports from China that have led to problems with local producers rather than spurred healthy competition. Brazil must not turn its back on the fundamental reforms necessary to make Brazilian industries more competitive and attractive to investors; namely, cut government spending and reduce the government's role in administering national savings.

Not to be overlooked is the issue of corruption in government and industry—an issue very familiar to both China and Brazil and to the countries that do business with them. Good governance leads to greater foreign direct investment, and no economy will survive unless corruption is curtailed.

Brazil can begin to insist that Chinese investments take into account social and political impacts, both in Brazil and in other countries where Brazilian companies compete. Standards for labor rights, the environment, job creation, anti-corruption and other priorities must be demanded from the Chinese, not just from Western investors. Further, if the Chinese truly want to integrate Brazilian farmers and other local producers, companies and workers into long-term arrangements and contracts for infrastructure, production and manufacturing of goods, a negotiated set of agreements with local unions and regulatory groups must be developed—all the while underscoring the importance of understanding ongoing relationships with Brazil's business community, labor management, and state and local governments.

Of great significance will be how China reacts to Brazil's appeal for mutual efforts to address the potential difficulties involving currency wars, trade deficits, competition between Chinese and Brazilian products in Brazil as well as in third markets, and one-sided investments. Brazil, on the other hand, must not put all of its eggs in China's basket and must address its relationship with other major economies in the region and strengthen its relationship with the United States in particular. The United States would do well to acknowledge that while it ignored Brazil, for whatever reason, China saw the void and moved right in.

Conclusion

Trade between Brazil and China is rising astronomically. In the past decade, China has become Brazil's major trading partner, knocking the United States off the pedestal. While China's interest in the region may appear to be purely economic, a closer look reveals that Brazil plays a far larger role in China's overall strategic plan and global ambition than may be evident at first glance.

China is investing huge sums in Brazil and in other partners who indirectly and directly affect Brazil's global prominence. China's growth is almost certain not to decelerate, and Brazil's ability to maintain

a mutually respectful and cooperative relationship with China will virtually ensure that it continues its successful journey to greater global prominence.

Whatever wrinkles may have appeared in the relationship do not seem, upon close inspection, to be fatal or permanent. The trading relationship, though robust, remains young and immature. It is growing much too fast to allow introspection and understanding of the nuances that are giving rise to concerns and misunderstandings.

Where the economic side of the China-Brazil relationship is growing, the personal and more human side seems to need attention and nurturing. Like Brazil, China is young in its financial prowess, economic achievement and global standing. Though successful in trade and commerce, and a formidable benefactor and competitor at once, China, too, has had to learn to run before it masters how to crawl.

A serious dose of goodwill and unhurried diplomacy between Brazil's insightful new president and her paternalistic counterpart in China may render more success and goodwill than many expect. Undoubtedly, for many years to come, China and Brazil will continue to travel as worthy partners on the New Silk Road.



M. Canton

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Concessions and Other New Instruments as Key to Development in Brazil

By Marçal Justen Filho, Curitiba

Introduction

The twentieth century saw profound changes in Brazil's approach to economic problems. The demise of the communist model paralleled disenchantment with government intervention. Freedom of private enterprise and wide-reaching deregulation of economic activities was the preferred option.

The Illusion of the "End of History"

For some time, the illusion that the dialectic dynamics of history had come to a close was prevalent. A definitive stage was believed to have been reached under which there would no longer be varied and divergent solutions to economic problems.¹ With the reduction of government intervention in the economic domain and the prevalence of individual freedom to both choose and apply the most economically efficient solutions, the capitalist model would become the only option. But the financial crises of the late 1990's and the first decade of the twenty-first century proved the error in the push for minimal government intervention.

On the one hand, the lack of government intervention led to unfortunate deviations in the development of economic activities. The need for an overreaching external control over the use of economic resources became apparent. This involved not only ethical values but also environmental concerns and sustainable development.

On the other hand, government intervention came to be seen as a relevant factor for fostering economic development. One cannot ignore the example set by China with regard to local economic systems. The Chinese model involves a greater and more intense government role in economic activity, while not eliminating the role of private agents. This is different from the Soviet economic model, which proved to be inefficient and incompatible with fundamental rights. The collapse of the Soviet model was a direct result of the lack of

commitment to efficiency that occurs from the dissemination of instruments developed by private enterprise.

But controversies over government inefficiency have advanced to another level. In the United States, an economic crisis was triggered by a combination of greed and the absence of government intervention. In Europe, unchecked government spending put at risk the economies of Greece, Ireland, Portugal, Spain and even Italy.

Thus, the answer to lack of government efficiency lies not in eliminating government involvement but in focusing its activities on fostering development with the greatest possible efficiency. For this reason, the need for efficient government intervention is at the center of debates over the relationship between the State and private agents.

The Combination of Concepts

Over time each nation develops its own model of government intervention in the economy, and each of these models is an amalgam of ideologically diverse concepts. There are sectors exclusive to the private initiative, and there are those in which the State directly develops the economic activity. This is true of Brazilian law.

The model of government intervention in the economy is currently open, and undergoing an evolutionary process. The dynamics of exploring economic resources, of developing wealth, and attending to collective needs, all impose on the State the need for permanent solutions.

Determining the role of the State in the economy involves several instruments, many of which are already in a process of revision and innovation.² This concept must be explored within the constitutional framework of each nation.

The Brazilian Constitution and the Economic Order

There is a wide constitutional framework

in Brazil relative to the use of economic resources by private agents and the activities of the government in the economy. One of the fundamental provisions of the 1988 Brazilian Constitution is in Article 3, summarizing the commitment of the State to the Brazilian nation:

The fundamental objectives of the Federative Republic of Brazil are:

- I. to build a free, just and solidary society;
- II. to guarantee national development;
- III. to eradicate poverty and substandard living conditions and to reduce social and regional inequalities;
- IV. to promote the well being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination.

These points are not purely rhetorical concepts but represent duties of the Brazilian State. Promoting these fundamental objectives requires constant intervention by the State in the economy. Economic and social development, the guarantee of fundamental rights ("the well being of all"), and the elimination of poverty and social and regional inequalities are all goals that can be achieved only by means of government action.

But this is not to say that the State should absorb all economic activities. Past experience proves that extreme government intervention in the economy is untenable. On the other hand, arguing for no government action is also unreasonable.

Private Property and Freedom of Initiative

The 1988 Brazilian Constitution assures private property, including means of production. Article 5, items XXII and XXIV, state that the government may not purely and simply take possession of goods belonging to individuals. Article 170 confirms

the presence of a capitalist system, in which profit is legitimized. Freedom of initiative is guaranteed, which means that it falls to private agents to decide how best to use their private property. All are allowed to practice economic activities, within legal parameters.

The constitutional framework established a capitalist economic system with specific and distinct characteristics. In so doing, it acknowledged the social function of private property pursuant to Article 5, item XXIII, of the 1988 Constitution, and also government intervention in the economic domain as a proper instrument for the promotion of the goals stated in Article 3 of the Constitution. But the mechanism for government intervention has an even more intense configuration, as will be further explored below.

Direct Government Economic Activity in the Traditional Model

In the twentieth-century tradition, the government is permitted to intervene directly in the economic domain. In this case, the State focuses its resources and efforts to assume the organization of the means of production. This direct performance by the State may be developed under a public law or a private-law regime. Even in the latter case, however, there is a strong public-law influence.

The 1988 Constitution reserves certain activities to the government, even if, in some cases, it allows for them to be later delegated to private agents. For example, under Article 175, it falls to the Brazilian government, either directly or through concession or permission, to provide public services.

This means the set of activities of exploring economic goods is divided into two groups. There are economic activities that are preferentially assigned to private agents, and there are the public services, assigned to the State.

Although there is no clear constitutional definition, “public services” are those in which there are relevant and essential needs, the performance of which cannot be sat-

isfactorily provided by the mechanisms inherent in private economic activity. Public service is rendered under a different regime than economic activities in the strict sense. Freedom of initiative does not apply, and the public services are provided under the principles of continuity, universality, equality, and affordability of tariffs, among others.

Some economic activities, developed under the private-law regime, are also exclusive to the government pursuant to Article 177 of the 1988 Constitution. In this case, there is no public service being provided, and the private-law regime applies, but the Constitution precludes private agents from exploring these sectors, thereby establishing a public monopoly.

The government is permitted to explore economic activities, competing on equal footing with private agents. Pursuant to Article 173, this can occur in cases where there is a relevant collective interest or national-security concern, as defined by law.

When exploring economic activities, the government is bound by the same legal regime applicable to the private enterprise. Constituting a legal person under a private-law regime is indispensable, though its activities will still be bound to public-law limits. As a rule, the contracts entered into by these legal persons will require public bids. The exception is those contracts that would place an insurmountable restriction on the end-activity of the government entity.³ The Court of Accounts will exert external control over all activities. There are several other means of control that will be discussed later.

Limits and Challenges of Traditional Direct Intervention

Past experience shows that the use of the traditional mechanism of direct intervention is indispensable, but it also faces limits and challenges, for several reasons.

First, government-owned corporations perform administrative governmental functions. They are part of the government’s structure and are instruments for accomplishing public policies. Thus, the understanding that they cannot operate

solely for profit is common—even when the company has private partners.⁴ For this reason, government-owned corporations are influenced from several angles by the current political situation.

Second, government-owned corporations are subject to a hybrid legal regime. These companies are not allowed any preferences or advantages over private corporations, but their legal regime is subject to public law. Thus, their decision-making process and company policy are subject to obstacles that private companies do not have to face.

Third, government-owned companies are subject to extremely rigorous means of control not applicable to the private sector. In many cases, decisions meant to avoid losses can be considered unethical—and in some cases even criminal—if they do not follow the formal aspects required. A decision that would be economically and financially reasonable, and undoubtedly ethical, for a private company may have an absolutely different legal standing if performed by a government-owned company.

Fourth, government-owned companies are not subject to bankruptcy, which has both positive and negative effects. Because of this, even inefficient practices and unsuitable services will not cause the company to cease exploring the activity. A government-owned company can operate inefficiently, which is not possible for a private company.

These circumstances, among others, have led to greater bureaucracy in government-owned corporations. It is problematic for a government-owned company to compete with private companies, precisely because the former’s managerial and executive processes are much slower and more costly.

Search for Alternatives

The difficulties and limits of direct government intervention led to other solutions being concurrently developed. These solutions came from practical experience and from theories developed by experts in the field.

Regulatory intervention is not the same as government control. The government

may establish conditions, restrictions and incentives. But it cannot impose mandatory solutions on private agents.

Free Private Initiative

The legal system continues to uphold private property, legitimize corporate economic activities and guarantee private liberties. For this reason, Article 174 of the 1988 Constitution states: “*As the normative and regulating agent of the economic activity, the State shall, in the manner set forth by law, perform the functions of control, incentive and planning, the latter being binding for the public sector and indicative for the private sector.*”

By stating that public planning is “indicative” for the private sector, Article 174 recognizes that certain activities and rules on private corporate governance do not eliminate free private initiative and that the will of the government and its regulatory output are not enough to implement certain measures and achieve specific results. There is an inalienable measure of personal freedom that is constitutionally protected and considered a fundamental constitutional principle.

Certain enterprises do not interest the private sector. Private agents will not be predisposed to invest in these enterprises,

even if the State considers their development to be indispensable. The development of these fields cannot be imposed by law.

In several cases, the proper solution consists of the State taking measures meant to improve the appeal of the enterprise and to encourage activities considered to be socially relevant. This concept is related to the idea of a “fostering state,” which utilizes its jurisdiction and resources to induce private agents to develop socially relevant activities.

The Promotional Model

Over forty years ago, Italian jurist Norberto Bobbio examined the new paradigms of government operations and distinguished two legal models. The classical legal concept corresponded to a “repressive law” regime, characterized by punitive sanctions geared towards discouraging undesirable conduct. The repressive law system still exists but is now concurrent with a “promotional law” system. The latter institutes “positive” sanctions that take the form of advantages and benefits for those who act in accordance with the desirable conduct.⁵

Bobbio demonstrates that, in the traditional model, only undesirable conduct is legally relevant. Conduct that is compatible with fundamental values is considered to be

legally neutral, in the sense that it does not lead to any legal consequences. Sanctions are bound to illicit actions. In this conservative government position, the State seeks to avoid changes to the status quo of ethical conduct.

In the promotional model, adopting a conduct prescribed by law becomes legally relevant. The “sanction”—or in this case, benefit—is bound to ethical conduct. Conduct that does not achieve the values sought by the legal system becomes legally neutral. This notion corresponds to an innovating and reforming government: the State incites society so as to recreate the social and economic relations and achieve its goals.

The defining characteristic of contemporary society is a legal system that is not only repressive but also promotional. Eliminating the repressive aspects of law is not feasible, but bringing it together with the promotional instruments of law is indispensable.

Concrete Manifestations of the Promotional Function

This promotional model of governance can be seen most clearly in fiscal measures that benefit certain persons, activities or underdeveloped regions. But there are several non-fiscal government measures available to encourage private activities. For instance, it is possible to offer favorable financing for companies that undertake relevant activities. Transferring public funds in order to finance sectors that lack investments is another possibility. The conditional donation of public assets with the achievement of specific goals is also feasible.

The complexity of this new scenario allows one to consider the government function of *promotion* or *fostering*, which is autonomous and distinct from other activities performed by the State. In furnishing this activity, the government does not directly provide for collective needs—as would be the case with public services; nor does it limit private autonomy—as would be the case with police power; nor does it involve lawmaking. The activities undertaken by



View from Corcovado, Brazil

the government in the case of fostering are neither sufficient nor apt to accomplish any governmental interests.

With fosterage, public interests are indirectly fulfilled by means of the actions of private agents. Fostering becomes a legal system meant for realizing activities seen as desirable by the State and that encompass national development. This is why fostering is seen as an indirect regulatory action. After all, fostering predominantly takes the form of normative or regulatory measures, though these are peculiar measures in that they do not amount to compulsory norms with prohibitive or mandatory instructions. The goals sought by the State are obtained indirectly, from the actions taken by private agents.

The goals of the government in providing incentives are not focused on achieving direct economic gains. The government is not seeking to increase its public revenue; on the contrary, fostering operations tend to decrease revenue, at least initially. But the fostering activity does not represent simple generosity. It is not about waiving public interests with the purpose of benefitting any one private agent—though this may occur at first.

As a rule, the fostering activity requires counter measures from the private agent involved. The private party is the beneficiary of the government's actions and is therefore conditioned to corresponding measures. The private agent may be bound to invest a minimum amount and in specific locations, develop certain benefits for the good of the community, generate wealth, ensure advantages to underserved populations and so on.

The benefit inherent in fostering activities is only a means of convincing the private sector to develop socially indispensable activities. In short, the social, economic and cultural gains inherent in fostering activities offset the loss in revenue or the benefits transferred by the government.

Limits to Government Fostering

Government fostering, however, is not always the most satisfactory solution. The

benefits gained by the private agents do not necessarily lead to the achievement of the goals desired by the government.

The limits to government fostering activities involve different circumstances. First, it is not always practical to encourage the private sector to follow the required conduct exclusively through fostering actions. The private party is responsible for all the risks inherent in the operation to be developed. So there are cases in which the fostering conditions are not sufficient to make a risky enterprise appealing. In these situations, traditional fostering measures are insufficient to achieve the intended goals.

Second, private autonomy prevents the State from interfering in the chosen corporate decisions. There are difficulties in establishing control over the performance of private agents. There is no way to eliminate the risk that the private party will take advantage of the incentive while not adopting the measures—including corporate measures—considered appropriate by the State in order to achieve the intended results. This leads to the spread of external control mechanisms over the activity of the private agent, which tends to increase bureaucratization and costs without fully eliminating the risks.

In other cases, the results of the fostered activities may be extraordinarily advantageous to the private agent. Thus, the government will ensure benefits for the private party, whose business exploration may lead to outstanding profits. In these cases the traditional fostering measure is effective, but unbalanced, as it leads to a disproportionate gain to the beneficiary.

Such a result should not lead to the nullity of fostered activity. The classic measures should still be utilized and, in many cases, they remain the most satisfactory solution. But it must be understood that the classic measures for fostering certain activities are not always the most appropriate solutions, and there are other measures that may be adopted.

The Association: Another Form of Fostering Activity

The above limitations to fostering activities led to the development of alternatives.

Such is the case with associations between the government and private sectors, with the latter realizing the greater share of investments and disbursements.

Associations may be broadly included in an encompassing conception of fostered undertakings, as they deal essentially with inducing private agents to develop socially desirable activities. But there is one major distinction: the government not only performs its passive function—establishing norms or benefits—but also provides the essential advantage of contributing the resources necessary for the enterprise. Therefore, the private party neither assumes the entirety of investments nor requires the use of conventional sources of financing. The government becomes the private party's partner, which also leads to indirect positive effects such as the formal recognition of the importance and gravity of the undertaking.

Through this system, socially desirable activities become achievable. The business risks of failure are shared by the private party and the government. But this solution is different from the instruments used in the past.

It is clear that the association of the government with private agents is a time-honored proposition that is widely used in several nations, including Brazil. This concept follows traditional models that present great benefits in several situations. These classical models, however, are not always able to provide the most desired results.

Concession of Public Services

One traditional association method consists in the concession of public services.⁶ There are several references to “concession” in the Brazilian Constitution and various laws. There is even a “General Law of Concessions,” Federal Law No. 8.987/1995. This law provides two formal definitions of concessions:

Art. 2. For the purposes of this Law, it is considered: . . .

II. concession of public service: the delegation of its rendering, made by the granting authority, by means of a bidding,

in the method of sealed competitive bidding, to the legal person or consortium of companies that demonstrates capacity for its performance, on its own account and at its own risk and for a determined period of time.

III. concession of public service preceded of the execution of public work: the total or partial construction, maintenance, refurbishing, enlargement or improvement of any work of public interest, delegated by the granting authority, by means of bidding, in the method of sealed competitive bidding, to the legal person or consortium of companies that demonstrates capacity for its performance, on its own account and its own risk, in such a way that the investment of the concessionaire is compensated and amortized by means of the exploitation of the service or the work for a determined period of time.

More recently, Brazil enacted Federal Law No. 11.079/2004 on Public Private Partnerships, referred to as PPPs, which are defined as a modality of concession and are basically differentiated by the public coverage of part or the whole of the remuneration to be afforded to the private partner.

Under Brazilian law there are several different institutes formally defined as “concession of public service,” subjected to different provisions of law. In all cases there is a contract by means of which a private party assumes the obligation to realize the necessary implantation, upkeep and improvement of the public service. It falls to the government to regulate and discipline the activities of the private party, directly or indirectly assuring revenue compatible with the investments made. This solution is applicable only in the case of public services and similar instruments—such as administrative concessions—and involves an endless discussion on the risk allocation of the undertaking.

The concession of public service engenders a public-law bond, specifically because its object is the delegation of the rendering of a public service. In many cases, the concession ensures satisfactory and desirable solutions. But there are limits, such as when the contractual posi-

tion assumed by the concessionaire of the service is so relevant that the government requires more intense legal powers beyond those already inherent in its position of conceding entity.

It is possible to assert that economic activities may be subject to government authorizations, which are very different from concessions. Some activities may be explored either as a public service under a public-law system, or as an economic activity under a private-law system. For instance, fixed telephone services are provided as public services by means of a concession. But, in the interest of fostering competition, other companies may be authorized to explore the same activity. It is not possible to provide an exhaustive list of all such cases.

Rise of Associations Under Private Law Regime

The rise in the complexity and intensity of the collective necessities led to different types of association between government entities and private agents realized under the private law framework.⁷

This solution involves increasing the risks of the governmental entities. After all, public resources will be applied in typically private enterprises and may result in losses—a risk inherent in economic activities. All precautions must be taken to reduce the chance of such losses.

Forming a Special Purpose Company—SPC

Development fostered by the government can be undertaken by a private company formed from combined public and private resources and taking the form of a joint-stock corporation with a clear and specific purpose. The vehicle for this solution is a Special Purpose Company, or SPC. SPCs are not autonomous corporate organizations. They are private-law joint-stock companies, subject to the corresponding legal framework. Their defining characteristic is in the choice of a limited and specific corporate objective to which a particular corporate function is bound.

The founding of an SPC requires a de-

limitation of the responsibilities of the government. The risks allocated to the parties are bound by the extent of their share in the SPC. As a rule, the invested capital is primarily private. The private partners assume the greater part of investments, which means they are the majority shareholders with power to appoint managers. While government capital is involved, it is not the greater part of the investment.

Because these associations involve the use of government funds, they must use measures to ensure the security of public interests. For example, there must be shareholders’ agreements that guarantee relevant rights to the public partners. This may include managing the company, appointing a certain number of managers, requiring the presence of a minimum number of shareholders for certain decisions, and so forth. There also may be agreements on the coordinated and harmonious right to vote. These shareholders’ agreements may determine the existence of a controlling group, composed of the private majority stockholders and the government stockholders.

The agreement, however, does not allow the public partner to transform the company into a tool for the development of governmental activities, despite the rights and guarantees afforded to the public partner and though it possesses public funds. Indeed, a fundamental characteristic of the company is the lack of assimilation into the main governmental structure, the non-existence of governmental functions of any nature being provided, and the inapplicability of principles particular to the public-law regime. The private partner is forbidden from making use of its prerogatives to compromise the corporate objective sought by the company—a corporate objective that is part of a private activity, pursued under a private-law regime.

The solution briefly discussed above does not utilize tools properly belonging to administrative law. It is a private-law model, in which the private agent is the mainstay. The government provides encouragement, prestige and assurances to the private initiative but always under a private-law system.

Direct Advantages of This Model

This model provides distinct solutions when compared with more traditional fostering activities. First, the State drives resources to a particular undertaking. Hence, it does more than simply furnish indirect advantages without effective consistency. The application of public resources reduces the need for capitalization by the private initiative and the costs resulting from financing. This promotes the economic feasibility of the enterprise.

Second, private managerial models are utilized. This means that private expertise is used for complex and specific tasks. The need for profit and the competition over market share encourages efficient resource management. Thus, the public resources are applied in a management model that is wholly distinct from the one utilized in the public sector.

On the other hand, the effective presence of the government in the company allows for supervision over the management of the resources and reduces the

risk of defective or ethically reproachable corporate decisions. The public partner directly takes part in the corporate environment, is aware of the decisions taken and may prevent undesirable deviations or omissions.

Finally, the profits obtained in the enterprise are shared among partners. Hence, the investments made with public resources return to the public partner.

Indirect Advantages of This Model

One indirect advantage of this model is that managerial and corporate practices common to the private sector become known and may be eventually assimilated by the government. As a result, the administrative entity can apply such practices to its own operations, and this may mean an increase in the efficiency of the undertakings later developed by the public sector.

Thus, the government is able to ameliorate one of the gravest problems it faces: the *asymmetry of information*. The State does not fully comprehend the characteristics,

problems, costs and advantages inherent in the development of private activities—a result of the lack of experience in working under the private model. By associating with private agents, the government gains entry into a new area of corporate organization, obtaining access to information that would otherwise be unavailable to it. In this way, it becomes possible to perfect public projects and avoid the losses that result from the lack of precise knowledge of operative characteristics.

Feasibility of the Proposed Solution

The previously described solution is compatible with the current Brazilian legal framework. During the last fifteen years, Brazil has become economically stable. Public and private investments have allowed a process of unprecedented development resulting in the elimination of many long-standing problems. But this phenomenon begets increased demand for service of necessities. The increase in economic activity leads to a demand for higher in-



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vestments, especially in infrastructure. Economic growth leads to the depletion of capacity in several fields. More investments are necessary to ensure that the development process continues and that the Constitution's promises and hopes become reality.

Consider the example of the air-transportation sector. The rise in economic activities led to an extreme increase in the use of air transportation. As a result, there was an extraordinary growth in the demand for use of airports. A lack of investments will lead to a limitation on national progress in this regard.

Further Considerations— Article 3 of the 1988 Constitution

The Constitution imposes on the government a duty to adopt all adequate and necessary measures to achieve the goals set forth in its Article 3. For this reason, the State is charged with demands particular to public law, but this cannot eliminate the possibility of the government operating under a private-law regime.

A relevant part of the tasks assigned to the government depends on the use of instruments that are particular to private law. These are necessary, but not sufficient. After all, there are limits for the State to achieve its intended results with public-law instruments.

Neither private capital nor public capital alone is sufficient to ensure the investments necessary for the progress of Brazil. Only the combination of the public and private sectors allows for the essential investments. Hence, the lack of resources in public-service sectors cannot prevent the use of funds for infrastructure investments.

Eventual Inadequacy of the Public Model

In many cases, it will be possible and adequate to realize investments in public and private capital under governmental control. In these cases, the public-law regime is applicable. But it is not possible to limit the propositions to this model only. There will be cases in which the most satisfactory solution will be the private-law regime, with a minority share belonging

to the government as a result of fostering an activity.

There are necessities that demand government performance, but their success presupposes the use of institutes and instruments particular to private law. This means not only founding mixed-capital private companies, which are indirectly subject to public-law restrictions, but also applying the private expertise in government entities.

Achieving the ends of the Brazilian State may therefore involve its association with private agents to perform in a private-law system. There are no constitutional impediments to this solution in Brazil.

More precisely, this solution is implicitly authorized, as it is the most reasonable and satisfactory means of ensuring that constitutional mandates are achieved. The legitimacy of this solution is directly related to acknowledging the governmental function of fostering activities.



M. Filho

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Endnotes:

1 The most famous example of this concept is evidently the one developed by Francis Fukuyama

in "The End of History and the Last Man," Francis Fukuyama, *O Fim da História e o Último Homem* (1992).

2 These remarks suffice to justify the author revisiting some of his earlier stands. Previous conceptions involved the model applicable at a particular point of the social progress.

3 The Brazilian Court of Accounts is unanimous in this regard. The following opinion is an example of this:

7. In this sense, the jurisdiction of the Brazilian Court of Accounts is unanimous in that these companies are subject to the Law of Biddings and Government Contracts until a law is passed regulating the constitutional instruction (Plenary Decision 1268/2003, Plenary Court).

8. An exception to this rule is found in cases in which adhering to the abovementioned legislation represent an insurmountable restriction on the end-activities of the company, in which the Law may be considered inapplicable, in accordance to the landmark decisions previously established by this Court in previous cases, such as Decision 663/2002 and Plenary Decisions 1268/2003, 1581/2003 and 403/2004, all judged by the Plenary Court.

Plenary Decision 1854/2009, Second Chamber, Reporting Minister Raimundo Carreiro.

4 As an example, one may think of the occasion in which a political authority vetted the revision in the tolls charged for the services rendered by a mixed-capital company. This led to great losses to the company, with grave repercussions on the dividends distributed to the private partners who were not controlling stockholders.

5 Bobbio's full analysis can be found in Norberto Bobbio, *Dalla Struttura alla Funzione* (1977).

6 It is commonly understood in Brazil that the word "concession" refers to several very different legal institutes. Apart from the concession of public services, Brazilian law acknowledges other forms. There is the "concession of public domain," which is not the same as the "concession for the exploitation of natural resources" (mining). The exploitation of oil resources is governed by a specific legislation, especially because the Brazilian Constitution provides for a governmental monopoly over it. And the word "concession" is used for other purposes, such as the attribution of Brazilian citizenship.

7 It would not be wrong to affirm that this proposition follows the model of private foundations organized and/or maintained with public funds. Foundations do not have associative natures, but the notion of a private foundation constituted by the government reflects the proposal of establishing activities of importance to the government under private law. As the matter is in large part specific, see Maria João Estorninho, *A Fuga para o Direito Privado: contributo para o estudo da actividade de direito privado da administração pública* (1999).

The Painful (and Taxing) Realities of Doing Business in Brazil

By Julio C. Barbosa, Coral Gables

Introduction

Countering the trend trumpeting Brazil's current economic appeal, this article seeks to demonstrate that doing business in Brazil is still very complicated, costly and can be surprisingly painful as well. Due to the natural limitations of the format, the article covers only the basic aspects of a foreigner doing business in Brazil. Certain topics—such as, but not limited to, tax compliance, trade and customs, and transfer pricing—are not included; each of those topics alone is worth study.

While there seems to be little doubt that Brazil's economy will keep growing, making the country attractive to foreign capital, prospective investors should give special consideration to their tax planning: the recent thirty-point increase in the country's industrial-product tax on imported cars is just the latest measure that contributes to legal and economic uncertainty.

Brazil's Form of Democracy

Brazil has always been protectionist to varying degrees, and its formal democracy includes tools that give the federal government powers not found in many other democratic countries. Economic protectionism has been a part of the political landscape since Brazil gained its independence from Portugal in 1822. This can be found in the economic policy of import substitution—replacing imports with domestic production based on the premise that a country should attempt to reduce its foreign dependency through the local production of industrialized products—that the country practiced for most of the twentieth century.¹ Such policies can be instituted through a far stronger executive branch than exists, for example, under the U.S. Constitution. For instance, except on certain matters, in Brazil the President of the Republic has the constitutional power to legislate by what is called Provisory Measure (*Medida Provisória*) “in case of

relevancy and urgency.”² Every Brazilian President has used (and some have argued, abused) the *Medidas Provisórias* (“MPs”), because almost anything can be “relevant” and “urgent” to the government, and this of course avoids messy congressional debate.

As of 19 September 2001, a new numbering system was assigned to the MPs, starting with “No. 1.”³ Since that time, the President of the Republic has issued 546 MPs, an average of 55 per year or 4.5 per month, to create legislation. While it is true that Congress must approve the MPs and the current Constitution allows Congress to amend the original text submitted by the President,⁴ their existence in the Federal Constitution certainly makes for a weaker Congress. Thus, the Brazilian executive branch has primary power, with a weaker legislative branch, and the Federal Justice becomes the ultimate check and balance. As a consequence, the federal justice system has faced an onslaught of hundreds of thousands of lawsuits filed by private citizens against the federal government.⁵ In 2004, 2.6 million new lawsuits were brought before the Federal Justice in Brazil,⁶ and in 2010 the number increased to 2.98 million, which makes 1,933 new federal actions per 100,000 inhabitants.⁷ And this is only the Federal Justice, disregarding the entire Federal Labor Law Courts and all of the state judiciaries, whose numbers are much higher. For the sake of comparison, in 2010:

[P]laintiffs [in the U.S.] filed 272,000 new civil suits in federal District Courts, including 34,000 contract claims, 4,000 real property claims, and 77,000 tort claims (15,000 of them relating to asbestos). The rest of the claims were statutory: 53,000 prisoner petitions, 32,000 civil rights cases, 19,000 labor law cases, 13,000 social security claims, and 11,000 intellectual property disputes.⁸

Brazil's Blended Civil Law System

Brazil has a civil law system, mean-

ing that the law is based on written codes, consolidations, and “statutes.” (In Brazil, “statutes” refers to regulations of a certain class of people (e.g., Statute of the Indian, Statute of the Foreigner) or of a certain activity or profession (e.g., Statute of the Lawyers, Statute of the Land, etc.). A “code” is a methodical set of rules of a specific field of law intended to be a body of permanent law. When certain legislations have not been codified, however, but have been assembled together (as, for instance, the several laws on labor), it is called “consolidation of laws.” Not as systematic as a code, a consolidation of laws merely assembles legislations in the same field of law in an organized single volume. In Brazil only the federal Union can legislate on civil law, commercial law, penal law, electoral law, agrarian law, maritime law, aerospace law, labor law, and criminal and civil procedure.⁹ As a consequence, for each of those areas, there is either a single national code (e.g., the Civil Code, the Commercial Code, the Tax Code, etc.), or a consolidation (for instance, the Labor Laws Consolidation), or a single statute (e.g., the Statute of Child and the Minor).

In Brazil, as in most civil law systems, court decisions usually do not serve as a source of precedent, and they bind only the litigating parties. Decisions of a Brazilian tribunal made by the absolute majority of its members are, however, the object of a *Súmula*, or a “summary” that constitutes a precedent for the purpose of making the jurisprudence uniform.¹⁰ In 2004, Congress amended the Federal Constitution to establish that the final decisions issued by a two-thirds majority of the members of the Federal Supreme Court (“STF”) would have binding legal effect on the entire judiciary.¹¹ The so-called *Súmulas Vinculantes*, (binding summaries, or binding precedent) are regulated by Law No. 11,417 of 19 December 2006 and enable the judiciary to decide in a definitive and final way thousands of cases dealing with

the same issue.¹² Additionally, the STF can declare the constitutionality (“ADC”) or the unconstitutionality (“ADIN”) of a certain law in the abstract,¹³ erga omnes, although only a certain few people or entities have standing to file those specific lawsuits.¹⁴ The decision of STF in an ADC or an ADIN has the same effect as a *Súmula Vinculante*, but it requires only a simple majority of the members of the STF (six justices).¹⁵ If the decisions of the STF on the ADCs and ADINs were made within a reasonable period of time, the legal uncertainty would decrease, especially when it comes to tax matters. It can take years, however, for the STF to decide an ADC or ADIN. For instance, it has been almost ten years since the Brazilian Confederation of the Industry (“CNI”) filed the ADIN No. 2578 on an important tax issue, but there is still no final decision.¹⁶ Thus, Brazil does not have a pure civil law system, although it is not a common law system either.

Foreign Investment in Brazil

The World Bank currently ranks Brazil number 127 out of 183 with regard to ease of doing business.¹⁷ In 2010 Brazil was ranked 124, meaning that it is falling in the rankings. With regard to protecting investors, the country is ranked number 74. On enforcing contracts, Brazil is ranked only 98. All of this contributes to the reputation of the “*Custo Brazil*,” broadly meaning the extra cost of doing business in Brazil due to everything from bureaucracy to infrastructure.¹⁸ In March 2010, ABIMAQ (the Brazilian Association of the Manufacturers of Machinery and Equipment), published a detailed comparison of the costs of doing business in Brazil, the United States, and Germany. Among other things, the research pointed out that the cost to manufacture comparable goods in Brazil is 36.27% higher than in those countries.¹⁹ Although the negative consequences of the *Custo Brazil* has been a subject of discussion since the early 1990s²⁰—the government even created a deregulation task force comprised of all government ministers to discuss it—progress has been slow.²¹

The Law of Remittance of Profits

Foreign investments in Brazil are governed by Law No. 4.131 of 4 September 1962 and its amendments.²² The original law is called Law of Remittance of Profits (“LRP”), and it defines foreign capital as:

any goods, machinery and equipment entered into Brazil without the initial expenditure of foreign currency, intended for the production of goods or services, as well as any funds brought into the country for use in economic activities, provided that [the goods and the funds] belong to individuals or business organizations domiciled or headquartered abroad.²³

The term “goods” also includes intellectual property in general, such as trademarks, patents, and technology transfers registered before the National Institute of Industrial Property (“INPI”). Moreover, in order to obtain exclusive use protection in Brazil for intellectual property rights, the foreign investor must register trademarks, industrial designs, utility models and patents already registered abroad with the INPI.

According to the LRP, Article 3(a), in order to be repatriated or to remit profits abroad, all foreign investments that enter Brazil must be registered with the Central Bank (“BACEN”). The registering process is simple and can be done electronically over the Internet. Upon registering, the foreign investor receives a permanent number, and this number will be necessary for any financial transaction concerning the registered capital. Foreign investments in Brazil are classified as direct or indirect. Direct investments are made either by investing in a new business or by acquiring an equity participation in an existing Brazilian company. On the other hand, investments in the financial and securities market, where there is no requirement to create or acquire participation in a Brazilian company, are considered indirect foreign investments.

Equity participation includes cash investments, investments by conversion of foreign credit, and investments by importing goods that have not been paid for yet. Investments in equity by the conversion of foreign credit (such as inter-company loans or other credits previously registered

with BACEN) are not subject to BACEN’s authorization and can be easily made by combining symbolic exchange agreements. Goods imported without payment may also be converted into foreign investment, but if the goods are used or were imported under certain tax incentives, they cannot be similar to goods produced in Brazil, and the conversion must be recorded with BACEN within ninety days after their customs clearance.

Foreign investments in the Brazilian financial and capital markets are regulated by BACEN’s Resolution No. 2,689 of 26 January 2000. Prior to investing in those markets, the foreign investor must, among other things, appoint one or more representatives in Brazil and obtain a register with the Brazilian Securities and Exchange Commission (“CVM”).²⁴ The CVM is the Brazilian counterpart of the SEC and was created by Law No. 6,385 of 7 December 1976.²⁵

Restrictions and Rules

Usually, investments in equity are not subject to governmental approvals or authorizations, and there are no requirements regarding minimum investment or local participation in capital. Foreign investors, however, are prohibited from engaging in business related to nuclear energy, hydraulic power generation, health services, and mail and telegraph services. Moreover, foreign investors may not hold more than a minority participation in media, airlines, financial institutions and insurance companies, except that they may acquire control of a bank pursuant to a reciprocal agreement or with prior authorization from the federal government.

As to airlines and airports—which in Brazil are all under the control and management of the federal Union—the large increase in the number of both domestic and international passengers has shown that modernization of Brazil’s airport infrastructure requires hundreds of billions of *reais* that the government does not have. As a consequence of hosting the 2014 FIFA World Cup, Brazil has entered into certain agreements with FIFA to modernize or

build stadiums and airports, and certain deadlines must be met to receive and accommodate the millions of expected visitors. Thus, on 18 March 2011 the President of the Republic sent to Congress MP No. 527 which, among several other things, significantly changes the business of airports and airlines in Brazil. Congress has proposed amending the MP to increase to 49% (from 20%) the percentage that foreign investors may hold in Brazilian airlines. MP No. 527 became Law No. 12,462 of 5 August 2011, but the proposed amendment has not yet been approved.

There are also restrictions on foreign participation in activities concerning national security, as well as on foreign ownership of rural areas and businesses in border zones.²⁶ While the restrictions were loosened on the airport business, restrictions in other areas are becoming tighter. For instance:

Farmland is being treated as a strategic asset on a par with oil. Last year, spooked by the idea of foreign sovereign-wealth funds and state-owned firms buying up vast tracts, the government resurrected a 1971 law limiting the amount of rural land foreigners can buy. It was revived even though in the 1990s it was deemed incompatible with the new democratic constitution and open economy. The details are under review: foreigners may be allowed to buy a bit more without restriction, and still more if the government thinks it is in the national interest. But there is no timetable for passing a new law. The Brazilian Rural Society estimates that \$15 billion of planned foreign agriculture investments are being dropped.²⁷

The same can be said regarding foreign investment in oil. In 2007 the government started the so-called Acceleration Growth Program (“PAC”), which was scheduled to receive up to R\$503.9 billion in projects related to energy, infrastructure, social and urban buildings, transportation, energy, sanitation, housing and water resources. The PAC sets forth three areas for investment: (1) logistics infrastructure, involving the construction and expansion of highways, railways, ports, airports and

waterways; (2) energy infrastructure, representing generation and transmission of oil, natural gas and renewable fuels; and (3) social and urban infrastructure, covering sanitation, housing, subways, commuter trains, water resources, as well as the universalization of the program “Light for All.”

In April 2010 the government launched the PAC 2, proposing to invest an additional R\$958,900 billion until 2014 (which includes preparation and investments related to the 2014 FIFA World Cup). Foreign companies can participate in the bidding process and development of PAC 2 projects. There are certain opportunities to participate in the exploitation and production of oil and to participate as suppliers of equipment and services, as well as natural gas transportation. Foreign firms can only pump oil in the recently discovered *pré-salt* oil fields as junior partners of state-controlled Petrobras, however, where previously they could bid for all concessions on equal terms.²⁸ In other words, the rules have been changing dramatically since the PAC 2 was launched last year.

Limits on Foreign Loans

As of 6 November 2010, there are new regulations on the loans that foreign parent companies make to their Brazilian subsidiaries. These regulations seek to prevent Brazilian companies from being undercapitalized and heavily indebted to their foreign parents. Basically, the goal is to make the parent companies increase their equity in the Brazilian subsidiaries.²⁹ As a result, interests paid or credited by a Brazilian company to a foreign-related party that is not incorporated in a country listed as a tax haven by the Brazilian tax authority, will be deducted for income tax purposes only when deemed to be necessary expenses for the Brazilian company’s activity and provided that, on the date of payment or credit of the respective interests, the following thresholds are cumulatively met:

(1) each related party debt-to-equity ratio cannot exceed twice the value of the direct equity investment made by such related party in the Brazilian recipient company; and

(2) the overall indebtedness, considering all forms and terms of financing, whether the loan agreement is registered or not before BACEN, cannot exceed the same proportion in relation to the aggregate amount of the direct equity investments made by all related parties in the Brazilian recipient company.

Any excess of the limits imposed by the law will be deemed an unnecessary expense for the Brazilian company’s activity, and non-deductible for income tax purposes.

Establishing a Company in Brazil

Business organizations in Brazil are regulated by the Civil Code³⁰ and by the law of *Sociedades Anonimas* (literally, “anonymous societies,” but the better translation is “corporations”).³¹ The Code and the law embrace the universal principle that a legal entity is different from its partners, meaning that the entity’s assets do not belong to its partners, and such assets may be used only to cover responsibilities attributable to the entity.³² The Civil Code uses the word “*sociedade*” for all of types of business organizations that have more than one partner. The word “*companhia*” (“company”), however, applies exclusively to the *sociedades anonimas*. In the Code’s context, probably the most appropriate translation for “*sociedade*” is partnership. Recently, the Civil Code was amended to include an individual company called “*Empresa Individual*” (loosely translated as “individual enterprise” or “individual business”).³³ In any case, from the perspective of a foreign investor, only the “*sociedade limitada*” (limited partnership) and the “*sociedade anonima*” (corporation) have relevance.

A partnership in Brazil is deemed to exist from the date its articles of organization are recorded with the *Junta Commercial* (Commercial Board). Each Brazilian state has a Commercial Board, but the statute that regulates them is the same: Law No. 8,934 of 18 November 1994. While the regulations of business entities are set forth either by the Civil Code or the Law of the

Corporations, recording the articles of organization of a partnership is regulated by another law and a series of regulations of the Commercial Boards themselves. That explains why it takes at least thirty days to record articles of organization before a Commercial Board in Brazil.

Among other requirements, foreign partners must appoint a legal representative resident in Brazil with the power to receive service of process and represent the company before the government authorities. The legal representative is the person who signs, on behalf of the foreign partner, the articles of organization of the Brazilian company and all of its amendments, as well as any other documents pertaining to the entity's business. The appointment is made by a notarized power of attorney ("POA"). If the POA is issued in a foreign country, it must be "legalized" at the respective Brazilian Consulate, translated by a translator accredited by the Commercial Board, and recorded at the Notary Public for the Registration of Titles and Documents. In addition, there is also a requirement that the foreign investor resident abroad prove its/his/her capability of doing business by providing certain personal documents (in the case of individuals) or corporate documents (in the case of business entities).

The articles of organization of a to-be-formed Brazilian partnership must be signed by the partners and two witnesses and, among other things, must set forth the partners' qualifications and positions, the subscribed corporate capital, the corporate bodies, the elected managers, as well as other matters related to the entity's business. Amendments to the articles must observe the same requirements.

The name by which the business organization will be identified must be researched at the Commercial Board and must comply with the principle of novelty; it cannot use a previously registered name, and the name must be sufficiently distinctive such that it cannot generate any confusion with existing names. The entity's name is an asset of the entity, and its exclusivity is protected by Brazilian law. As mentioned, trademarks, industrial designs, utility models and patents already registered abroad or

already being used by the foreign investor, and which will be used in Brazil, must be registered with the INPI in order to ensure exclusivity. Moreover, in order to receive royalties from the Brazilian entity, the foreign investor must enter into a license agreement with it and record the agreement with the INPI as well. Remittances of royalties are taxed, a topic covered in the next section.

Contrary to most states in the U.S., where a business organization can be formed without any specific business purpose ("any and all lawful business" being the general purpose), in Brazil the entity's business purpose (for some reason called the "social object") must be spelled out in articles of organization, and the entity will not be allowed to do business out of its stated purpose. A business organization can apply for a license with any of the regulatory Brazilian agencies only if its articles of incorporation list as its social object the one regulated by the specific agency. For instance, and this certainly comes under the meaning of *Custo Brazil*, if an entity does not list among its business purposes the act "importing goods," even though the entity is a distributor of the same goods, it will not be able to obtain a license to import, unless it amends its articles of organization to include "importing that certain specific type of goods" as one of its business purposes. Amending an entity's articles of organization in Brazil is as complicated as the initial filing.

The Limited Partnership

The name and certain similarities notwithstanding, the Brazilian limited partnership is different from a limited liability company in the U.S. To begin, the capital of a limited partnership is divided in quotas, there are no membership certificates and the articles of organization set forth the capital contribution of each partner (not "member," as in the U.S.). Each partner's liability is restricted to the value of his/her/its quotas. There is no stipulated minimum capital, and the increase or reduction of the partnership's capital must be reflected in the articles of association. If the capital

is increased, in order to avoid the dilution of the partners' quotas, the Civil Code provides for the first right of refusal of the existing partners, which is proportional to the percentage of their quotas. The partnership's capital can be reduced when there are irreparable losses, or the existing capital is excessive.

The Civil Code does not provide for different classes of partners, and the capital contribution cannot be provided through services,³⁴ although it does not necessarily need to be made through cash. The partners can deliberate as they wish regarding the distributions of profits and losses.³⁵ Deliberations on certain matters enumerated by the Civil Code require the approval of three-quarters of the quotas representing the partnership's capital (for instance, amending the articles of association, merger, dissolution, etc.). Other matters require approval by half of the quotas, while certain others can be decided by the majority of the partners attending a meeting.³⁶ The qualified quorums cannot be diminished by the partners, although they can be increased. Resolutions can be taken during meetings (*reuniões*) or assemblies (*assembléias*), as provided by the articles of association.

A meeting may be attended by any number of partners, and an assembly can be installed only on first call with a minimum number and on a second call with any number of the partners. When there are more than ten partners, resolutions must necessarily be taken during an assembly. Written notice of the meeting or assembly must be provided unless all the partners attend or state, in writing, that they are aware of the place, date, time and agenda. Limited partnerships must hold at least one yearly assembly, on or before 30 April, to deliberate on the partnership's accounts and to resolve matters about the balance sheets and the financial results.³⁷

As a rule, limited partnerships do not need to audit and publish their financial records, except if they are large-sized companies; i.e., those that, in the preceding fiscal year of the preparation of the balance sheets, reported total sheets above R\$240 million or an annual gross income higher

than R\$300 million.

Limited partnerships may be managed by one or more senior managers, partners or non-partner managers. The senior managers are appointed by the partners and may be designated in the articles of association or in another corporate document. There is no minimum or maximum mandate period for the position of senior manager, and the partners may, at any time, remove him/her from office.

Vis-à-vis a corporation, the limited partnership is simpler and less formal with a more flexible structure and reduced costs, which makes it appropriate for foreign partners with one common controller. If, however, the partnership is controlled by different groups of partners or if it has plans to issue debentures, subscription warrants, commercial papers and other securities and stock, then adopting the corporate format makes more sense. Moreover, a limited partnership cannot engage in certain business, such as banking and other financial activities.

Business companies have the obligation to maintain bookkeeping records of the business they take part in, presupposing the organization of an accounting department with duly certified professionals. Bookkeeping has several purposes: management assessment; support for third parties' information interests; and surveillance of compliance with mainly fiscal legal obligations.

Corporations

Corporations are entities whose capital is divided into shares and whose partners' liability is limited to the issuing price of their respective shares.³⁸ Corporations can be publicly or closely held, and the public ones are regulated by the CVM. As a general rule, no minimum capital is required. As a prerequisite to forming a corporation, a minimum of two shareholders must subscribe and contribute at least 10% of the capital. The law does not use the expression "articles of organization" for a corporation; only the word "bylaws" (*estatutos*) is used. The rules differ for public and private corporations but, in any case, the bylaws must be filed with the state's Commercial

Board.³⁹ Usually, a capital increase is done by amendment of the bylaws, and existing shareholders have right of first refusal. The corporation's capital can be reduced, as can the limited partnership's, due to certain losses or excess of capital.

Brazilian corporations can issue common, preferred or fruition shares, with or without nominal value. If the shares have nominal value, the issuing price of new shares cannot be lower than the nominal value of the existing shares. Common shares guarantee to holders the right to vote, while preferred shares have determined preferences or advantages, such

as priority in receiving dividends or in receiving capital repayment. The number of non-voting preferred shares, or those subject to restriction to vote, cannot be more than 50% of the total of the shares issued.⁴⁰ The fruition shares are those that result from the amortization of either the preferred or common shares. According to Law of the Corporations, Article 44, § 2°, amortization is an early distribution to the shareholders, without reduction in the corporation's capital, of certain amounts that could be distributed to them in case of the corporation's liquidation.

As a mandatory minimum dividend, the



law provides the percentage of the net profits set forth in the bylaws or, if the bylaws are silent, at least 50% of the net profits minus certain adjustments.⁴¹

As a general rule, the resolutions of a corporation are taken by the absolute majority of votes (50% + one vote of the valid votes of the shareholders who are present, excluding the annulled votes), with certain exceptions listed in Article 136 of Law of the Corporations, such as the amendment of the corporation's bylaws and the reduction of the mandatory minimum dividend, which require at least 50% of the corporate shares that have the right to vote. The shareholders may conclude agreements among themselves regarding the purchase and sale of their shares, right of first refusal to purchase from one another, the exercise of their right to vote or their power of control. The corporation must observe the agreements when they are filed in the corporation's headquarters⁴² and, in case of breach, these agreements are enforced by the Brazilian courts.

A corporation is managed by a Board of Directors and by Executive Officers, or only by the latter if there is no Board of Directors. The Board of Directors is elected by the Shareholders' General Assembly, and the Executive Officers are elected by the Board of Directors. If there is no Board of Directors, the Executive Officers must be elected by the Shareholders' General Assembly. A Board of Directors with at least three directors is mandatory in public corporations and optional in private ones. The members of the Board of Directors must be shareholders of the corporation and do not need to live in Brazil.⁴³

The Executive Officers are responsible for representing the company and managing its business. There must be at least two executive officers, shareholders or not, who reside in Brazil. The executive officers have a mandate up to a maximum of three years.

Corporations shall also have an Audit Committee, with a minimum of three and maximum of five members, and with equal numbers of replacements, shareholders or not. There is certain confusion regarding the Audit Committee because it can be per-

manent if there is a provision in the corporation's bylaws; if not, it can be convened by request of the shareholders.⁴⁴ Regardless of the existence of the Audit Committee, the financial statements of corporations must be audited by independent auditors. Last but not least, corporations—public and private—must publish, both in an official gazette and in a newspaper of wide circulation in the place where they have their main offices, the minutes of their meetings and any other resolutions that may affect third parties.

Taxation in Brazil: the Basics

Brazil has a multitude of taxes, generally levied one on top of the other in a cascade effect (*efeito cascata*), effectively making the government a risk-and-investment-free majority partner in most businesses. For instance, 54% of the final price of a car manufactured in Brazil consists of taxes of all sorts. On imported products in general, taxes make up an average of two-thirds of the final prices. To illustrate, on an imported product the initial tax basis is usually its CIF value. Applied on top of that is the import tax, then the IPI, then the customs expenses, then the ICMS, then PIS, and COFINS due on the import. Upon customs clearance, the cost of the good may be more than double the original CIF value.

As a consequence, many business entities must employ accountants and CPAs and have tax, labor law and corporate attorneys on retainer—obviously adding to operating costs.

The Brazilian federal tax system is handled by the *Secretaria da Receita Federal do Brasil* ("RFB"), whose latest incarnation was created by Law No. 11,457 of 16 March 2007. The RFB is the Brazilian equivalent of the IRS, and on paper it is under the authority of the Ministry of the Economy (*Ministério da Fazenda*). Similarly, states and municipalities have their own agencies. The main taxes can be divided into the four following groups:

I. Federal Corporate Income Taxes.

For tax purposes, there is no distinction

between domestic and foreign investors. A company is considered to be domestic if it has been incorporated under Brazilian law and is domiciled in the Brazilian territory. As noted, Brazilian law requires the company's effective management to be present physically in Brazil. Brazilian companies are taxed on a universal basis, and the profits generated by a foreign subsidiary or branch must be included in the December 31 financial statements of the Brazilian entity in the year in which the profits are earned, regardless of an effective dividend or profit distribution.⁴⁵

In certain other circumstances, such as the liquidation of a Brazilian company, foreign profits may be subject to Brazilian tax before December 31. Brazilian tax law provides that a subsidiary's financial statements must be prepared according to its local commercial legislation and translated into Brazilian currency. Consolidation of profits and losses of foreign companies, in principle, is not authorized for Brazilian tax purposes (except for branches of the same entity located within the same jurisdiction if certain conditions are met). Losses incurred by the Brazilian entities through a foreign company may not be used to offset Brazilian profits. But if the foreign profits are subject to income tax in the country in which the foreign company is located, the Brazilian parent company is entitled to a tax credit in Brazil, subject to certain limitations.

Brazil has two federal corporate income taxes: the corporate income tax ("IRPJ"), and the social contribution on the net income ("CSLL"). There are no state income taxes. Part of income tax collected, however, is transferred from the federal government to the states and municipalities.

The IRPJ is levied on business net income at a rate of 15%, plus a surtax of 10% on annual income that exceeds R\$240,000.00 per year or R\$20,000.00 per month. According to Law No. 9,430 of 30 December 1996, taxpayers may opt to calculate the IRPJ quarterly or annually. If the IRPJ is calculated quarterly, it is also payable quarterly. A 15% rate is applied over the quarter's net income, plus 10% surtax on net income exceeding R\$60,000

per quarter.⁴⁶

The CSLL's purpose is to fund social and welfare programs, and it is paid in addition to the IRPJ at a rate of 9% of income; for financial institutions, private insurance and capitalization companies, the rate is 15%. The overall income tax rate, considering the maximum rate for the income tax (15% + 10%) plus CSLL, is currently 34%.

There are basically three methods of calculating the IRPJ and the CSLL: (1) actual profit; (2) presumed profit; and (3) arbitrated profit. Note that a business whose annual gross income is under R\$2.4 million may elect to be taxed under the "simple system."⁴⁷

(1) Actual Profit System: The net taxable income is equal to the entity's net book profit, which is determined by applying Brazilian GAAP. Businesses are required to maintain appropriate accounting records, an income tax book and the supporting documentation along with the respective calculations. Dividends received from other Brazilian entities and revenue from investments in other companies are generally excluded from taxable income. Losses can be carried forward indefinitely (but cannot be carried back), subject to a maximum 30% off-set of the annual taxable income. Non-operational losses may be carried forward, but they can be used to off-set only non-operational profits, such as capital gains.

(2) Presumed Profit System: A business may elect to be taxed under the presumed profit system when all of the following conditions are met: (a) its total revenues in the preceding year were lower than R\$48 million; (b) the business is not obligated to file its taxes under the actual profit system (for examples, factories and financial institutions);⁴⁸ (c) it did not earn any foreign profits, income or gains, either directly or through foreign subsidiaries;⁴⁹ and (d) it does not qualify for an exemption or reduction of the corporate income tax.⁵⁰ The business must make the election at the beginning of each year, and the choice can be renewed every year. The election is valid for both corporate income tax and social contribution tax on

profits.⁵¹ Under the presumed tax regime, the taxes must be calculated and paid on a quarterly basis.

The presumed profit is calculated by applying a predetermined percentage, which varies according to the activity of the taxpayer, to the gross sales. The total amount of capital gains, financial revenue and other revenue are then added to this presumed profit base. Finally, the corresponding tax rates are applied to the presumed profit.⁵² For instance, the rate of tax on income from revenues derived from the sale of products is 8%, while the rate of tax on revenues derived from services is 32%. For CSLL, the percentages are 12% and 32%, respectively.⁵³

(3) Arbitrated system: Under certain circumstances, where the taxpayer does not comply with certain accessory obligations, either under the actual profit or the presumed profit systems, the RFB may arbitrate profits. If the gross income is known, the taxpayer may pay the arbitrated tax under the rules of the presumed profit but usually at higher rates, and eventually the RFB adds penalties. The income tax paid on the arbitrated profit is final and cannot be set off against future payments.⁵⁴

II. Gross Revenue Taxes: PIS and COFINS

PIS ("Program for Social Integration") and COFINS ("Contribution for the Financing of Social Security") are federal taxes levied on gross revenues on a monthly basis, and they can be cumulative or non-cumulative. Since their creation, PIS and COFINS were levied, respectively, at the rates of 0.65% and 3% for most of the business activities, and generated a cascading effect because there was no credit mechanism. Law No. 10,637 of 30 December 2002 changed the PIS, and Law No. 10,833 of 29 December 2003, and established new rules for the COFINS. As a consequence, the PIS rates were increased to 1.65% from 0.65, the COFINS to 7.6% from 3%, and a credit mechanism was created. Therefore, the PIS and COFINS levies on a business entity's gross revenues are non-cumulative, with a combined rate

of 9.25 percent.

III. Indirect Taxes: IPI, ICMS, and ISS

The IPI (manufactured products tax) is a federal tax levied on the importing and the manufacturing of goods.⁵⁵ The IPI must be paid either by importers, manufacturers, or entities legally treated as manufacturers.⁵⁶ The applicable rate varies with the product and its classification in the IPI tax rates table ("TIPI").⁵⁷ Contrary to most other taxes, whose rates cannot be increased in the same year that a decision to increase them is made, the IPI's rates (as well as the IOF's) can be increased at any time by government decree (something that has been done frequently).

The ICMS (tax on the circulation of goods and on certain services) is a tax levied by the states and the Federal District on the circulation (and not necessarily the sale) of goods and on the rendering of services of interstate and inter-municipal transport, as well as communication services, "even though the operations and the rendering of the services start abroad."⁵⁸ By express provision of the Constitution, the ICMS is also levied on imported goods.⁵⁹ While technically the ICMS is not a sales tax, every manufacturer, distributor, and retailer of almost every type of goods, as well as providers of those certain services, must pay the ICMS⁶⁰ and pass the cost along to the consumer. Most Brazilian consumers have no idea how much the ICMS costs them, because invoices and receipts usually indicate only the total price of the good, not the amount of the ICMS.

Certain goods and services are ICMS exempted, such as books, newspapers, magazines, goods bound for export, leased goods, etc.⁶¹ The rates vary from 7% to 25%, according to the product or whether the transaction is interstate or intrastate. On interstate transactions, the rate is 7% for certain regions and 12% for other ones. Transactions within the same state range from 17% to 19%, depending on the state, but sales of cars, communication services and electricity are subject to 25% ICMS.

Each state has its own ICMS Regulations, and as an incentive to attract invest-

ments, certain Brazilian states offer ICMS tax reduction or exemption on certain products, which may vary according to the type of merchandise, type of taxpayer, type of operation or type of service rendered. In order to avoid what is called a “fiscal war” among the states, there are certain restrictions regarding benefits and incentives that the states may offer. In fact, incentives can be offered only by consensus among all of the Brazilian states through an entity called CONFAZ. Many states (especially the less industrialized), however, are known for ignoring the CONFAZ and offering benefits considered unconstitutional by other states (the more industrialized). In these cases, lawsuits seeking the declaration of the unconstitutionality of those benefits are brought by the latter states against the former and recently, in a single day, the STF voided twenty-three regulations created by certain states to attract investments to the detriment of other states.⁶²

The ISS (services tax) is a tax levied by the municipalities and the Federal District on the services enumerated in the list attached to Complementary Law No. 116 of 31 July 2003. The tax is levied on the price of the service, and its rate varies from 2% to 5%, depending on where the service is provided, where the service provider is located, and the type of service. As with almost all Brazilian taxes, the ISS also applies on the import of services,⁶³ although the export of certain services is exempted.⁶⁴

IV. Other Federal Taxes: Import Tax, IOF, CIDE and Withholding

There are several other taxes; some are addressed briefly below.

The import tax is a federal tax levied on imported goods. The applicable rates can be found in the TEC (the Mercosur Common External Tariff)⁶⁵ and vary according to the product and its country of origin.

The IOF (“Tax on Financial Operations”) is a federal tax levied on credit, exchange, insurance and securities transactions made through financial institutions.⁶⁶ The tax also applies to transactions in gold and includes inter-company loans. Like the IPI,

IOF rates may be raised by decree of the federal government and become effective immediately. The tax basis varies according to the taxable event and the financial nature of the transaction.⁶⁷

The CIDE (“Contribution for Intervention in the Economic Domain”) is another protectionist tax that was created by Law No. 10.168 of 29 December 2000 ostensibly to stimulate the technological development of the Brazilian industry. The CIDE is levied at a rate of 10% on payments made by Brazilian entities to non-residents in the form of royalties, technical assistance, technical and administrative services, etc.⁶⁸

Income tax withholding applies to certain domestic and international transactions. Generally, in domestic transactions (e.g., certain payments to service providers, payment of salary in excess of a certain amount, incomes from financial investments) the withholding tax is a prepayment of the income tax on the individual or entity’s final tax return. On the other hand, payments made to nonresidents are subject to income tax withholding in Brazil and are usually final. The rates depend upon the nature of the payment, the residence of the beneficiary, and the existence of tax treaties between Brazil and the country where the beneficiary is located. Most common rates range from 15 to 25% and, as a general rule, income paid to residents of low tax jurisdictions⁶⁹ is subject to a 25% withholding tax.⁷⁰ Currently, subject to certain limitations, remittances to non-residents are exempt from withholding in several cases (e.g., dividends, interest and commission on export financing and on export notes; interest on certain government bonds; rental fees for aircrafts and ships; sea and air charter; demurrage, container and freight payments to foreign companies; and international hedging).

V. Tax Treaties

Although Brazil has signed tax treaties to avoid double taxation with various countries,⁷¹ the existing treaties offer only limited opportunity to reduce or eliminate withholding taxes on payments abroad. Most of the treaties currently in force have

tax-sparing clauses.⁷²

Notably, Brazil has not signed a tax treaty with the United States, notwithstanding the significant efforts of entrepreneurs from both countries since the 1960’s. In any case, there is an administrative regulatory measure that allows the deduction of the income tax according to the principle of reciprocity.

Conclusion

Brazil has come a long way since the extreme nationalism of the 1950’s and 60’s. Brazil has opened its market to foreign products, restructured the foundations of its economy and solidified the civil power. There is still work to be done, however, to improve the ease and cost of doing business there. Foreign investors have many opportunities in Brazil, but they should be aware of the inherent difficulties and prepare accordingly.



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Endnotes:

- 1 See, e.g., MARIA DA CONCEIÇÃO TAVARES, *DA SUBSTITUIÇÃO DE IMPORTAÇÕES AO CAPITALISMO FINANCEIRO: ENSAIOS SOBRE ECONOMIA BRASILEIRA* (Rio de Janeiro: Zahar Editores, 6th ed.) (1977).
- 2 CONST. OF 1988, art. 62.
- 3 Decree No. 3.930, of 19 Sept. 2001.
- 4 CONST. amend. no. 32, of 11 Sept. 2001.
- 5 Articles 108 and 109 of the Federal Constitution set forth the jurisdiction of the Federal Justice. The federal courts have exclusive jurisdiction over any lawsuit in which the federal government or any of its agencies or quasi-governmental bodies is a party,

as well as over cases involving foreign states or international agencies. Labor, military and electoral courts are within the federal system but have their own specialized courts. In Brazil, bankruptcy, and patent cases are litigated before state courts.

6 See http://www.stj.gov.br/portal_stj/publicacao/engine.wsp?tmp.estilo=2&tmp.area=398&tmp.texto=77804.

7 See http://www.cnj.jus.br/images/pesquisas-judiciarias/Publicacoes/relat_federal_jn2010.pdf.

8 J. Mark Ramseyer & Eric B. Rasmusen, *Are Americans More Litigious? Some Quantitative Evidence*, 6 (Jan. 8, 2010) (quoting from U.S. Dept. Commerce, *Statistical Abstract of the United States*, 2010 Tab. 323 (Wash., D.C.: Bureau of the Census, 2010), available at www.rasmusen.org/papers/litigation-ramseyer-rasmusen.doc).

9 CONST. OF 1988, art. 22(1).

10 C. C. P., art. 479.

11 Constitutional Amendment No. 45 of 31 December 2004 that became Federal Constitution, Article 103-A.

12 Pursuant to the Federal Constitution, Article 103-A, Law No. 11,417 of 19 December 2006, Article 2, § 3, requires a majority of two-thirds of the STF justices to issue, revise or cancel a “*Súmula Vinculante*.” The STF has 11 justices—the author believes a required majority may perhaps be 7 or 8.

13 Law No. 9,868 of 10 Nov., 1999.

14 *Id.* at art. 2.

15 *Id.* at art. 28, sole paragraph.

16 See *infra* note 46 and additional comments on the section regarding taxes in Brazil.

17 World Bank, *Doing Business: Measuring Business Regulations - Ease of Doing Business in Brazil 2011*, available at <http://www.doingbusiness.org/data/exploreconomies/brazil/>.

18 The original source is unknown.

19 *Impacto do “Custo Brasil” na competitividade da indústria brasileira de bens de capital* [The Impact of *Custo Brasil* on the Competitiveness of Brazilian Industry of Goods of Capital], ABIMAQ (São Paulo, March 2010), available at <http://www.abimaq.org.br/Arquivos/Html/DEEE/Custo%20Brasil%20de%20BK%20caderno%2031mar10.pdf>.

20 World Bank, *The Custo Brasil Since 1990-92*, World Bank Report No. 15663-BR (10 Dec. 1996), available at http://siteresources.worldbank.org/BRAZILINPOREXTN/Resources/3817166-1185895645304/4044168-1186403960425/20pub_br125.pdf.

21 On efforts to bring public awareness to the problem and try to resolve it, see especially José Augusto C. Fernandes, *Brazil Cost: How To Develop and Promote a Competitiveness Agenda*, undated, available at <http://www.cipe.org/pdf/publications/fs/BrazilCost.pdf>.

22 The original law has been amended at least 9 times since it became effective, the first time by Law No. 4.390 of 29 August 1964 and most recently by Law No. 11.371 of 28 November 2006.

23 L.R.P., art. 1.

24 BACEN, Res. No. 2,689 of 26 Jan. 2000, art. 3.

25 Since its enactment, Law No. 6,385/76 has been amended 10 times, most recently on 28 December 2007.

26 Law No. 6,634 of 2 May 1979 and Decree n° 85.064/80 limit activities carried out within Brazil’s frontier zone, including foreign ownership of land in those areas. The prospective foreign investor should consult the government agencies if interested in the acquisition of certain lands, and the General Office of the National Security Council will decide whether or not to authorize the acquisition.

27 *A Self-made Siege: First they went for the Currency. Now for the Land*, THE ECONOMIST, 24 Sept. 2011, at 48, available at <http://www.economist.com/node/21530144>.

28 *Id.*

29 See especially certain amendments introduced by Law No. 12,249 of 6 Nov. 2010 (sent by Congress to the President of Republic as M.P. No. 472/09).

30 The current Brazilian Civil Code entered into force on 11 January 2003 by virtue of Law No. 10,406 of 10 January 2002.

31 Law No. 6.404 of 15 Dec. 1976 and its amendments.

32 It should be noted that the separation of assets notwithstanding, Brazilian law provides for the disregarding of the corporate entity in certain cases. Generally speaking, however, the grounds are very different and broader than the ones for lifting the corporate veil in the U.S. Often, it suffices that the entity is not able to pay a certain debt. It is very common in labor lawsuits.

33 The “*Empresa Individual de Responsabilidade Limitada*” is a novelty in Brazilian law for it creates an individual limited liability company. Civil Code, art. 980-A, as amended by Law No. 12.441, of 7 July 2011.

34 C. C., art. 1055, § 2°.

35 C. C., art. 997, VII, which is also applicable to limited partnerships according to Civil Code art. 1054.

36 C. C., art. 1076.

37 C. C., arts. 1071-1080.

38 Law No. 6.404, of 15 Dec. 1976, art. 1.

39 *Id.*, art. 80.

40 *Id.*, arts. 15-20.

41 *Id.*, art. 202.

42 *Id.*, art. 118.

43 *Id.*, arts. 140-145.

44 Law No. 6.404 of 15 Dec. 1976, art. 161.

45 M.P. No. 2158/2001, art. 74. In December 2001 the National Confederation of Industry (“CNI”) filed an ADIN before the STF seeking the declaration of unconstitutionality of Article 74, arguing that only profits effectively transferred to the Brazilian parent company should be taxed. On 18 August 2011, after the vote of 9 of 10 justices (the STF has 11 justices, but one removed himself from the case), no majority was formed in the STF to decide the issue. Basically, four justices declared Article 74 constitutional, four declared it unconstitutional, and one voted without deciding the issue, making the vote of the remainder tenth justice irrelevant, because a majority of six justices is required to determine the unconstitutionality of a law (Law No. 9,868 of 10 November 1999, Article

23). The result, or its lack thereof, notwithstanding, the interested parties are entertaining the possibility of filing an Extraordinary Appeal (RE) before the STF itself seeking to revisit the issue on the grounds that four justices who voted in the case have retired, and the issue should be reviewed by the current STF justices. It could be another ten years until a final decision is made. On the votes, see <http://m.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=1990416>.

46 Law No. 9.249 of 26 Dec. 1995, art. 3 and its paragraphs.

47 Comp. Law No. 123, of 14 Dec. 2006, art. 3.

48 Law No. 10.637 of 30 Dec. 2002, art. 46.

49 Law No. 9.718 of 27 Nov. 1998, art. 14; and Tax Income Regulations (“RIR”) 1999, art. 246.

50 *Id.*

51 R.I.R./1999, art. 516, §§ 1° and 4°.

52 R.I.R./1999, art. 518, and art. 519, §§ 1° to 6°.

53 Law No. 9.249, of 26 Dec. 1995, art. 20.

54 R.I.R./1999, art. 529 to 539.

55 See Decree 7,212 of 10 June 2010.

56 *Id.*, art. 9.

57 Available at <http://www.receita.fazenda.gov.br/Alíquotas/DownloadArqTIPI.htm>.

58 Comp. Law No. 87, of 13 Sept. 1996 (Kandir Law, art. 1).

59 CONST. OF 1988, art. 155, para. 2, IX (a).

60 *Id.*, art. 4.

61 *Id.*, art. 3.

62 *O STF e a Guerra Fiscal [The STF and the Fiscal War]*, Estadao.com.br, 7 June 2011, available at <http://www.estadao.com.br/noticias/impreso,o-stf-e-a-guerra-fiscal,728909,0.htm>.

63 Comp. Law No. 116 of July 31, 2003, art. 1, § 1.

64 *Id.*, art. 2, I.

65 Available at <http://www.desenvolvimento.ov.br/portalmidic/sitio/interna/interna.php?area=5&menu=1848>.

66 Law No. 5.143 of 20 Oct. 1966.

67 See <http://www.receita.fazenda.gov.br/aliquotas/ImpCreSegCamb.htm>.

68 Law No. 10.168 of 29 Dec. 2000, art. 2.

69 Available at <http://www.receita.fazenda.gov.br/legislacao/ins/2010/in10372010.htm>.

70 Law No. 9.779 of 19 Jan. 1999, art. 8.

71 Brazil has double taxation treaties with: Argentina, Austria, Belgium, Canada, Chile, China, the Czech Republic, Denmark, Ecuador, Finland, France, Hungary, India, Israel, Italy, Japan, Luxembourg, Mexico, the Netherlands, Norway, the Philippines, Peru, Portugal, Slovakia, South Africa, South Korea, Spain, Sweden and Ukraine. The list is available at the RFB Website at <http://www.receita.fazenda.gov.br/Legislacao/AcordosInternacionais/AcordosDupla-Trib.htm>.

72 A tax sparing clause is a tax treaty provision whereby a contracting state agrees to grant relief from residence taxation with respect to source taxes that have not actually been paid.



Section

MIDYEAR MEETING

28 October 2011, Miami, FL



Rafael R. Ribeiro (Hunton & Williams), Christopher N. Johnson (Gray Robinson), Quinn Smith (Smith International Legal Consultants)



Professor Darren Latham (Florida Coastal), Edward M. Mullins (Astigarraga Davis), Peter A. Quinter (Becker & Poliakoff)



Gary Davidson (Diaz Reus), Richard C. Lorenzo (Hogan Lovells), Garardo J. Rodriguez-Albizu (Greenberg Traurig), Christopher N. Johnson (Gray Robinson)



Christopher Kokoruda (Astigarraga Davis), Omar K. Ibrahem (Omar K. Ibrahem, P.A.)



Guest with Carlos Osorio (Aballi Milne)

RIGHT: Christopher C. Kokoruda (Astigarraga Davis), Arnoldo B. Lacayo (Astigarraga Davis), C. Ryan Reetz (DLA Piper); and a guest



Scene



Section Chair Nicolas Swerdloff (Hughes Hubbard) helps the International Law Section Mid-Year Meeting at the Miami office of Hogan Lovells.



Committee meeting break-out session.



Reception guest with Melissa Groisman (Becker & Poliakoff); Peter A. Quinter (Becker & Poliakoff), Sandy P. Jones (FIU Law School)



Rafael R. Ribeiro (Hunton & Williams), Richard C. Lorenzo (Hogan Lovells), Santiago A. Cueto (Cueto Law Group)



Richard C. Lorenzo (Hogan Lovells); Gaston P. Fernandez (Hogan Lovells)



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Rules and Guidelines for Foreign Law Firms Practicing in Brazil

By George Augustus Niaradi, São Paulo

General Environment

As of this writing, the São Paulo Bar (“OAB”) is in the process of determining whether the restrictions imposed on foreign law firms established in Brazil should be maintained.

The war between national and foreign firms has dramatically increased with the desire of foreign firms to escape European and North American financial crises, gain new markets and intensify their presence in Brazil. Among the seventeen foreign firms established in Brazil, associated or not with local companies, nine of them have been there for the last three years. That is not a lot, considering that there are an estimated 10,000 firms and more than 700,000 lawyers in Brazil.

Foreign lawyers are working in independent firms or are associated with local companies and can practice in Brazil only as legal consultants of their country of origin. This is a common restriction worldwide, since no domestic services will be prohibited to the professional who has obtained the equivalent of a diploma and has passed the Bar exam of the OAB.

Nevertheless, the law restricts the association of foreign and Brazilian firms. Other countries like the UK, Germany and Chile, permit the establishment of a foreign law firm for accessory domestic legal services, as long as the foreign firm has contracted with a local firm.¹

In September 2010, a Note on this question was published by Dr. Claudio Felipe Zalaf of the Tribunal of Ethics and Discipline of the Bar of São Paulo.² This opinion has since been approved by the majority of the *Ordem dos Advogados do Brasil - Seção de São Paulo* (Sao Paulo section of the Brazilian Bar Association) in its Counsel on 21 February 2011.³ A discussion of this opinion follows.

Legal Context

Law No. 8.906 of 4 July 1994 regulating the Statute of Advocacy,⁴ and Decree No.

91.2000⁵ from the Federal Council of the Brazilian Bar Association, prohibited any kind of association between foreign and Brazilian lawyers.

Before discussing the Counsel’s reasoning, it is necessary to define certain terms:

- A **foreign lawyer** is a professional authorized to practice the profession overseas, regardless of his or her nationality.
- A **foreign law firm** is a firm composed of foreign lawyers according to the law of the country in which the firm is based.
- A **firm of consultants in foreign law** is a company, with headquarters in Brazil, composed of consultants in foreign law.
- A **Brazilian lawyer** is a lawyer who graduated from a Brazilian law school and is registered with the Bar after having passed the OAB Bar examination.
- A **Brazilian law firm** is composed of Brazilian lawyers.

From these definitions, a clear distinction appears. Certainly a lawyer is a lawyer everywhere in the world. But the difference between foreign and Brazilian lawyers is the right to practice in Brazil.

A practice governed by Brazilian law under the supervision of the OAB

The *Ordem dos Advogados do Brasil* (“OAB”) (Brazilian Bar Association) has the exclusive power to promote representation, defense, selection and discipline of the profession on the national territory. In the scope of its powers, OAB can grant to foreign lawyers in Brazil the right to act as consultants in foreign law. In this context, foreign lawyers must follow the Brazilian Statutes of Advocacy and are subject to the Code of Ethics and discipline,⁶ as well as to the rules imposed on Brazilian law firms and Brazilian lawyers.

Restricted to consultancy in foreign law

Regarding the principle set by Original Book, Article 1, IV, XIII and 170, anyone,

including a foreigner, has the right to practice any profession under the provisions of the law. In this context, the OAB is entitled to regulate the activities of foreign lawyers in Brazil, as long as these activities do not interfere with the exercise of advocacy.

Brazilian lawyers can practice in all areas of their competence, whereas consultants in foreign law can practice only under the umbrella of the OAB in a limited area. Foreign lawyers authorized to practice the profession in their country of origin can provide counsel only on foreign law, after authorization from the OAB.

A foreign consultant must swear to practice exclusively in the law of his or her country of origin, with dignity, independence, ethics and respect for the duties and prerogatives of the profession and with due respect for the Federal Constitution, the law of the Brazilian states and human rights.

A limited scope of association or collaboration and the recognition of a right to associate or collaborate

Chapter XIII, Article 5, of the Constitution establishes freedom of lawful association.⁷

In its Article 16, the Statute of Advocacy, however, prohibits the establishment of law firms using commercial tools that are incompatible with advocacy and employing personnel who do not belong to the profession.⁸

According to Article 5, II of the Constitution,⁹ no one shall be obliged to do or to allow anything, otherwise than provided by the law. Therefore, there is no legal restriction on the association or the collaboration of Brazilian and foreign firms.

Only lawyers, however, are allowed to establish law firms. Following this principle, Decree 112/2006 of CFOAB,¹⁰ Article 8, paragraph 3, prohibits any merger or acquisition of lawyers of different firms.

The contract of association or cooperation is not to establish a new legal entity; neither shall it induce the de facto estab-

lishment of a firm, with the aim of skirting legal prohibitions.

In that spirit, the purpose of the contract shall be to promote the collaboration of the firms involved in the process, within the scope of their respective competences and for the exclusive benefit of the clients.

A right of association under the control of OAB

Article 8, chapter IV of Decree 112/2006¹¹ of the FC of OAB states that:

The contract of association/collaboration shall be registered in the register of companies and filed for control by the Counsel of OAB, along with any modification of the structure of the association/collaboration. Unless approved by the Counsel, any association/collaboration will be void.

Article 8 thus authorizes law firms to form associations or collaborations under the supervision of OAB.

Chapter IV uses the term “law firms,” without specifying Brazilian or foreign and without referring to the term “consultant in law.” It would be wrong to conclude, however, that the term refers to Brazilian entities only, as that would imply foreign consultants and foreign lawyers are not bound by the rules governing the operation of Brazilian law firms—nor by the code of conduct and ethics of Brazilian advocacy.

Decree 98/02, Article 3, paragraph 2 on the regulation of Brazilian law firms,¹² referring to Decree 92/2000¹³ does not mention the registration of association/collaboration contracts. To that extent, it can be argued that Decree 98/2002¹⁴ would be applicable to agreements of cooperation/association between Brazilian law firms only.

On the other hand, Decree 91/2000¹⁵ requires the express authorization of cooperation between consultants in foreign law and Brazilian law firms, in order to prevent consultants from engaging in the practice of law, even if it would be with the support of a Brazilian law firm.

With respect to this provision, there is no prohibition per se against a contract of collaboration or association. In both cases, the profession itself is divided in areas of

practice. Regarding the legality of such contracts, and notwithstanding any ethics restrictions, those firms will have to comply with the following rules:

- Each firm must preserve its identity and independence.
- The contract shall not contain any exclusivity clause.
- The professional secrets of each entity must be preserved.
- Pleading and legal advice in Brazilian law, whether direct or indirect, is prohibited to any foreign lawyer not registered as a Brazilian lawyer.
- The firms will maintain separate physical offices and distinct corporate forms, as well as physically and electronically separated archives.
- Any reference to a cooperation or association shall be made with moderation and make clear the firms are separate entities.
- Any attempt at fiscal fraud through these mechanisms constitutes an infraction. The tribunal, however, cannot prohibit any contract of cooperation/association on the basis of a presumption of fraud per se. It is impossible to prohibit what is legal, for fear of hypothetically illegal behavior.

The disposition of Decree 92/2000¹⁶ on publicity reinforces this interpretation of the law. In the subsequent regulation, there is no mention of the terms “consultants in foreign law” or “firm of consultants

in foreign law.” One can ask if this type of structure is entitled to use publicity and is exempted from the restrictive rules imposed by Decree 94/2000.¹⁷ The author considers that this decree shall apply to consultants in foreign law.

Conclusion¹⁸

The association/collaboration between consultants in foreign law firms and local firms is possible, as there is no prohibition against it.

Each firm must preserve its identity and independence, respect each other’s professional intellectual property, maintain separate offices and data, and refer to the cooperation or association only in moderation.

According to Decree 91/2000,¹⁹ foreign lawyers will be entitled to practice in Brazil only as consultants in foreign law. No legal advice, consultation or solicitation in Brazilian law is ever permitted by any foreign lawyer not registered as a Brazilian lawyer. Advertising and websites are must comply with rules set forth in Decrees 91²⁰ and 94²¹ of the Federal Counsel of the OAB. When possible digressions are identified, Brazilian lawyers and consultants are subject to disciplinary procedures under the Brazilian regulation of advocacy.

In short, the practice of advocacy is the watchdog of democratic values. Thus, consultants in foreign law must abide by the Statute of Advocacy, and by general rules and regulations enacted by the OAB.

The Process of Authorization of Foreign Lawyers to Practice in Brazil²² according to Art. 54, V, of the law 8.906.94

A foreign legal professional, regularly entitled to practice advocacy in his or her country can only be authorized by Brazilian Bar to practice the following:

The authorization of the Bar only grants the right to give consultation in foreign law.

The authorization is granted by the Counsel of OAB, belonging to the jurisdiction of the Consultant.

Article. 8º, chapter I, V, VI e VII e 10, of the Law requires²³

1. Proof of a visa of residence in Brazil;
2. Proof of certification to practice law or of registration in the Bar of the country of origin.
3. Proof of good conduct and reputation, testimony by the institution of origin and by three Brazilian lawyers, members of OAB Counsel.
4. Proof of lack of disciplinary sanctions and lack of infractions, testimony by the Bar or any similar institution from the country of origin.
5. Proof of lack of conviction by a criminal court or ongoing criminal procedure.
6. Proof of reciprocity of treatment of Brazilian lawyers in the country of origin of the foreign lawyer.

The Brazilian Bar is also entitled to ask for any documentation that it would consider necessary, duly translated and certified by public notary.

The OAB will have to maintain a close collaboration with the relevant institutions of the country of origin.

Following this authorization, the candidate will promise to practice exclusively in the field of consultation in the law of his [or her] country of origin, with dignity, independence and ethics, in the scope of his [or her] professional prerogatives, and with due respect for the Federal Constitution, the law of the Brazilian states and human rights.

Consultants regularly authorized are granted the right to establish work collaborations in the exclusive field of consultancy in foreign law.

1. The firm must be established and organized according to Brazilian laws with the exclusive aim of providing consultation in foreign law.
2. Any act of establishment or any modification must be approved by the Counsel of OAB.
3. The firm will be entitled to use its brand internationally, upon authorization of its headquarters in the country of origin.
4. The name of the company must contain the following language: "Consultores em Direito Estrangeiro" (Consultants on Foreign Law).
5. The firm will communicate to OAB Counsel its brand and complete identification of its foreign consultants, as well as any alteration of this information.
6. Consultants and consultant companies will have to obey the rules of conduct and ethics of Brazilian advocacy.
7. The authorizations granted by OAB must be renewed every three years.
8. Federal Law No. 8.906, along with the Brazilian Statute of Advocacy and the code of conduct and ethics, apply to all consultant firms. In the case of a violation of these rules, the license to consult can be suspended.
9. Consultants and consultant firms are subject to the same tax laws as national companies/ Brazilian consultants.
10. Following the authorization, the Bar will communicate the information to the Federal Counsel of OAB within thirty days, for national registration of the consultants or firms.



G.A. NIARADI

George Augustus Niaradi has a degree in social science and law from the University of São Paulo, with specialization in public law, and a doctorate in international law from the University of São Paulo (2003). He continued his studies as a Postdoctoral Fellow in natural law at the Università della Santa Croce, Rome, Italy (2005), with extension courses at the Law Faculty of Coimbra (2001), Central European University, Budapest, Hungary (2005). In the São Paulo Bar Association, he is Councillor, a member of the 4th Chamber of Appeals and holds the position of President of the International Relations Committee. Formerly, Mr. Niaradi was President of the Commission of Foreign Trade and International Relations (2007-2009).

Endnotes:

- 1 Cláudio Bini e Gabriel Marciliano Jr., *Os Escritórios Estrangeiros Entre Nós*, available at <http://www.oabsp.org.br/noticias/2005/08/19/3144/?searchterm=advogado estrangeiro>.
- 2 Relator Doctor Claudio Felipe Zalaf, OAB-SP, Tribunal of Ethics and Discipline, *Turma de Ethica professional, Processo E-3922/2010*, available at <http://www.oabsp.org.br/noticias/2010/09/16/6432/?searchterm=advogado estrangeiro>.
- 3 4ª Câmara Recursal of Tribunal of Deontology OAB SP, 21 Feb. 2011, available at <http://www.oabsp.org.br/noticias/2011/02/25/6771/?searchterm=advogado estrangeiro>.
- 4 *Estatuto da Advocacia e da Oab*, Law No. 8.906, 4 July 1994, available at <http://www.oab.org.br/arquivos/pdf/LegislacaoOab/estatuto.pdf>.
- 5 *Provimento No. 91/2000*, available at <http://www.oabsp.org.br/noticias/2010/09/16/6432/?searchterm=advogado>.
- 6 *Código de Ética e Disciplina da OAB*, available at <http://www.oab.org.br/arquivos/pdf/LegislacaoOab/codigodeetica.pdf>.
- 7 *Constituição Federal do Brazil in Estrangeiro*, available at <http://pdba.georgetown.edu/Constitutions/Brazil/vigente.html>.
- 8 *Estatuto da Advocacia e da OAB*, Law No. 8.906, 4 July 1994 available at <http://www.oab.org.br/arquivos/pdf/LegislacaoOab/estatuto.pdf>.
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- 10 Decree 112/2006 of CFOAB, available at <http://www.oab.org.br/msProvimentoPrint.asp?id=112/2006>.
- 11 Decree 112/2006 of CFOAB, available at <http://www.oab.org.br/msProvimentoPrint.asp?id=112/2006>.
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- 13 Decree 92/00, available at <http://www.oabsp.org.br/comissoes2010/sociedades-advogados/provimentos/2.-provimento-92-2000-revogado>.
- 14 *Id.*
- 15 *Provimento No. 91/2000*, available at <http://www.oabsp.org.br/noticias/2010/09/16/6432/?searchterm=advogado>.
- 16 Decree 92/00, available at <http://www.oabsp.org.br/comissoes2010/sociedades-advogados/provimentos/2.-provimento-92-2000-revogado>.
- 17 Decree 94/00, available at <http://www.oabsp.org.br/comissoes2010/sociedades-advogados/provimentos/4.-provimento-94-2000>.
- 18 Zalaf, *supra* note 2.
- 19 *Provimento No. 91/2000*, available at <http://www.oabsp.org.br/noticias/2010/09/16/6432/?searchterm=advogado>.
- 20 *Provimento No. 91/2000*, available at <http://www.oabsp.org.br/noticias/2010/09/16/6432/?searchterm=advogado>.
- 21 Decree 94/00, available at <http://www.oabsp.org.br/comissoes2010/sociedades-advogados/provimentos/4.-provimento-94-2000>.
- 22 Marciliano Jr., *supra* note 1.
- 23 *Regulamento Geral do Estatuto da Advocacia e ea OAB SP sobre o Regulamento Geral previsto na Lei no 8.906, 4 julho 1994*, available at <http://www.oab.org.br/arquivos/pdf/LegislacaoOab/RegulamentoGeraI.pdf>.

**IRAQI KURDISTAN REGION
KURDISTAN BAR ASSOCIATION**

No.: 185
Date: 27 October, 2011



**دەستانی عێراق
هه‌ڕانی کوردستان**



To: the President and members of Florida Bar Association

Subject: Cooperation

Dear Sirs,

First of all I as the president of Kurdistan Bar and in the name of our Board Members of Kurdistan Bar Association convey our warmest greetings to your respectful members.

We take the participation of the Kurdistan Bar Association members in the (55th) Conference of UIA in Miami- Florida as an excellent chance and opportunity to create a bridge of cooperation and the exchange of legal and commercial knowledge between our Bar Association and your respectful Bar.

Dears, the establishment of our Bar Association dates back to Jan 3, 1993 and comparing to the other world bar Associations is a newly emerged legal entity.

Therefore, I would kindly request your assistance in the terms of the Bar Association management in the administrative and financial perspectives and the ways on how to develop the legal profession in Kurdistan region.

Finally, I personally thank all of the members of your Bar to welcome our representatives of Kurdistan Bar Association and we hope that this meeting would become an initial stage for the cooperation and the exchange of knowledge between our Bar Association and your respectful Bar. And we would be glad to welcome you at anytime you visit Kurdistan region in the future.

Best regards,

Wrea Sadi Ahmed
President of
Kurdistan Bar Association
October 27, 2011



Email: kba_1993@yahoo.com
Website: www.KurdistanbarAssociation.com

The New Phase of International Arbitration in Brazil

By Arnaldo Wald, São Paulo

I. Introduction

In recent years Brazil has experienced significant developments in arbitration, especially due to the enactment of the Brazilian Arbitration Act (Law No. 9307/96), the Supreme Court's confirmation in 2001 of its constitutionality, the ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") in 2002,¹ and case law developed by the Superior Tribunal of Justice ("STJ").

According to data provided by the main arbitral institutions in Brazil,² approximately 200 commercial arbitral proceedings commenced in 2009 and in 2010. Moreover, according to ICC caseload statistics, as far as the nationality of the parties involved in arbitration is concerned, Brazil ranked first in Latin America from 2006 through 2009³ and fourth in the world in 2009⁴ (preceded by the United States, France and Germany). From 2009 to 2010, the number of Brazilian arbitrators in ICC cases increased by 25%.⁵

A recent survey concluded that arbitration is a useful method of dispute resolution that has received wide acceptance and cooperation from Brazilian courts.⁶ The survey analyzed 790 judicial decisions relating to arbitration from the year 1996, when the Arbitration Act was enacted, until February 2008. The research considered information contained in the databases of the Supreme Federal Court, the STJ and the courts of appeal, with a few exceptions. The statistics show that only 15% of court decisions concern annulment proceedings, where in most cases Brazilian courts have correctly interpreted the Arbitration Act.

Brazilian courts have taken a clear position in favour of arbitration, rendering important decisions regarding various matters, such as flexibility in the enforcement of arbitral awards, the extension of arbitration agreements to non-signatory parties, and the arbitrability of disputes involving state entities and insolvent parties. Further,

legal and economic changes have given rise to a new climate that may encourage Brazil to engage in investment treaty arbitration.

II. Enforceability of Arbitral Awards

The Brazilian Arbitration Act provides that any arbitration award rendered in Brazilian territory is considered a domestic award.⁷ In this regard, the Third Chamber of the Brazilian Superior Court of Justice rendered, on 24 May 2011, a decision that may promote the use of Brazil as the seat of domestic or international arbitrations.⁸

The court decided unanimously to reverse a decision by the Court of Appeal of the State of Rio de Janeiro that mistakenly considered an ICC arbitral award rendered in Rio de Janeiro a "foreign award." The decision has significant implications for the enforcement of arbitral awards administered by foreign arbitral institutions in Brazil. The ruling clarifies that arbitral awards rendered by arbitral tribunals seated in Brazil are domestic, irrespective of whether the applicable arbitration rules belong to an institution seated abroad, and that such awards need not be confirmed by the STJ.

In a decision on the merits in *Recurso Especial 1.231.554/RJ*,⁹ Justice Rapporteur Nancy Andrighi confirmed that Brazil's legislature had established the place where the award is rendered as the sole criterion for determining whether an award is domestic or foreign for purposes of enforcement in Brazil.¹⁰ In her view, the mere fact that the arbitration had been administered by the ICC did not make the award foreign, particularly where the arbitrator was of Brazilian nationality, Brazilian law was applied and the award was in Portuguese. Therefore, the court held that the ICC award, which had been rendered in Rio de Janeiro, had the same effect as a final decision by national courts pursuant to Article 475-N, IV of the Brazilian Code of Civil Procedure and Article 31 of the Brazilian

Arbitration Act (Law No. 9307/96).

The development of international arbitration in Brazil in recent years also owes much to the pro-arbitration position taken by the STJ in the recognition and enforcement of foreign arbitral awards. STJ statistics show that out of thirty-one requests for recognition of foreign arbitral awards already decided, only seven were refused, and four were dismissed without prejudice. Even in those cases in which the STJ refused to recognize a foreign arbitral award, it based its decision on the grounds set forth in the Arbitration Act¹¹ and the New York Convention.¹² The STJ has refused to examine the merits of foreign arbitral awards, limiting recognition and enforcement proceedings to verifying whether certain formalities have been followed.¹³

Another issue that is causing some debate in Brazil concerns the recognition and enforcement of arbitral awards annulled in their place of origin.¹⁴ In a case in which we are participating as counsel before the STJ, our client is seeking to obtain recognition and enforcement of an award annulled in the country of origin. Particularly, the relevant matters to be decided are (1) whether national courts have the discretion to recognize an annulled award in light of the expression "may" under Article V(1) (e) of the New York Convention,¹⁵ and (2) whether it is possible to give effect to an annulment court decision that violates Brazilian public policy. There are no specific case decisions on this matter yet.

Further, the STJ has dealt with a complex issue regarding the recognition and enforcement of an arbitral award and an arbitration-related court decision. In *Sentença Estrangeira Contestada 853*¹⁶ and *Sentença Estrangeira Contestada 854*,¹⁷ GE Medical Systems Information Technologies sought enforcement of two foreign decisions: (1) an award rendered by an arbitral tribunal on the basis of a representation agreement referring all disputes to arbitration—a matter being widely dis-

cussed before Brazilian courts; and (2) an arbitration-related decision by the New York district court, recognizing the validity of the arbitration agreement. Tecnimed Paramedics Eletromedicina Comercial challenged, on *lis pendens* grounds, both requests for recognition. Tecnimed argued that due to the pending proceedings in Brazil, which discuss the validity of the arbitration agreement, the court had to stay the proceedings of recognition of the arbitral award and of the U.S. court judgment in order to avoid conflicting decisions.

The full bench ("*Corte Especial*") of the STJ held that recognition proceedings can run simultaneously with the action brought before the Brazilian courts and therefore refused to stay either proceeding. In his vote, Justice Castro Meira declined to review the merits of the award or the U.S. judgment, stressing that the court's duty is only to analyze whether the awards fulfil the requirements set forth by law.

III. The Extension of Arbitration Agreements to Non-Signatory Parties

The extension of the arbitration agreement to non-signatories has also caused

much debate in Brazil, especially with respect to groups of contracts and groups of companies.

The Brazilian Arbitration Act states that for an arbitration clause to be binding it "shall be *in writing* contained in the contract itself or in a separate document referring thereto."¹⁸ The act does not require that consent—which differs from the actual written agreement set out in a document—be given in a particular form; it is sufficient that the arbitral clause itself be "in writing." Thus, an arbitration agreement does not necessarily need to be signed to be binding upon parties.¹⁹

To be sure, the Brazilian legal system recognizes other ways to ascertain consent and intent. In this sense, arbitral tribunals have, in certain circumstances, extended the effects of an unsigned arbitration agreement to companies on the grounds that their conduct implied such consent.²⁰

In order to extend the effects of an arbitration clause to non-signatories, arbitral tribunals have taken into account the following: (1) whether the company played an active role in the negotiations that resulted in the agreement containing the arbitration clause; (2) whether the company was

involved in the negotiation, performance or termination of the contract containing the clause; (3) whether the company was expressly or impliedly represented in the transaction or in arbitration.²¹

Brazilian courts have already rendered decisions in this matter, recognising the possibility of extending the effects of an arbitration agreement to the companies of a group. In *Trelleborg do Brasil Ltda. v. Anel Empreendimentos Participações e Agropecuária Ltda.*,²² the Court of Appeals of São Paulo held that the arbitration clause bound the controlling company of Trelleborg since, according to the court, it had consented to arbitration by actively participating in the negotiation and performance of the contract and the arbitration proceedings.

Sentença Estrangeira Contestada 856 is also a case where consent was found in the absence of a writing. Although one of the parties in the arbitration did not sign the contract providing for arbitration, the STJ granted exequatur on grounds of estoppel; i.e., that the defendant had not objected to the arbitration in its statement of defence.²³

Moreover, Brazilian courts have also considered whether or not a company that



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signed a shareholders' agreement as intervening party was subject to an arbitration agreement included therein, rather than in its bylaws. For instance, in an ICC award²⁴ that subsequently became public by being presented in Brazilian state court proceedings,²⁵ the arbitral tribunal held that the company was not bound by the arbitration agreement provided for in a shareholders' agreement and thus could not participate in the ICC arbitration.

IV. Arbitrability of Arbitral Disputes Involving Insolvent Parties

Brazilian courts have recently decided a complex issue that is still controversial in many countries; namely, the arbitrability of disputes involving insolvent companies. In a recent edited version a paper presented at the IBA Conference of Vancouver, Laurent Lévy wrote that there could be, in this matter, a "Bankruptcy of Arbitration."²⁶

Decisions rendered by the STJ and the Court of Appeals of the State of São Paulo have decided that the Brazilian Bankruptcy and Reorganization Act²⁷ does not forbid the continuation of pending arbitration proceedings when there has been a bankruptcy declaration by one of the parties, and that the arbitral award is binding on the bankruptcy court.

In *Saúde ABC v. Interclínicas*, the latter had its extrajudicial liquidation declared while arbitration proceedings were underway. Interclínicas requested a stay of the arbitration, alleging lack of jurisdiction of the arbitral tribunal and arguing that it had lost its capacity to sue and be sued and the free disposition of its rights as a consequence of the insolvency adjudication. The arbitral tribunal decided that it had jurisdiction over the matter and moved forward with the proceedings.²⁸

In an attempt to stay the arbitration, Interclínicas sought injunctive relief from the STJ. The court, facing the issue for the first time, rejected the request for relief. According to the court, the fact that the company was undergoing extrajudicial liquidation did not render it incapable of entering into enforceable agreements, which is the

subjective standard required by Article 1 of the Arbitration Act. In the court's view, the liquidator has broad powers to represent the insolvent company in new or pending transactions, and the restrictions as to what he or she can or cannot do are not such as would prevent the company from going to arbitration when there is an arbitration agreement in a contract signed before the declaration of bankruptcy.

The relevant issue, according to the STJ, is that the arbitration agreement was executed before the adjudication of the extrajudicial liquidation, a fact that made it a valid contractual provision at the time that it was executed by the parties. The court thus concluded that there would be no reason to invalidate the arbitration agreement *ex post facto* and, as the arbitration proceedings guarantee the rights of due process, there was no violation of public interest concerning the extrajudicial liquidation proceedings, particularly the rights of creditors.

Finally, the STJ recognized that although there are legal limitations to the sort of claims that can be filed or can proceed once the insolvency of the company is characterized and the liquidation decreed, the prevailing position of the courts allows continuation of a case where a determination of liability or a quantification of damages is sought. Only enforcement and foreclosure are stayed, so as to guarantee the equality of all creditors according to their status (privileged, secured, non-secured). The court highlighted that this is a valid principle for judicial lawsuits and for arbitrations alike, with no justifiable distinctions between them.

Another leading decision was rendered by the Court of Appeals of the State of São Paulo in *Jackson Empreendimentos v. Diagrama*,³⁰ where the bankruptcy of the latter was declared during the course of the arbitration proceedings. The arbitral tribunal decided to move forward with the arbitration and rendered an award validating and quantifying the debt of the bankrupt party. The arbitral award being an execution instrument, Jackson Empreendimentos filed for inclusion of the credit in the schedule of creditors before the bankruptcy

court, which was denied by the court of first degree, alleging that the arbitration proceedings should have been stayed as a consequence of the bankruptcy declaration.

Jackson Empreendimentos filed an appeal against the first-degree decision before the Court of Appeals of São Paulo. The court considered that, although the bankruptcy of Diagrama affected the interests of all creditors, there was no statutory rule that prevented the submission of disputes involving the bankrupt company to arbitration, if the arbitration agreement was entered into before the bankruptcy was declared, when the company had full legal capacity to enter into such agreement. The State Court of Appeals observed that the bankrupt company must be represented in the arbitration proceedings by the liquidator; otherwise, the arbitral award and the proceedings will be null and void. Moreover, the court considered that the legal provision according to which all disputes involving the bankrupt company must be decided by the bankruptcy judge was not applicable to the case, given that the dispute submitted to arbitration involved an unascertained sum (Article 6, paragraph 1, of the Brazilian Bankruptcy and Reorganization Act).

Finally, the court also noted that the Brazilian Bankruptcy and Reorganization Act currently in force had modified the previous regime and does not require the participation of the district attorney in the proceedings involving the bankrupt company. Thus, the court ordered the inclusion of the credit in the schedule of creditors.

These decisions consolidate Brazilian case law towards the arbitrability of disputes involving insolvent parties.

V. Investment Treaty Arbitration

Historically, Brazil has been resistant to investment treaties and investment arbitration. Brazil has never ratified any international investment agreements, nor has it signed the ICSID Convention.

Recent facts show, however, that the time for change has come. Brazil has gone from recipient to exporter of foreign direct investment, through national private and

even state companies that are increasingly investing abroad, especially in its neighbors, in Africa and Asia.

From 1990 onward, globalization, privatization, the opening of the economy to foreign investments, and several constitutional amendments helped create the right climate to consolidate national and international arbitration.³¹ The Arbitration Act in 1996, the case law of the courts and the evolution of scholarly writings soon led to a real “cultural revolution” with regard to the matter, resulting in an “explosion” of arbitration proceedings.³²

In the 1990’s, Brazil signed fourteen bilateral investment treaties, six of which were submitted to congress for ratification.³³ The executive power subsequently withdrew the ratification proposals, and none of the treaties went into effect. The reasons for the Brazilian government’s decision were legal, economic and political in nature. The legal reasons encompassed problems related to the remittance of profits overseas, the expropriation regime and the use of arbitration. In turn, the economic reasons involved the belief that the flow of foreign investments to Brazil at the time was sufficient to meet its needs, without the help of guarantees of investment treaties.³⁴

It is time for Brazil to reconsider this position. Today there is an increasing need for massive investments in infrastructure in light of the 2014 FIFA World Cup, the 2016 Olympic Games, and the development of telecommunications, construction, and oil and gas (*pré-salt*³⁵) industries.

Besides, a new generation of international investment agreements is being developed in order to adjust to the needs and priorities of emerging countries. These treaties reconcile the rights of investors with the possibility for each country to establish its public policies in a wide range of sectors, while respecting the investor’s trust in the legal regime in effect at the time the investment was made.

Brazil is thus urged to rethink its old approach and take advantage of its new position and bargaining power. Brazil has the opportunity to pursue a fresh start in this field, developing a new generation of international instruments for promo-

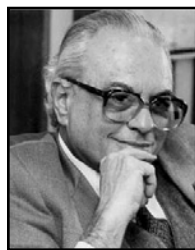
tion and protection of its investments and improving the use of regional mechanisms already at its disposal, such as the Agreement on Reciprocal Payments and Credits of the Latin American Integration Association (CCR/ALADI).

VI. Conclusions

The evolution of Brazil’s law and economy, along with the positive approach of its courts to arbitration, ensures a bright and prosperous future for arbitration in Brazil, as the country consolidates its leadership position in Latin America among other emerging nations. Brazilian courts are following international trends, envisioning arbitration as a useful and effective dispute resolution method.

Moreover, Brazil’s exponential growth—with the increasing demand for construction contracts, joint venture investments and corporate governance in the coming years—shall provide many opportunities for further application and development of arbitration, which itself is actually a tool for the country’s development.

Finally, we can affirm with no hesitation that the twenty-first century is the century of international arbitration in Brazil, and the forthcoming years shall be even more exciting than the previous ones.



A. Wald

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Endnotes:

1 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 23 June 1958, Pub. L. No. 4,311 of 23 July 2002, <http://www2.mre.gov.br/dai/arbitrais.htm>.

2 The following institutions were considered in this survey: Câmara de Mediação e Arbitragem de São Paulo (CMA), Centro de Arbitragem da Câmara

de Comércio Brasil-Canadá (CCBC), Câmara FGV de Conciliação e Arbitragem, Centro Brasileiro de Mediação e Arbitragem (CBMA), Câmara Americana de Comércio para o Brasil (AMCHAM), Câmara de Arbitragem Empresarial – Brasil (CAMARB) and Conselho Arbitral do Estado de São Paulo (CAESP).

3 Int’l Chamber of Commerce [ICC], *2006 Statistical Report*, ICC INT’L CT. OF ARB. BULL. (2007); *2007 Statistical Report*, ICC INT’L CT. OF ARB. BULL. (2008); *2008 Statistical Report*, ICC INT’L CT. OF ARB. BULL. (2009); *2009 Statistical Report*, ICC INT’L CT. OF ARB. BULL. (2010).

4 *2009 Statistical Report*, ICC INT’L CT. OF ARB. BULL. (2010).

5 Information rendered by ICC on 25 Feb. 2011.

6 Law School of Getulio Vargas Foundation (Direito FGV) and Brazilian Committee of Arbitration (CBar), *Arbitragem e o Poder Judiciário: Invalidez da Sentença Arbitral*, http://www.cbar.org.br/PDF/Pesquisa_GV-CBar_relatorio_final_1_etapa_2fase_24.06.09.pdf. This survey was also published in 19 REVISTA BRASILEIRA DE ARBITRAGEM [REV. BRASILEIRA DE ARB.] 7 (2008).

7 Brazilian Arbitration Act of 1996, Pub. L. No. 9,307/96, Article 34: “A foreign arbitral award is an award made outside of the national territory.”

8 For a discussion, see Arnoldo Wald, *Nuovo Pignone v. Petromec: Amicus Curiae by the ICC Brazilian Committee*, WORLD ARB. AND MEDIATION REV. (2011) (forthcoming).

9 *Nuovo Pignone SPA v. Petromec Inc*, Resp 231,554/TJ, Nancy Andrichi, J. (3rd S.T.J., 2011). See the case comment by Francisco Cláudio de Almeida Santos, *A nacionalidade da sentença arbitral. Critério Territorialista do Direito Brasileiro*, 30 REVISTA DE ARBITRAGEM E MEDIAÇÃO [REV. DE ARB. E MEDIAÇÃO] (2011).

10 The author’s law firm submitted an amicus curiae brief in this action. For a copy of the brief, see Arnoldo Wald & Theophilo de Azeredo Santos, *Descabimento de homologação de sentença arbitral proferida no Brasil por se considerada pela lei como sentença nacional*, 29 REV. DE ARB. E MEDIAÇÃO 423 (2011).

11 Brazilian Arbitration Act of 1996, Pub. L. No. 9,307/96, Article 38:

The homologation request for the recognition or enforcement of a foreign arbitral award can be denied only if the defendant proves that:

- I - the parties to the agreement lacked capacity;
- II - the arbitration agreement was not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the country where the award was made;
- III - it was not given proper notice of the appointment of the arbitrator or of the arbitral procedure, or in the cases of violation of the adversary proceeding principle rendering its full defense impossible;
- IV - the arbitral award has exceeded the terms of the arbitration agreement, and it is not possible to separate the portion exceeding the terms from what has been submitted to arbitration;
- V - the commencement of the arbitral proceed-

- ings was not in accordance with the submission to arbitration or the arbitral clause;
- VI - the arbitral award is not yet binding on the parties, or has been set aside or has been suspended by a court of the country in which the arbitral award has been made.
- 12 *L' Aiglon SA v. Têxtil União SA*, SEC 856/EX, Carlos Alberto Menezes Direito, J. (S.T.J. 2005); *Oleaginosa Moreno Hermanos SA v. Moinho Paulista Ltda.*, SEC 866/EX, Felix Fischer, J. (S.T.J. 2006); *First Brands do Brasil Ltda. v. STP Petropplus Produtos Automotivos SA*, SEC 611, João Otávio de Noronha, J. (S.T.J. 2007); *Spie Enertrans SA v. Inepar SA*, SEC 831/FR, Arnaldo Esteves Lima, J. (S.T.J. 2007); *Nahuelsat SA v. Embratel SA*, SEC 1.305/FR, Hamilton Carvalhido, J. (S.T.J. 2007).
- 13 Rodrigo Garcia da Fonseca & Leticia Barbosa e Silva Abdalla, *Recognition and Enforcement of Foreign Arbitral Awards in Brazil*, 2 Y.B. OF INT'L ARB. (forthcoming).
- 14 Lauro Gama Jr., *Recusas Fundadas no artigo V (1) (E), da Convenção de Nova Iorque: Peculiaridades de sua Aplicação no Brasil* in ARBITRAGEM COMERCIAL E INTERNACIONAL – A CONVENÇÃO DE NOVA IORQUE E O DIREITO BRASILEIRO 235 (Arnoldo Wald & Selma Ferreira Lemes eds., 2011); José Carlos de Magalhães, *A Convenção de Nova Iorque e a Lei de Arbitragem*, 18 REVISTA DE DIREITO BANCÁRIO, DO MERCADO DE CAPITAIS E DE ARBITRAGEM, 317 (2002); João Bosco Lee, *A Homologação de Sentença Arbitral Estrangeira: a Convenção de Nova Iorque de 1958 e o Direito Brasileiro de Arbitragem* in ARBITRAGEM – ESTUDOS EM HOMENAGEM AO PROF. GUIDO FERNANDO DA SILVA SOARES, IN MEMORI-AM, 175, 188 (Pedro Batista Martins, Selma Ferreira Lemes & Carlos Alberto Carmona eds., 2007); Paulo Borba Casella & Daniel Gruenbaum, *Homologação de sentença arbitral estrangeira anulada*, 9 REV. DE ARB. E MEDIAÇÃO, 207 (2006); Pedro Batista Martins, *A recepção nacional às sentenças prolatadas no exterior* in ASPECTOS FUNDAMENTAIS DA LEI DE ARBITRAGEM 435, 460 (Pedro Batista Martins, Selma Ferreira Lemes & Carlos Alberto Carmona eds., 1999).
- 15 Jan Paulsson, *May or Must under the New York Convention: An Exercise in Syntax and Linguistics*, 14 ARB. INT'L 227, 230 (1998); Alexis Mourre, "May or Must?" *Las Causales de no Reconocimiento de Laudos Prevista en el Artículo de la Convención de Nueva York*, San Ellas Facultativas? in EL ARBITRAJE COMERCIAL INTERNACIONAL – ESTUDIO DE LA CONVENCIÓN DE NUEVA YORK CON MOTIVO DE SU 50º ANIVERSARIO 367 (Guido S. Tawil & Eduardo Zuleta eds., 2008); Fernando Mantilla-Serrano, *Algumas Notas sobre a Execução de Sentenças Arbitrais Anuladas e a Convenção de Nova Iorque*, 24 REV. BRASILEIRA DE ARB. 92, 93 (2009).
- 16 *GE Medical Systems. v. Technimed Paramedics Eletromedicina Comercial Ltda.*, AgRg SEC 853 Castro Meira, J. (S.T.J. 2011).
- 17 *Id.* at 854.
- 18 Brazilian Arbitration Act of 1996, Pub. L. No. 9,307/96, Article 4. [Emphasis added.]
- 19 Arnaldo Wald, *Os Aspectos Formais da Convenção de Arbitragem (Comentário do art. II, (1) e (2), da Convenção de Nova Iorque e sua Aplicação no Direito Brasileiro)* in ARBITRAGEM COMERCIAL E INTERNACIONAL – A CONVENÇÃO DE NOVA IORQUE E O DIREITO BRASILEIRO, *supra* note 14, at 102, 103.
- 20 ICC Case No. 4131 in COLLECTION OF ICC ARBITRAL AWARDS 1974-1985 146, 153 (Sigvard Jarvin & Yves Derains eds. 1990); ICC Case No. 5103 in COLLECTION OF ICC ARBITRAL AWARDS 1986-1990 361, 370 (Sigvard Jarvin, Yves Derains & Jean-Jacques Arnaldez eds. 1994). See also BERNARD HANOTIAU, *COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS* 50 (2006); Oliver Capresse, *A arbitragem e os grupos de sociedades*, 6 REVISTA DE DIREITO BANCÁRIO, DO MERCADO DE CAPITAIS E DA ARBITRAGEM 353 (2003).
- 21 See landmark case *Dow Chemical v. Isover-Saint-Gobain*, ICC Case No. 4131.
- 22 *Trelleborg do Brasil Ltda. v. Anel Empreendimentos Participações e Agropecuária Ltda.*, 267,450-4/6 Constança Gonzaga, J. (7th T.J.S.P. 2006) 10 REV. DE ARB. E MEDIAÇÃO 243 (2006).
- 23 *L' Aiglon S.A. v. Têxtil União S.A.*, SEC 856 Carlos Alberto Menezes Direito, J. (S.T.J. 2005).
- 24 *Companhia Nacional de Cimento Portland v. CP Cimento e Participações S.A. e Latcem S.A.*, ICC Case No. 14,144/CCO 14 REV. DE ARB. E MEDIAÇÃO 259 (2007).
- 25 *Companhia Nacional de Cimento Portland v. CP Cimento e Participações S.A. e Latcem S.A.*, 2006, 001,014953-3, Marcia de Andrade Pumar (Rio de Janeiro, 2006) 14 REV. DE ARB. E MEDIAÇÃO 228 (2007).
- 26 Laurent Lévy, *Arbitration and Bankruptcy: Bankruptcy of Arbitration?*, 5 DISP. RESOL. INT'L 103 (2011).
- 27 Article 6 of the Brazilian Bankruptcy and Reorganization Act (Law No. 11.101 of 9 Feb. 2005) provides that the bankruptcy declaration entails the suspension of all pending actions against the bankrupt debtor. Nevertheless, this rule does not apply to actions seeking the recognition of the obligation of the bankrupt debtor to pay a sum of money that is still not yet ascertained (art. 6, para. 1). Article 76 provides for the principle of concentration of the bankruptcy, which consists in the exclusive jurisdiction of the bankruptcy court to rule on all actions concerning the bankrupt debtor's assets, interests and businesses.
- 28 The decision rendered by the arbitral tribunal eventually became public by reason of the superven-
- ing court litigation to stay the arbitration initiated by *Interclínicas*. This decision on jurisdiction has been published in 15 REV. DE ARB. E MEDIAÇÃO 239, 247 (2007).
- 29 *Saúde ABC v. Interclínicas*, MC 14,295/SP, Nancy Andrigui, J. (S.T.J. 2008). The decision is also published in 19 REV. DE ARB. E MEDIAÇÃO (2008), with comments by Arnaldo Wald. See also *Interclínicas v. Saúde ABC*, Resp 1,125,185/SP, Nancy Andrigui, J. (S.T.J. 2011).
- 30 *Jackson Empreendimentos v. Diagrama*, AI No 531,020-4/3-00, Pereira Calças (T.J.S.P. 2008). This decision is also published in 19 REV. DE ARB. E MEDIAÇÃO (2008), followed by comments by Arnaldo Wald. The final statements presented by the appellant are also published in the same issue of REV. DE ARB. E MEDIAÇÃO at 183.
- 31 Constitutional Amendments Nos. 6, 7, 8 and 9, all from 1995, consolidated the opening of the economy to foreign investments.
- 32 Arnaldo Wald, *A recente evolução da arbitragem no direito brasileiro (1996-2001)* in *Reflexões sobre arbitragem in memoriam do Desembargador Cláudio Vianna de Lima* 143, 168 (Pedro A. Batista Martins & José Maria Rossani Garcez eds. 2002); Arnaldo Wald, *A New Approach to International Investment Agreements (IIAS) in Brazil in Liber Amicorum Bernardo Cremades* 1183 (M.Á. Fernández-Ballesteros & David Arias eds., 2010).
- 33 Although Brazil had signed 14 BITS, none of them was ratified by Congress. The BITS are listed in chronological order: Portugal (9 Feb. 1994); Chile (22 March 1994); United Kingdom (19 July 1994); Switzerland (11 Nov. 1994); France (21 March 1995); Finland (28 March 1995); Italy (3 April 1995); Denmark (4 May 1995); Venezuela (4 July 1995); South Korea (1 Sept. 1995); Germany (21 Sept. 1995); Cuba (26 June 1997); Holland (25 Nov. 1998); Belgium and Luxemburg (6 Jan. 1999); http://www.unctad.org/sections/dite_pccb/docs/bits_brazil.pdf.
- 34 Diplomat Ronaldo Costa Filho, of the Foreign Relations Ministry, lecture at the São Paulo State Federation of Industries (FIESP) seminar on bilateral investment agreements, "Revisitando os acordos bilaterais de investimentos," Sept. 2008, www.fiesp.com.br; See also the study *Os acordos para a promoção e a proteção recíproca de investimentos assinados pelo Brasil* prepared by the Legislative Advisors of the Chamber of Deputies at the time the referred APPIs were being analyzed by the National Congress in May 2001, <http://apache.camara.gov.br/porta/arquivos/Camara/internet/publicacoes/estnottec/pdf/102080.pdf>.
- 35 The "pré-salt" layer of the continental shelf off the coast of Brazil holds significant petrochemical resources, although it is very deep and challenging to drill.

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International Judicial Cooperation in Brazil: Recognition and Enforcement of Foreign Decisions at the Superior Court of Justice

By Nadia de Araujo, Rio de Janeiro,
and Frederico do Valle Magalhães Marques, Toronto

Introduction

In this new world era of globalization—with its resulting transnational jurisdictional problems—international judicial cooperation is key as States are forced to accept orders and decisions rendered in a foreign jurisdiction. This is true for both civil and criminal matters.

Brazil has a long tradition of international cooperation, dating to 1847 when *Aviso Circular n.1* stated rules for execution of letters rogatory. Indeed, this cooperation has grown steadily since the late 1990's and has continued into this century. Today there are large numbers of Brazilian nationals living abroad who avail themselves of judicial cooperation for routine problems as, for example, with regard to the recognition and enforcement of a foreign divorce decision. Also, in the criminal field, investigators must often depend on other countries to track money electronically.

From 1934 until 2004, the Supreme Court (*Supremo Tribunal Federal*) had exclusive jurisdiction to recognize foreign judgments, arbitral awards and all foreign orders to be executed in Brazil. Constitutional Amendment No. 45 transferred to the Superior Court of Justice (*Superior Tribunal de Justiça*) (sometimes referenced herein as the “STJ”)¹ the recognition and enforcement of foreign decisions. This change was part of the judicial reform implemented in Brazil in 2004 and was occasioned by the overload of cases before the Supreme Court and the need to allow the Court to focus its attention on constitutional matters only. International judicial cooperation was therefore transferred to the Superior Court of Justice, which is also in charge of the application and interpretation of federal legislation.

In Brazil, as stated in Article 493 of the Brazilian Code of Civil Procedure, all foreign decisions must undergo a procedure

of recognition, known as *homologação de sentença estrangeira* (recognition of foreign decisions),² before those decisions can be given full legal effect in the country.³ This requirement has applied ever since Brazil gained its independence from Portugal in 1822.⁴ The Brazilian Code of Civil Procedure dates from 1939 and does not have executive rules on the procedure for the recognition of foreign decisions. In 2005, the Superior Court of Justice regulated the procedure for recognition of foreign decisions by Resolution No. 9, which has updated many issues settled by case law during the time the Supreme Court was judging international judicial cooperation cases. One example of an important new change is the availability of injunctive relief during the recognition process, something not previously allowed by the Supreme Court. Because Resolution No. 9 can be modified by the STJ at any time, converting this new regulation into statutory provisions would provide a better framework to parties.

A new Code of Civil Procedure is now being discussed by the Brazilian Congress, and we expect that this change may occur. In 2010, a Commission of Experts led by Justice Luiz Fux presented the Senate with a bill (called a “law project” in Brazil) for this new Code of Civil Procedure. Law Project No. 166 was discussed and modified by the Senate and is now under discussion at the *Câmara dos Deputados* (Brazil's House of Representatives). The bill includes a new chapter on recognition and enforcement of foreign decisions that turns Resolution No. 9 into statutory provisions. As stated above, this much anticipated change would advance international cooperation in Brazil by giving parties more certainty as to the applicable legislation for foreign decisions.⁵

The number of cases submitted to the Superior Court of Justice for recognition

has more than doubled over the last few years. While the Supreme Court had ruled on roughly 7,000 cases between 1934 and 2004, the Superior Court of Justice has examined the same number of cases since 2005. This article reviews the current system of recognition of foreign decisions in Brazil under the rules of Resolution No. 9, as well as under the most recent Superior Court of Justice cases.

Characteristics of and Requirements for Recognition of Foreign Decisions

The system of recognition of foreign judgments in Brazil works as a *giudizio di delibazione*, inspired by the Italian model. This method does not evaluate the merit of the foreign decision to be recognized but does ensure the fulfillment of certain legal requirements and, at least tangentially, the evaluation of the merits of the question so as to prevent the flouting of public policy, national sovereignty or good customs. The core principle is that the decision of the foreign court is not scrutinized for the decision's merits unless it is unsustainable under Brazilian public policy. For example, divorce was not permitted in Brazil before 1977. Thus, foreign decisions on divorce proceedings involving Brazilian nationals were considered to be against public policy. Since the implementation of a divorce regulation in 1977, the recognition of such foreign decisions has been routine.

The public policy consideration requires careful study of Superior Court of Justice decisions over the last six years, as it is commonly used by defendants as a ground to argue the merits of a foreign decision whose recognition process is pending. In granting the recognition to foreign decisions, the Superior Federal Court always mentions that the decision is not against

public policy and that all formal requirements are present. Nonetheless, the line between what is a question on the merits or on public-policy grounds is very thin. This can be demonstrated by analyzing decisions relating to recognition of foreign arbitral awards. In one case, the absence of proof that the clause was signed and thus entered into by the defendant was considered as being against public policy, and the award was vacated.⁶ In other similar cases, however, the awards were granted recognition. It is fair to say that the Superior Court of Justice is aware of the important role it plays in guaranteeing that foreign decisions are recognized without being reviewed on the merits. Over the last six years, most arbitral awards have been granted recognition without serious challenge to the merits.⁷

Apart from the issue of a foreign decision being manifestly against public policy, the only arguments defendants are permitted to make in responding to a recognition request are those dealing with procedural legal requirements. The requirements for the recognition of foreign judgments appear mainly in two domestic statutes: the Brazilian Code of Civil Procedure (“*Código de Processo Civil*” or “CPC”), and the classic Introductory Law to the Civil Code, whose name has been recently changed to Introductory Law to Brazilian Law (“*Lei de Introdução às normas do Direito Brasileiro*” or “LIN”). In Resolution No. 9, Article 5, the Superior Court of Justice has kept the same requirements as the Supreme Court but added new ones in Article 4. In the bill for a new Code of Civil Procedure, the area of judicial cooperation includes new articles on recognition and enforcement of foreign decisions that are in accord with Resolution No. 9, including its latest revisions.

The requirements are: (1) the foreign court or authority had jurisdiction to make the decision; (2) the parties were properly served or the default judgment was legally certified; (3) there is evidence of the authenticity of the judgment or decision and of its final character (the foreign decision shall be enforceable in the country of origin); and (4) the foreign judgment or decision has been certified by the Brazilian

Consulate/Embassy of the country of origin and has been translated into Portuguese by a Brazilian sworn legal translator. The bill for the new Code of Civil Procedure also would require that the foreign decision may not be contrary to public policy.

The first two requirements, jurisdiction of the foreign court and service of process, have raised issues that, despite their procedural nature, are at the heart of the recognition process and have stirred long discussions in many cases. The third and the fourth requirements, proof that the decision is final and issues of certification and translation—albeit very common, as parties do not always provide adequate certification—do not raise doctrinal discussions. Thus, in the discussion below, we will concentrate on the first and second requirements.

Jurisdiction of the Foreign Court

The first requirement imposes on the Superior Court of Justice a duty to analyze the issue of jurisdiction in accordance with both Brazilian law and foreign law. In Brazil, jurisdiction (international competence) is regulated by the Code of Civil Procedure, Articles 88, 89 and 90. According to the Brazilian Constitution, provisions of Brazilian law apply to Brazilians and foreign residents alike.

The jurisdiction of Brazilian courts can be of two types: exclusive or concurrent. Situations where Brazilian courts have exclusive jurisdiction are those related to real property located in Brazil, as established by Article 89 of the Brazilian Code of Civil Procedure. Article 89 covers two situations: property rights over real estate located in Brazil and procedures related to the inheritance of real property located in Brazil. Thus, a foreign decision concerning real estate located in Brazil will not be recognized by the Superior Court of Justice.

Nonetheless, over the years, case law has applied an interpretation that encompasses a broader view of this matter, such as accepting divorce decisions that include real property as long as there was no dispute over the matter. The Superior Court of

Justice has been careful in cases where real estate in Brazil is transmitted through inheritance. In SE 755, although the real property was in Brazil—a clear case of exclusive jurisdiction—the foreign decision was recognized because the distribution of the estate was done in accordance with Brazilian rules.⁸ In another judgment (SEC 3532),⁹ where someone other than the heir was granted the estate, a Swiss court decision was not recognized because that choice was not possible under Brazilian law and, as the property was located in Brazil, only a Brazilian court could decide the issue, according to Article 89 of the Code of Civil Procedure.

The issue of concurrent jurisdiction is a different matter, and the Superior Court of Justice has acknowledged foreign jurisdiction more easily if the case falls within the three categories stated in Article 88. In these situations, although Brazilian courts have concurrent jurisdiction to hear the case, the STJ will recognize a foreign decision as well. In certain instances, parties might file a lawsuit both in Brazil and elsewhere where: (1) the defendant, of whatever nationality, is domiciled in Brazil; (2) the obligation must be performed in Brazil; and (3) the case is based on an incident that took place, or arises from an action taken in Brazil. When such a lawsuit is brought at a foreign court, jurisdiction is conferred as to that plaintiff, who cannot subsequently claim a lack of jurisdiction of the foreign court in order to frustrate the Brazilian recognition process. If the case falls under Article 88, and the party was present in the proceedings, the Supreme Court had always recognized the foreign decision without delay. Since 2005, the Superior Court of Justice has followed this path and has continued to recognize foreign decisions in similar cases. The bill for the new Code of Civil Procedure expressly addresses this situation when it states in Article 23 that a suit brought in Brazil does not preclude the recognition of a foreign decision or arbitral award.

Brazilian law repudiates the theory of international *lis pendens*. Thus, recognition will be granted even if there is an action pending before Brazilian courts. If

two lawsuits are brought in different jurisdictions and the Brazilian case is decided first and becomes final, not subject to any appeals, then the foreign decision will not be recognized later. The reverse is also true: if the foreign decision arrives first, it will be recognized and will preempt the Brazilian action, as the foreign decision will have *res judicata* effect. In a recent case, the Superior Court of Justice affirmed this rule when it decided to follow through with the recognition process of a foreign decision while the Brazilian judgment was pending.¹⁰

Conversely, it is irrelevant to a Brazilian judge if there is an identical case pending abroad; this fact alone will not be enough to prevent the judge from having jurisdiction over the case. A case initiated in Brazil will follow its normal course and may be interrupted only if a final foreign decision is recognized by the Superior Court of Justice. Only after the recognition process is finished will the foreign judgment be enforceable in Brazil. In the same way, if a case brought before a Brazilian judge reaches a final decision first, the pending of the recognition process before the Superior Court of Justice becomes irrelevant. In such circumstances, the foreign decision will not be recognized. The bill for the new Code of Civil Procedure would maintain this rule in Article 23.

Process Serving and the Due Process Clause

Process serving and due process comprise the second requirement under Brazilian law. The Superior Court of Justice will examine whether the parties have been regularly notified and whether notice was duly served even if the party did not appear before the foreign court. Resolution No. 9 expressly mandates that this requirement be reviewed by the Superior Court of Justice, so that due process of law is confirmed to have been followed.

When a defendant appears before the foreign court without being coerced and takes part in all procedural phases of the case, the due process clause is fulfilled. According to old cases once brought before the Supreme

Court and subsequently followed by the Superior Court of Justice, even if there was an irregularity in the notification, the uncoerced attendance of the party is enough to grant recognition to the foreign decision.

On the other hand, when a defendant is domiciled in Brazil, the proper form of service is through letters rogatory. Other means will not be considered valid, even if the local foreign law provides for different ways of notification, such as by mail or by way of affidavit. According to case law dating from the Supreme Court and followed by the Superior Court of Justice, such notification would violate Brazilian public policy, and the request for recognition would be denied. The Superior Court of Justice has confirmed this many times.¹¹ The bill for the new Code of Civil Procedure would maintain this rule through Article 881, paragraph 2.

Evidence the Foreign Decision is Final; Authentication; and Translation

Although important, the last requirements are much less debatable. Their fulfillment falls to the requesting party to present evidence that the decision constitutes a final decision in the country of its origin, that it is authentic and comes from a valid court. The Brazilian court also must be provided with a translated version that can be trusted.

This evidence usually comes in two forms: (1) through a certificate, or express declaration, of the foreign tribunal; or (2) when such documents do not exist, through a legal opinion issued by two lawyers, applying the rule contained in the Bustamante Code (Articles 409-411) on the proof of foreign law. There is no specific form by which it should be demonstrated that the foreign judgment constitutes a final ruling. Thus, it is crucial to ensure that the judgment is final according to the laws of the jurisdiction in which the decision was originally pronounced.

The fourth and final requirement is related to the translation and authenticity of the document. Documents in a foreign language will not be accepted by the Superior

Court of Justice, a rule inherited from the days when the Supreme Court decided the matter. Resolution No. 9 adds that the authenticity of the foreign judgment must be made by the Brazilian Consulate/Embassy at the place of origin. Therefore, the foreign decision and other documents presented with the request for recognition must be authenticated by the Brazilian consular authority in the country of the decision's origin before arriving in Brazil, unless transmitted through Central Authorities pursuant to treaties that have such provision; for example, the Bilateral Treaty of France and Brazil for civil matters. This is justified by the fact that Brazilian consuls abroad carry out notarial functions, enabling them to issue documents that will be presented in Brazil.

The translation into Portuguese by a sworn translator (*tradutor juramentado*) is another requirement that cannot be circumvented. The lack of proper translation will result in the denial of the recognition request. The Supreme Court had ruled that the translation must be performed by a sworn translator because his or her work automatically certifies its authenticity. Since 2005, the Superior Court of Justice has continued to confirm this requirement. If a sworn translator of the original language of the decision cannot be found, the parties can nominate an ad hoc translator or use an interpreter registered with the competent organ of the Brazilian Commercial Register. Recognition will be denied if the translation was performed in the country of origin, unless it was made pursuant to a specific provision of a bilateral or multilateral treaty or convention. The proposed revised Code of Civil Procedure also would maintain this rule through Article 881, paragraph 4.

Novelties of the Recognition Process by Resolution No. 9

Article 483 of the Code of Civil Procedure originally stated only that no foreign decision would be executed in Brazil unless the decision was recognized by the Supreme Court to be in accordance with internal law. In 2005, Resolution No. 9 replaced

that requirement with new rules regarding recognition of foreign decisions, set forth in three new paragraphs of Article 4.

The new rules seek to resolve issues raised by Supreme Court case law. For example, since the beginning of the nineteenth century, Brazil has had a large immigrant population from Japan. Over the last thirty years, many of the new generation have chosen to return to their homeland. In Japan, divorce is granted by a municipal administrative authority (city hall), with powers that only a judge would have in Brazil. Therefore, parties who have divorced in Japan have only these municipal decisions and ostensibly could not ask a Brazilian judge to recognize such an order not envisioned under Brazilian law. Sensitive to this situation, however, the Supreme Court has stated that such an administrative decision of Japan would be considered a foreign decision in the sense required by Brazilian laws, and has always recognized them. Resolution No. 9 embodied this thinking in paragraph 1, and the Superior

Court of Justice Court has already applied it many times.

Paragraph 2 allows for partial recognition of a foreign award. This is another situation where the Supreme Court's interpretation of statutory law has been crystallized in the Resolution. Commonly, in divorce cases, for example, the Supreme Court might recognize the foreign divorce but not other parts of the ruling such as the determination of alimony, dispositions concerning children and so on. There was doubt for many years as to whether the foreign decision could be recognized only partially. Resolution No. 9 confirms that it can be, and the Superior Court of Justice has already proceeded accordingly many times.

For example, in a recent request for recognition of a U.S. divorce decision from Texas, that also ruled on the partition of real estate, the Superior Court of Justice could not accept the portion of the decision concerning the real estate since it was not reached through an agreement between the

parties. Thus, as this partition of real estate located in Brazil could be decided only in Brazil, pursuant to Article 89 of the Code of Civil Procedure that grants Brazilian courts exclusive jurisdiction over property located in Brazil, the decision was only partially recognized: the divorce was recognized, the partition of the property was not.¹² In another case where a maintenance order was required, recognition was partially granted as far as alimony only to the child of the debtor was concerned.¹³

Finally, paragraph 3 allows that during the recognition procedure, provisional measures (or interim relief), as long as urgent and justified, may be granted. This is probably the biggest change in the process of recognition. Here, the Superior Court of Justice has innovated and followed a path different from the Supreme Court's previous work. In the past, the Supreme Court had decided that until the foreign decision was recognized, no effect of any kind could be derived from it. Thus, provisional measures during the



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proceedings all were denied. Nonetheless, some parties have challenged this position arguing that, because the recognition process was a claim and in the course of such proceeding a provisional measure could be obtained, there was no basis for the Supreme Court's decision in this regard. The Superior Court of Justice was sensitive to this line of reasoning, and Resolution No. 9, Article 4, paragraph 3 allowed for provisional measures as long as the same requirements for provisional measures in other local proceedings were satisfied. This means parties have to prove duress and urgency. Since 2005, while many provisional measures have been requested, very few have actually been granted. The Superior Court is using a strict level of scrutiny and has been very cautious in its analysis of the requirements when granting such a measure.¹⁴ Many of these requests are for the authorization of a new marriage before the recognition of the requested divorce is granted; for the sale of property; and for the authorization of matters relating to children before a decision on guardianship has been recognized, among others.

Cases relating to recognition of foreign arbitral awards have also involved requests for provisional measures. In Request MC 14795, the provisional measure to freeze assets of a company that had to pay an arbitral award was denied on the grounds that the measure was not allowed before the proceedings of recognition were finished, a decision that cited old cases of the Supreme Court that have expressly been changed by the new rule. The decision comes as a surprise under the wording of Resolution No. 9, Article 4, paragraph 3, and in line with other decisions by the President at that time that had denied similar requests but under different arguments.¹⁵ Although the recognition of the award is still pending in SEC 3709, the Public Ministry issued an opinion against the recognition because it found that there was no evidence of the defendant's acceptance of the arbitral clause; thus, no agreement to arbitrate.

The two cases where the measure was granted are worth reviewing. In the first, there was a request for recognition of a decision that asserted the paternity of a

minor. The mother needed permission from the judge to travel with the child, while the father was challenging the recognition. The mother was using the birth certificate that listed the defendant as the father, and both parents have to give permission for the travel arrangements.¹⁶ Interim injunctive relief was needed to allow the child to travel while the matter was still unsettled. In the second case, the foreign award was in a case where a money judgment was entered for the plaintiff, and there was a request to freeze the defendant's property in Brazil to guarantee further payment while the recognition procedure was pending. The Superior Court of Justice granted the petition, and the sale of the property was abated while the recognition procedure was pending.¹⁷ The proposed new Code of Civil Procedure would retain this rule in Article 879, paragraph 3.

Conclusion

The Superior Court of Justice has replaced the Supreme Court in the exercise of exclusive jurisdiction over all pending and future cases relating to the recognition of foreign decisions. In the last six years, the Superior Court of Justice has used case law developed by the Supreme Court as a solid foundation but has also developed and implemented its own ideas. The STJ has also carved new rules in Resolution No. 9, allowing for partial recognition of foreign decisions and the granting of provisional measures during the recognition procedure—so far one of its boldest ideas. Thus, in a very short time, the Superior Court of Justice has left its own mark in the field of international judicial cooperation. Its achievements have paved the way for the bill (legal project) proposing a new Code of Civil Procedure, which is now pending approval at the House of Representatives (*Camara dos Deputados*). That legislation would adopt the main features of Resolution No. 9, thereby providing parties with more certainty in the field of recognition and enforcement of foreign decisions. Once the new Code of Civil Procedure is enacted, these provisions will assure other nations that Brazil has a comprehensive statutory

body of rules in international cooperation.



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Endnotes:

1 CONST. amend. no. 45/2004. The Superior Court of Justice issued Resolution No. 9 in May 2005, which contains the legal requirements for the recognition of foreign judgments and arbitration awards in Brazil, as well as the granting of letters rogatory, and is in force until the final approval of its Internal Rules. It is important to explain that until the Constitution of 1988, the Supreme Court had jurisdiction over all matters in the so-called third instance; i.e., the right to review any threats to the Constitution and to federal law. Although Brazil is a federal system, all legislation in civil and criminal matters is federal (thus the system can be called national). The states' legislative power is very limited, unlike in other systems, such as Canada and the United States. The 1988 Constitution created a new court, the Superior Court of Justice, which has taken over some of the jurisdiction for review in matters of federal law from the Supreme Court. Now, with the new amendment, additional jurisdiction of the Supreme Court has been transferred to the Superior Court of Justice in order to lighten the Supreme Court's burden. The aim was to make the Supreme Court a true constitutional court, dealing with constitutional questions only. The full text of all decisions cited in this paper can be accessed by their class and number directly at both courts' websites: the Supreme Court's is <http://www.stf.gov.br>, and the Federal Superior Court is <http://www.stj.gov.br>. The key word to research case law is "*jurisprudência*." A word in the decision or the type or number of the decision will then reveal the case. Given this ease of

accessibility, citations to other publications of these cases will not be included herein.

2 Its Portuguese name could be translated “homologation process,” but “recognition and enforcement” is better known.

3 In recent years one of the authors, Nadia de Araujo, has extensively studied this issue. For more detailed references, see, in Portuguese, Nadia de Araujo, *DIREITO INTERNACIONAL PRIVADO: TEORIA E PRÁTICA BRASILEIRA* (2011), and Nadia de Araujo, coordinator, *COOPERAÇÃO JURÍDICA INTERNACIONAL: COMENTÁRIOS A RESOLUÇÃO n. 9 do S.T.J.* (2010). In English, see Nadia de Araujo, *Dispute Resolution in MERCOSUL: The Protocol of Las Lenas and the Case Law of the Brazilian Supreme Court*, 32 U. MIAMI INTER-AM. L. REV. 25, 44 (2001).

For more information on the Brazilian system of recognition of foreign decisions, see, in English, Jacob Dolinger, *Brazilian International Procedural Law*, in *A PANORAMA OF BRAZILIAN LAW* 349, 365-66 (Jacob Dolinger & Keith S. Rosenn eds., North-South Center & Editora Esplanada Ltda. 1992) (1991); Daniela Trejos Vargas, *Proceedings Inaugural Conference on Legal and Policy Issues in the Americas*, 13 FLA. J. INT’L L. 125, 127-28 (2000); Maria Angela Jardim de Santa Cruz Oliveira, *Recognition and Enforcement of United States Money Judgments in Brazil*, 19 N.Y. INT’L L. REV. 1 (2006). For a recent account of recognition of foreign arbitral awards, see Mauricio Gomm-Santos, *Brazil’s Conflicting International Arbitration Case Law: The Inepar and Renault Decisions*, 64 DISP. RESOL. J. 82 (2009). The instant article uses and expands on information that was previously published by the authors in *Recognition of Foreign Judgments in Brazil: the Experience of the Supreme Court and the Shift to the Superior Court of Justice*, 1 WORLD ARB. AND MEDIATION. REV. 211 (2007). At that time, the Superior Court of Justice had just begun deciding cases on international cooperation, while now there is a firm and established body of case law on the subject.

4 Brazil was the metropolis of the Portuguese Empire from 1808 to 1821, when the King was transferred from Portugal in that country’s war with France’s Napoleon. In 1821, King João VI went back to Portugal but left his son Pedro as regent. Pedro later

declared the independence of Brazil from Portugal in 1822. Brazil was an empire from 1822 to 1889, when the Republic was declared, and a federal presidential system implemented, inspired by United States’ institutions.

5 Articles 878 to 883 of the bill (legal project) deal with the matter and will be mentioned when applicable throughout this work.

6 See SEC 967, S.T.J. (2006) (where the court considered as being an offence to public policy the absence of proof that defendant chose arbitration as a method of dispute resolution because his signature was missing in the contracts where the clause was inserted. The court asserted that the absence of unequivocal choice by one party of arbitration is against the principle that arbitration can be used only if there is manifest choice to submit to it). Also in SEC 866, S.T.J., the contract was concluded verbally, and there was no proof that arbitral clauses were negotiated; thus, no proof of its acceptance. Public policy was the reason for denying the arbitral award recognition. Nonetheless, in SEC 856, S.T.J. (where there was also no proof of the signing of the arbitral clause), the court reached the opposite conclusion and decided that although there was no signed contract, there was proof of the understanding of the parties, and both appeared before the arbitral tribunal. Thus, there was no reason to vacate the award on public policy grounds.

7 For an analysis of the work of the Superior Court of Justice in the recognition process of foreign arbitral awards, see Nadia de Araujo, *O Superior Tribunal de Justiça e a homologação dos laudos arbitrais estrangeiros, balanço positivo de quarto anos de atuação*, 3 REVISTA SEMESTRAL DE DIREITO EMPRESARIAL 229 (2008), where the author shows that the STJ had decided 24 cases, and only 3 had been denied. The numbers have grown since then, but the ratio between granted and denied cases has not changed.

8 SE 755, S.T.J., published in 2005. The opinion stated that although article 89, II, declared the Brazilian judge to have exclusive jurisdiction, in this case the foreign decision respected Brazilian law and distributed the property according to it.

9 SEC 3532, S.T.J. (2011).

10 AG SEC 854, S.T.J. (2011). This case was a motion to modify a prior decision that had stayed the recognition process on the grounds that there was a pending suit in Brazil. The Superior Court of Justice decided that there could be no stay of the recognition process and that it should continue up to judgment. The case concerned the request for recognition of a foreign arbitral award, while the Brazilian case tried to discuss the validity of the arbitral clause. As it was not a matter of exclusive jurisdiction, the Superior Court of Justice found it could not discuss the validity of the clause in the recognition process of the arbitral award, where only requirements of Resolution No. 9 could come into play.

11 As an example, see SEC 833, S.T.J. (2006) (a request to recognize a foreign arbitral award was denied on public policy grounds because there was no proof that service of process had properly reached defendant and only a letter rogatory constitutes sufficient proof that communication was done according to Brazilian rules).

12 SE 1633, S.T.J. (2011).

13 SE 4703, S.T.J. (2010).

14 In a search for examples for this article, more than 50 requests were reviewed, of which only 2 were granted.

15 See MC 14.795, S.T.J. (2008) (denying the request for provisional measure in a process of recognition of a foreign arbitral award, still pending in SEC 3709). But see SE 3861, S.T.J. (2008) (decided in the same year by President Cesar Asfor Rocha as well, where the question of the requested provisional measure was denied but on the grounds it did not represent a clear and present danger or an urgent matter under the wording of Resolution No. 9, art. 4 para. 3). For a comment on MC 14.795, see Valeria Galindez, *Comverse Inc. v. American Telecommunications Ltda: Superior Court of Justice Denies Interim Relief to Secure Enforcement of Foreign Arbitral Award pending its Recognition* (15 IBA Arb. News No. 1) at 154 (2010).

16 See SE 6551, S.T.J. (2011).

17 See SE 5717, S.T.J. (2011).

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Brazilian Immigration Policies: An Effective System for Foreign Workers and Investors

By Maria Luisa Souza Costa Soter da Silveira, Rio de Janeiro, and
Christel Estuardo Cunningham, São Paulo

Ever since its discovery by Portugal in the year 1500, Brazil has always been a country open to immigration. Immigration to Brazil started in 1808 with 300 Chinese citizens coming from Macau, and since then there have been several immigration cycles involving peoples from many different countries.

Despite the current worldwide economic collapse, since 2002 Brazil has presented a positive combination of controlled inflation, reduced taxes, leveled balance of payments and a constant growth of its gross domestic product. The Brazilian Ministry of Labor verified that in 2009 almost one million new jobs were created, representing a 3.11% growth.

According to a recent study prepared by the Brazilian Ministry of Tourism,¹ the FIFA World Cup (2014) and the Olympic Games in Rio de Janeiro (2016) are expected to generate 2 million (direct and indirect) jobs; a 55% growth in foreign investment; and approximately 73 million domestic landings (versus 59 million registered in 2009).

Sources of Law and Immigration Rules

Article 5 of the Brazilian Federal Constitution (1988) guarantees to foreign nationals living in Brazil the same rights to which Brazilian citizens are entitled. They must be treated equally, with no discrimination based on citizenship, other than the restrictions set forth in the Constitution. In Brazil, the primary law regulating the conditions for foreign nationals is Law No. 6,815/80, regulated by Decree No. 86,715/81. Further, the requirements for the granting of work permits based on temporary or permanent visas are determined by specific Normative Resolutions issued by the National Council of Immigration, resulting in a much more expeditious process than would otherwise be the case. The Normative Resolutions are constantly updated, following as closely as possible the needs of the modern world. There are also

Recommended Resolutions that regulate special situations, such as humanitarian grounds for refugees who do not meet all the requirements for obtaining a visa, and medical grounds for people who are in Brazil or need to come to Brazil for treatment.

MERCOSUR, Allied Countries and Immigration Rules

Whether or not a foreign national needs a consular business or tourism visa to enter Brazil depends on his or her country of citizenship. In general, for citizens of most of the European and the South American countries, no consular business or tourism visa is required. For citizens of the United States and for most of the Central American, Asian, African and Oceanic countries, a consular business or tourism visa is required. By contrast, MERCOSUR nationals and Bolivian and Chilean citizens (both countries are so-called Allied countries for immigration purposes), Colombian, Ecuadoran, Peruvian and Venezuelan citizens may enter Brazil holding only an Identity Card from their country of origin with no need of a passport. Additionally, MERCOSUR and Allied countries' nationals may reside, study and work in Brazil without obtaining a work permit or a residence permit prior to arrival. Such foreign nationals may apply for an initial temporary two-year visa and residence permit either in their country of residence pursuant to a proper request made to the Brazilian Consulate with jurisdiction over their place of residence, or they may apply directly to the Brazilian Federal Police upon their arrival in Brazil. This temporary visa may be transformed into a permanent residence permit after an administrative process before the Brazilian immigration authorities.

Common Work Permits and Visas

Depending on the purpose of the foreigner's trip, a specific type of visa and a

prior work permit granted by the Brazilian Ministry of Labor may be needed. Following are the most common:

Business Visa

A consular business visa is available for people coming to Brazil to attend business meetings, conferences, seminars, workshops or trade shows; for crew members of an airplane or a ship who do not hold an international crew card; for media coverage or filming; or for an adoption. Under no circumstances can a foreign national work for and/or be paid by a Brazilian source when in Brazil under a consular business visa. A list of the countries for which a consular business visa is required can be found at www.portalconsular.mre.gov.br. Foreign nationals involved in the installation, service and/or repair of equipment in Brazil do not qualify for a consular business visa. Citizens of countries for whom a consular business visa is not required who receive the "Entry Form" ("*Tarjeta de Entrada*") that is handed out on their flight to Brazil and who are coming in without a consular business visa must mark the box entitled "business." When stamping the Entry Form, the Federal Police officer in the airport will determine the permitted period of stay (which would normally be ninety days, but the officer only may permit a shorter period). Citizens of countries for whom a consular business visa is required must apply for it at the Brazilian Consulate having jurisdiction over the place of residence. Consular business visas are normally multi-entry visas for a period of up to five years, but this depends on what the reciprocating country offers to Brazilian citizens. The validity of the consular business visa begins on the date of first entry into Brazil. Business visa holders, regardless of nationality or visa validity period, can stay in Brazil only for up to ninety days in one continuous period, or for a shorter period if otherwise noted on the visa. An extension of the original 90

days can be granted by the Federal Police in Brazil, although the total stay (whether on several trips, or on a single trip with a visa extension) cannot exceed 180 days within a period of 12 months counted from the first entry in Brazil holding the business visa. The processing time for the granting of a consular business visa varies, depending on the Consulate, from three to fifteen business days.

Technical Temporary Visa – Ninety Days

As provided by Normative Resolution No. 61/04, the purpose of this temporary visa is to allow the rendering of technical assistance and/or services by foreign technicians and companies to Brazilian companies. Such visa is not applicable to foreign citizens who will execute or render administrative, financial or management activities within the Brazilian company that requested the visa application on behalf of the foreigner. The foreigner must be a technician and may not substitute or even replace the local manpower. The foreign technician must prove that he/she has a minimum of three years of professional experience related to the technical assistance and/or service that he/she will render in Brazil. The Brazilian company responsible for the visa application can produce a statement evidencing such information about the foreigner. Documents such as diplomas and experience letters issued by the foreign company are not necessary, but they may be used to reinforce the expertise of the foreign technician. Once the validity of this temporary visa is terminated, it is not possible to request an extension of the work permit and visa in Brazil. Pursuant to the provisions of Normative Resolution No. 74/07 (general immigration guidelines), it is necessary to apply for a new work permit and visa to the Brazilian Ministry of Labor and to the Brazilian Consulate, respectively, meaning that the foreign technician must leave Brazil and re-start all the procedures mentioned herein, as well as wait abroad for the approval of the new work permit and issuance of the visa. As this type of temporary visa does not allow an employment relationship between the foreign technician

and the Brazilian company, the Brazilian company is not directly responsible for the payment of salary and/or compensation to the foreign technician living and rendering services in Brazil. Further, the expatriate shall not be considered a Brazilian resident for tax purposes.

Technical Temporary Visa – One Year

This temporary visa is also ruled by Normative Resolution No. 61/04, and thus the restrictions mentioned above concerning functions and payments are totally applicable to this type of temporary visa. Features of this visa that differ from the prior include: (1) greater duration of the validity; (2) acceptance of a sole extension requested by the Brazilian company on behalf of the foreigner while still in Brazil for the same period of one year; (3) production of a complete set of documents with an experience letter issued abroad on behalf of the foreigner (duly notarized and legalized prior to being sent to Brazil and with a Portuguese sworn translation prepared in Brazil); (4) execution of a Commercial Agreement (such as a Technical Cooperation Agreement, Technical Assistance and/or Services Agreement, or Transfer of Technology Agreement) between the foreign company and the Brazilian company sponsoring the visa; (5) proof that whoever signed the agreement on behalf of the foreign company was empowered to do so, such document being duly notarized and legalized prior to being sent to Brazil and with a Portuguese sworn translation prepared in Brazil; and (6) a training program for the Brazilian employees of the sponsoring company, as specified below. Such visa is applicable and may be filed when a Brazilian company needs to receive technical assistance directly from a foreign company to train its own Brazilian employees or to render services to other local companies. It is not mandatory to evidence and/or provide in the Commercial Agreement the name of the foreign technicians who will render services in Brazil, but it is mandatory to provide, among several other items, the following data: (1) professional qualification of the foreigner; (2) specific

and detailed plan of the services to be rendered by the foreign technicians; (3) the number of Brazilian employees who will directly receive the technical training from the foreign technicians; (4) manner, term, places where the technical assistance/technical training will be rendered by the foreign technicians; (5) results expected with the training program; and (6) structure of remuneration agreed to by the Brazilian and foreign companies. This visa can be extended to the legal dependents of the foreigner. Note that such legal dependents will be not authorized to render any kind of services to any Brazilian company or individual, upon remuneration or salary, during the validity of the term of the working permit granted on behalf of the foreigner. As this type of temporary visa does not allow an employment relationship between the foreigner and the Brazilian company, only the foreign entity should pay compensation/salary to the foreign individual. In addition, the worker should not be subordinated to the Brazilian entity (i.e., should not receive orders and directions from the Brazilian entity). Regarding tax aspects, note that the foreigner does not need to stay on a continuous basis in Brazil during the validity of the one-year term, as this is a multiple entry type of visa. Considering this fact, for tax purposes, the foreigner shall be subject to Brazilian tax rules only if he/she stays in Brazil for a period longer than 183 days on a cumulative basis.

Temporary Visa Under an Employment Relationship

This type of visa application is used when a Brazilian company needs to hire an expatriate with an expertise and education level that a Brazilian employee cannot offer. The parties will have an employment relationship regulated in accordance with Brazilian labor rules. The Brazilian company shall act as “Employer” and the foreigner shall act as “Employee,” the employment contract being limited to a maximum two-year term. It is possible to extend the working permit/visa for the same term above pursuant to the execution of a new labor agreement and filing of a request for an extension of the temporary

visa with the Brazilian Ministry of Justice, which will first hear the Ministry of Labor. The foreigner should have a minimum education level and professional experience in accordance with Table 1 below.

This temporary visa under an employment relationship may also be extended to the legal dependents of the foreigner. Legal dependents may not render any kind of services upon remuneration or salary to Brazilian companies or third persons during the validity of the term of the working permit granted on behalf of the foreigner. Normative Resolution No. 74/07 states that foreign citizens may not keep an employment relationship in Brazil that may constitute a reduction of salary and/or compensation received abroad. The Brazilian company must declare that the remuneration to be received by the foreigner is equal to or higher than the remuneration paid by the company for the same occupation/activity that will be rendered by the foreigner in Brazil. It is also important to note that the so-called “two-thirds rule” must be followed. Pursuant to this rule, there are two guidelines that must be observed by Brazilian companies for the hiring of foreign employees: (1) Two-thirds of the employees hired by the Brazilian company should be Brazilian citizens (two Brazilian employees are needed for each foreign employee); and (2) the total amount of salaries paid to foreign employees must correspond to one-third of the total pay-

roll, and it may not be higher than the total amount of two-thirds of the salaries paid to Brazilian employees in the payroll. For tax purposes, during the period of validity of the temporary visa, the foreigner shall be considered as a tax resident and, therefore, he or she must obey the Brazilian tax rules regarding payment of income tax and other taxes. Also, the employee is entitled to all of the Brazilian labor rights.

Permanent Visa With Managerial Powers

This visa is governed by Normative Resolution No. 62/2004. The legal basis of this visa application is the existence of a foreign direct investment registered with the Brazilian Central Bank online system (“SISBACEN”) on behalf of the Brazilian company made directly by its foreign legal entity shareholder. In this modality, it is mandatory to have the appointment of the foreigner as a statutory legal representative in the Articles of Association or Bylaws of the Brazilian company, the investiture of the foreigner as statutory legal representative being conditioned upon the granting of the work permit and permanent visa with managerial powers by the Brazilian Ministry of Labor. There are two ways to obtain the visa depending on the amount of foreign direct investment remitted to the Brazilian company: (1) \$R600,000.00—allowing the granting of the visa for a conditional initial 5-year term of residence

in Brazil; or (2) R\$150,000.00 (Brazilian *reais*), plus the commitment to create ten new jobs for Brazilian workers—allowing the granting of the visa for an initial two-year term of residence in Brazil. The foreigner may also be appointed as statutory legal representative of other Brazilian companies of the same economic group, pursuant to the request of a concomitant authorization to the Brazilian Ministry of Labor. This visa becomes unconditional if, at the end of the conditional period (five or two years, as the case may be), the sponsoring company proves that the capital injected by the foreign shareholder remains invested in the Brazilian company and if there is proof of creation of the new jobs (specifically for item 2 above). For the purposes of extending the validity of the RNE, the foreigner must remain appointed and vested as statutory legal representative of the Brazilian company.

Permanent Visa for Foreign Individual Investor

This type of visa is ruled by Normative Resolution No. 84/09. The legal basis of this visa application is the existence of a foreign direct investment registered with the Brazilian Central Bank online system on behalf of the Brazilian company made directly by its foreign individual investor (who must be a shareholder of said Brazilian company). This visa is conditional for an initial three-year term. The required amount of the foreign direct investment corresponds to \$R150,000.00. Depending on the importance of the project, however, it may be approved with a smaller amount. In this modality, it is mandatory to have the capital injection made in the Brazilian company duly registered with the local Board of Trade pursuant to the execution of an amendment to the Articles of Association or Bylaws of the Brazilian company. The Brazilian Ministry of Labor also requires the submission of an Investment Plan stating specific targets related to the creation of jobs; income to Brazilian nationals; increase in productivity; assimilation of technology; and destination of resources for specific sectors. The most important aspect of the Investment Plan is the social

TABLE 1

Minimum Education Level	Professional Experience
Nine years for foreigners with medium level.	Two years experience in the activity to be rendered in Brazil.
Bachelor’s degree level concluded(university/ technical).	One year experience in the activity to be rendered in Brazil, counted from the date of conclusion of the degree/course.
Post-graduation (minimum of 360 hours) or master’s degree.	It is not necessary to have experience.
Cultural/Artistic profession—no minimum education level.	Three years experience in the activity to be rendered in Brazil.

relevance of the Brazilian company and its capability to generate jobs and revenue. Thus, the extension of this visa application depends on proof that the new jobs to Brazilian nationals described in the investment were created in the first year of the validity of the visa.

General Immigration Procedures

There are no special preference categories for the purposes of immigration to Brazil. All work authorization applications must be analyzed directly by the General Coordination of Immigration at the Ministry of Labor located in Brasília, Distrito Federal. All documents produced abroad must be notarized abroad by a notary public, legalized by the Brazilian Consulate and translated into Portuguese in Brazil by a sworn translator prior to being filed with the Brazilian Ministry of Labor. Currently, the issuance of the approval of the work authorization by the Ministry of Labor takes approximately forty-five days, counted from the filing date of the visa application. Once the work permit is approved, it is published in the Brazilian Official Gazette, and the Brazilian Ministry of Labor shall send the authorization to the Ministry of External Relations which is the Brazilian authority in charge of the remittance of the working permit/authorization to the Brazilian Consulate abroad indicated in the work authorization application form. This procedure by the Ministry of External Relations may take up to five days to be performed.

After that, the foreigner may go directly to the Brazilian Consulate abroad, with a specific set of documents, which may vary in accordance with the internal rules of each Brazilian Consulate, and request the issuance of the visa stamp in the passport. As soon as the visa stamp is issued, the foreigner may travel to Brazil and proceed with his or her enrollment with the Brazilian Federal Police to obtain his Foreign ID Card (so-called “RNE”). In addition to such documents, it is also important to enroll the foreigner with the Ministry of Finance to obtain the Individual Taxpayer’s Registry (so-called “CPF”), if applicable. Finally, in accordance with the nature of the visa granted by the Brazilian Ministry of Labor, the foreigner must also enroll with a Labor Department to obtain his/her Labor and Social Security Card (so-called “CTPS”).

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M. da Silveira



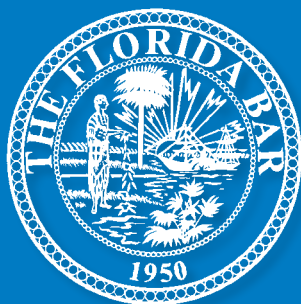
C. Cunningham

Labor Disputes and in the Specialized Section on Collective Labor Disputes. Isa Soter frequently lectures on subjects related to corporate immigration and expatriates.

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Endnote:

1 http://www.copa2014.turismo.gov.br/export/sites/default/copa/noticias/todas_noticias/downloads_noticias/Turismo_no_Brasil_2011_-_2014.pdf



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A Proposed Brazilian Constitutional Amendment to Make Judgments Res Judicata Before All Appeals Have Been Exhausted

By Keith S. Rosenn, Miami

I. Introduction

The President of Brazil's Federal Supreme Court, Minister Cezar Peluso, has recently submitted to Congress a proposal for a constitutional amendment designed to shorten significantly the seemingly endless litigation delays, to reduce the gargantuan caseloads of the country's two highest courts and to increase the likelihood that convicted criminals with money or position will actually serve their sentences. This sensible amendment, dubbed the *PEC dos Recursos* (Proposed Appeals Amendment), would go a long way towards accomplishing these goals by the simple device of making judgments final and non-appealable immediately after they have been upheld upon first appeal, even though such judgments may ultimately be revised by subsequent collateral attack in Brazil's two highest federal courts.¹ The proposed amendment has generated serious controversy among Brazilian lawyers, academicians and jurists.

The need for this amendment, the way in which it will operate, and why it is so controversial cannot be understood without some knowledge of how Brazilian courts operate and why lengthy delays have chronically plagued the Brazilian judicial system. More particularly, one needs to focus upon the multiplicity of procedural devices used by lawyers to try to ensure protracted litigation. The problem is not a new one. It originated with the procedural system that Brazil inherited from the Portuguese; however, it has reached crisis proportions since adoption of the 1988 Constitution, which created a plethora of new rights and actions. As a consequence,

Brazilian courts, particularly its two highest federal courts—the Federal Supreme Court (STF) and the Superior Tribunal of Justice (STJ)—have experienced a huge surge in the number of cases on their dockets.² Despite heroic efforts by Brazilian judges in resolving large numbers of cases, back-



Brazil's Supreme Court

logs have increased in many jurisdictions, further exacerbating the chronic delays.³

One of the often reiterated complaints about the Brazilian judiciary is that litigation seems to go on interminably.⁴ There is anecdotal evidence of cases that have taken nearly ninety years to resolve,⁵ but it is difficult to find data about the actual length of delays because official judicial statistics make no attempt to measure the length of time needed to conclude litigation.⁶ Recently it has been estimated that it would take somewhere between six and thirteen years for the judgment in an ordinary action involving a non-complex international dispute to become res judicata in a suit initiated in the courts of São Paulo, Brazil's most populous state.⁷ The great bulk of this time would be consumed by the appellate process rather than the trial before a single judge sitting without a jury.

One of the principal reasons for the seemingly endless delays in the Brazilian

judicial system is the excessive number of appeals permitted by the Constitution and the procedural codes. Reflecting a serious mistrust of judges, the Brazilian legal system gives most litigants up to four bites at the apple by providing three different levels of appellate review. Virtually all cases can be appealed to an appellate tribunal.⁸ In addition, all interlocutory orders are appealable.

II. Overview of Brazil's Appellate System

A. Appeals From Final Judgments

Appeal is the most important form of review. A basic rule of Brazilian civil procedure is that a request to appeal must be addressed first to the judge who, or tribunal that, rendered the judgment. That judge or tribunal must forward the record to the appellate tribunal after a determination that the formal requirements for review have been met. If the rendering court decides that the formal requirements have not been met, it will deny leave to appeal.⁹ The appellate tribunal makes its own de novo determinations of fact and law on the basis of the written record.

The appeal almost always has the effect of suspending enforcement of the lower court's judgment without any need to post a supersedeas bond.¹⁰ Moreover, judgments awarding more than 60 times the minimum wage (about \$17,225) against any federal, state, or municipal government or any public law entity are subject to mandatory appeal because they have no effect until confirmed on appeal.¹¹

Appeals ordinarily are heard by a panel of three judges of the Tribunal of Justice, the highest state court, or a Federal Regional Tribunal, an intermediate federal

appellate court. If the decision of the panel is unanimous, no further appeal will lie except for the special appeal to the Superior Tribunal of Justice or the extraordinary appeal to the Supreme Court, which are discussed below. If the decision is not unanimous, the losing party can appeal the decision by seeking a rehearing en banc, which will be decided by a group of five judges selected from two different chambers within the same appellate body.¹²

A second level of appellate review is provided by special appeal to the Superior Tribunal of Justice, the second highest federal court, from cases decided by the state Tribunals of Justice or the Federal Regional Tribunals. The special appeal can be taken whenever the appealed decision: (1) is contrary to a treaty or federal law, or denies the effectiveness thereof; (2) upholds an act of a local government challenged as contrary to federal law; or (3) interprets federal law differently from another tribunal.¹³ Unlike the United States, the great bulk of Brazilian law is federal.

The Superior Tribunal of Justice has thirty-three members and sits in panels of five. The appeal will be assigned to a single minister who acts as the *rapporteur* in analyzing the appeal. The *rapporteur* acting alone may summarily dismiss any special appeal that is plainly inadmissible, such as one that is untimely, baseless or makes a contention that has already been rejected by a line of decisions of the Superior Tribunal of Justice or the Supreme Court. If a special appeal is summarily dismissed, the appellant may appeal the *rapporteur's* decision to a panel of the Superior Tribunal of Justice. If the appeal is heard, the *rapporteur* will summarize the case orally for the rest of the panel and announce his or her vote. Counsel are permitted to present oral argument. The other ministers will either concur or dissent depending upon what they have heard, but any member of the panel can request an opportunity to study the file or the applicable law.

If the panel's decision is not unanimous, the losing party may file an additional appeal, requesting en banc review before a larger panel of the tribunal. If the panel's decision is inconsistent with that of another

panel, additional review can be sought before a Section of the Superior Tribunal of Justice.¹⁴

A third level of appellate review is provided by extraordinary appeal to the Federal Supreme Court. An extraordinary appeal can be taken from any decision in sole or ultimate instance that is contrary to the Constitution, declares a treaty or federal law unconstitutional or upholds a law or act of a local government against a constitutional challenge or a challenge of conflict with federal law.¹⁵ The extraordinary appeal is derived from the writ of error in the U.S. Judiciary Act of 1789. Because the Brazilian Constitution is so extensive and contains many provisions that one would expect to encounter only in statutes or regulations,¹⁶ it is far easier to challenge the constitutionality of decisions in Brazil than the United States. Like the Superior Tribunal of Justice, the Supreme Court ordinarily sits in panels of five and also assigns appeals to one member of the panel designated as the *rapporteur*. If the panel's decision diverges from a decision of another panel or the full court, the losing party can request that the appeal be reheard en banc. If there are at least four dissenting votes, certain kinds of decisions of the entire Supreme Court are subject to additional review by means of a request for rehearing.¹⁷

Until recently, the Brazilian Supreme Court lacked any device analogous to the U.S. Supreme Court's writ of certiorari to enable it to screen out unimportant cases or cases presenting contentions that had already been rejected by its prior decisions. As a result, the Brazilian Supreme Court's caseload had been running well in excess of 100,000 cases per year. In 2004, Congress passed Constitutional Amendment No. 45, which, among other reforms to the judiciary, created a new constitutional limitation on extraordinary appeals called "general repercussions." Since 3 May 2007, the Supreme Court has been refusing to hear any extraordinary appeal that does not present a constitutional question with general repercussions. This means that the appeal must present economic, political, social or juridical questions that extend beyond

the parameters of the specific case.¹⁸ A vote of two-thirds of the Supreme Court is required to dismiss an appeal for lack of general repercussions.¹⁹ If four out of the five members of a panel decide that an appeal has no general repercussions, that determination will be decisive, and the issue may not be appealed to the full Court.²⁰ Unlike the writ of certiorari, which has no precedential value, the determination that an extraordinary appeal presents no general repercussions constitutes a binding precedent with respect to all other such appeals presenting the same issue.²¹

The general repercussions requirement has substantially reduced the number of extraordinary appeals and bills of review on the Supreme Court's docket. The number of extraordinary appeals distributed to members of the Supreme Court declined by 86.4% between 2007 and 2010—from 49,708 appeals in 2007 to 6,735 in 2010.²²

B. Interlocutory Appeals

All interlocutory orders may be appealed by a bill of review (*agravo*). There are two forms of interlocutory appeals. One (*agravo retido*) is made for the purpose of preserving the point on appeal and is retained by the trial court until final decision. If that decision is appealed, the interlocutory appeal, at the appellant's request, will be determined as a preliminary matter to the appeal of the final decision. The second type of interlocutory appeal goes directly to the appellate tribunal. This form of interlocutory appeal suspends the proceedings in the trial court only if the appellant obtains a stay from the appellate tribunal. Ordinarily, a stay will be granted by the *rapporteur* to whom the appeal is assigned only if there is threat of irreparable harm or grave injury.²³ In an attempt to reduce the number of direct interlocutory appeals, the Code of Civil Procedure was amended in 2005 to convert the direct interlocutory appeal into a retained appeal unless the challenged decision is capable of causing irreparable harm or serious injury, or the decision denies the admissibility of an appeal.²⁴ If no stay has been granted and the interlocutory appeal is successful, the acts taken by the trial judge subsequent to the

appeal ordinarily will be voided, and the trial proceedings will have to commence again from the point at which the successfully challenged decision was entered.²⁵ If the interlocutory appeal is unsuccessful in the first appellate court, further appellate review may be sought before the Superior Tribunal of Justice or the Federal Supreme Court by special appeal or extraordinary appeal. In 2008, however, the Supreme Court amended its internal rules to extend the requirement of a showing of general repercussions to interlocutory appeals.²⁶ As a result, the number of bills of review declined by 56.4% during the same period—from 56,909 in 2007 to 24,801 in 2010.²⁷

C. The Request for Clarification

Brazilian law affords opportunities for additional delay by allowing any party to ask any court to clarify any decision it has rendered. This request can be filed whenever there is obscurity or contradiction in any judgment or appellate decision, or whenever the decision failed to decide a contention that should have been decided.²⁸ It can be filed with the court of first instance or any of the appellate tribunals, including the Superior Federal Tribunal and the Supreme Court. Because a request for clarification can be made multiple times and because it suspends the period for bringing any other forms of review by any party, it has been a favorite device for delaying proceedings. To try to discourage this dilatory tactic, the Code of Civil Procedure was amended in 1994 to grant the judge or tribunal the power to impose a fine of up to 1% of the amount in controversy for filing a request for clarification that is manifestly for purposes of delay, and up to 10% of the amount in controversy for doing so repeatedly.²⁹

D. Res Judicata and the Rescissory Action

Under current law, a judgment has the force of *res judicata* only after it is no longer subject to revision by special or extraordinary appeal.³⁰ But even after it has become *res judicata*, a final judgment on the merits can still be set aside by a rescissory action. Such an action must be brought within two

years of the date the judgment became final and non-appealable.³¹ The grounds for bringing a rescissory action are fairly broad, making an end to litigation even more elusive. Final judgments can be set aside by collateral attack for: (1) judicial corruption; (2) fraud by the prevailing party or collusion between the parties to produce a fraud on the law; (3) offense to *res judicata*; (4) literal violation of a statutory provision; (5) false evidence; (6) subsequently discovered documentary evidence; (7) an invalid confession or settlement; or (8) factual error.³² Rescissory actions can be appealed all the way to the Supreme Court.

The proposed constitutional amendment will convert the special appeal to the Superior Tribunal of Justice and the extraordinary appeal to the Supreme Court into rescissory actions. The grounds for bringing the special and extraordinary appeals will, however, remain the same.

III. Impunity for Privileged Criminals

While the poor and underprivileged are frequently wrongfully imprisoned in Brazil despite the theoretical availability of habeas corpus,³³ the wealthy and politically well connected almost invariably avoid spending any time in prison when accused of crimes or even after criminal convictions. Brazilian law grants many types of persons the privilege of avoiding pretrial detention with common criminals. The privilege of special prison, often at one's own home, extends to all elected officials, the police, the military, employees of the criminal justice system, judges, prosecutors, diplomats, clergy, civil servants, former members of a jury, pilots, firemen, directors and administrators of unions and business syndicates, teachers, and anyone with a university degree.³⁴ Most importantly, the right to special prison lasts until one's conviction becomes final and non-appealable.³⁵ Wealthy and privileged criminal defendants generally manage to postpone trial for many years by filing dilatory motions, such as a request to take the testimony of someone abroad. If ultimately convicted, they appeal their convictions

seemingly indefinitely while at liberty. Not infrequently, the prosecution becomes barred by the statute of limitations.

One of the more illogical provisions in the Brazilian Constitution provides: "No one shall be considered guilty until his criminal conviction has become final and non-appealable."³⁶ Even the rare orders of imprisonment of persons convicted of serious crimes like rape or murder have been overturned on habeas corpus by the Supreme Court until the conviction becomes final and non-appealable.³⁷

Although criminal proceedings have been brought against 152 current members of the Brazilian Congress, some of whom have been convicted on multiple charges in the lower courts, none has gone to jail. The Constitution confers upon them parliamentary immunity and the right to be tried exclusively before the seriously overburdened Supreme Court. Between September 1988 and April 2010, the Supreme Court convicted no member of Congress. Between May and September 2010, however, the Supreme Court actually convicted three members of Congress, although none was sentenced to hard jail time.³⁸ In October 2010, a panel of the Supreme Court convicted a deputy from the State of Rondônia, Natan Donadon, and sentenced him to serve thirteen years and four months in prison. Despite this conviction, Donadon is currently in Congress because his conviction is not yet final. Donadon filed a request for clarification of the decision, and a member of the Supreme Court, relying upon the constitutional presumption of innocence until the judgment becomes final and non-appealable, issued a preliminary injunction overriding a decision of the Superior Electoral Tribunal. Thus, Donadon was allowed to retake his seat in Congress.³⁹

IV. Why the PEC dos Recusos Should Be Adopted

Obviously, the *PEC dos Recusos* is not a panacea for all the dysfunctional aspects of the Brazilian procedural system. Severely restricting the use of interlocutory appeals and actually imposing sanctions against

attorneys for delaying tactics would also help enormously. But the proposed constitutional amendment should significantly improve the present system. The first important change should be further reduction in the number of appeals taken to the Supreme Court and the Superior Tribunal of Justice. In 2007, when the requirement that appeals present an issue with general repercussions was first instituted, the number of extraordinary and interlocutory appeals constituted 94.4% of the Supreme Court's caseload. In 2010, that percentage declined to 76.9% but still amounted to a total of 31,536 cases.⁴⁰ The situation is similar in the Superior Tribunal of Justice, with special and interlocutory appeals constituting 63.6% of the total caseload, amounting to a total of 201,176 cases.⁴¹

The great bulk of these appeals are filed by organs of the state and federal governments.⁴² Moreover, the primary purpose of many of these appeals is simply to delay payment of debts owed by these governmental entities. Many raise issues that have already been decided adversely to the appellant by the Superior Tribunal of Justice or the Supreme Court. Not surprisingly, the success rate of all the extraordinary and interlocutory appeals decided by the Supreme Court is quite low. In 2010, 82.5% of the extraordinary appeals and 95% of the interlocutory appeals decided by the Supreme Court were denied.

Passing this proposed constitutional amendment should drastically reduce the number of these appeals filed before Brazil's two highest courts by removing the incentive to continue to delay payments that are due. This will afford the members of these tribunals more time to study carefully and to decide the really important questions presented to them.

Second, at least some of the appellees may also be able during their lifetime to collect sums owed to them rather than have to leave these credits to their heirs. This has been made more likely by two decisions of the Supreme Court last year suspending enforcement of Article 2 of Constitutional Amendment 30 of 30 September 2000, which had seriously aggravated the lengthy delays in collecting judgments by allowing

all agencies of the Brazilian federal, state and municipal governments to parcel out payment of final non-appealable judgments, with the exception of small claims and support payments, over a ten-year period.⁴³ Passage of the proposed amendment should reduce the waiting period for most creditors by five or six years.

Third, the proposed amendment might actually result in some of the wealthy and politically connected criminals going to jail by having their convictions become *res judicata* many years earlier. The proposed amendment does not, as some of its critics have suggested, violate the presumption of innocence contained in Article 5 (LVII) of the Constitution. It cleverly works around this over-exuberant provision by moving forward the date a conviction becomes final and non-appealable. To claim that one should continue to be presumed innocent after one's conviction has been affirmed on appeal makes no sense. Nor does this proposed amendment in any way interfere with habeas corpus, the denial of which can be appealed all the way to the Superior Tribunal of Justice and the Supreme Court. The Brazilian Constitution does not guarantee a litigant any set number of appeals. Article 5 (LV) provides only that "litigants in judicial and administrative proceedings and defendants in general are assured an adversary system and a full defense, with the measures and recourses inherent therein." The adversary system and a full defense do not require three or four appeals.

Fourth, the proposed amendment has the additional benefit of helping to augment the prestige of the lower courts. The existing procedural system reflects a profound mistrust of judges, making all judicial decisions appealable and postponing finality until all possible appeals are exhausted. The proposed amendment displays far greater confidence in the ability of the lower courts to decide cases correctly and places far greater value on the decisions of the lower courts.

There is probably some merit to the charge that this proposed amendment values the decisions of the lower courts equally despite the fact that Brazil is a vast

country in which the quality of judicial decisions may vary from state to state. But this criticism has no real terminus. No matter what kind of system is in place, some judges may be better than others. It may well be that certain decisions would have come out differently if they had been assigned to a different *rapporteur* on the Supreme Court or the Superior Tribunal of Justice. Even if Brazil were far less populous and geographically diverse, it would be impossible for all judicial decisions to be reviewed by the highest federal courts. That some state or regional tribunals might be better or worse than others is not an important enough reason to reject a reform that will significantly diminish the huge caseloads of the highest courts in the country and reduce the inordinate delays in the administration of justice.

The only real problem with the proposed amendment is how to make an egg out an omelet. If a judgment is overturned on special or extraordinary appeal after the creditor has already executed on it, how does one insure that the amount realized is returned to the debtor? This criticism of the proposed amendment will probably disappear if the draft of the new Code of Civil Procedure, which has already been approved by the Senate, is enacted.⁴⁴ The draft code also prevents appeals from suspending the effect of lower court judgments. Even though there may be an occasional case in which restitution of an executed judgment is impossible after a judgment debtor prevails on collateral attack, this possibility should not prevent enactment of a seriously needed reform that should significantly improve the administration of justice in Brazil.



K. Rosenn

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Professor Rosenn has practiced law with a Brazilian law firm and has worked as a project specialist with the

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Endnotes:

1 A constitutional amendment is necessary to accomplish this because the jurisdiction of these courts and the types of appeals are all set forth in the Brazilian Constitution of 1988. The proposed amendment will add two new articles, 105 A and B, to the Constitution:

105A-The admissibility of the extraordinary appeal and the special appeal shall not prevent the challenged decisions from becoming final and non-appealable.

Sole paragraph. No instrument shall grant a suspensive effect to the appeals, but the *rapporteur* may request preference in the judgment.

105B- Any ordinary appeal, with a devolutive and suspect effect, may be taken within a period of fifteen (15) days from a decision that, with or without determining the merits, extinguishes a proceeding of original jurisdiction:

I- from the local Tribunal to the competent Superior Tribunal;

II- from the Superior Tribunal to the Federal Supreme Court.

2 A comprehensive World Bank study found that the number of cases filed in Brazilian courts increased by a factor of six between 1990 and 2004. World Bank, *Brazil: Making Justice Count: Measuring & Improving Judicial Performance in Brazil*, World Bank Report No. 32789-BR (30 Dec. 2004) [hereinafter World Bank Report]. Between 1987, the year prior to adoption of the present Constitution and the past decade, the number of cases decided by Brazil's Supreme Court increased by a factor of 5.5. In 1987 the Supreme Court decided 20,122 cases; between 2000 and 2010, the Supreme Court decided an annual average of 110,720 cases. Calculated from data published by the Supreme Court at: <http://www.stf.jus.br/portal/cms/ver/Texto.asp?servico=estatistica&pagina=REAIProcesso> [hereafter S.T.F. Statistics].

3 Augusto Zimmermann, *How Brazilian Judges Undermine the Rule of Law: A Critical Appraisal*, 11 INT'L TRADE & BUS. REV. 179 (2008). It is difficult to estimate the length of the delays in judicial proceedings because the official judicial statistics make no attempt to measure the time it takes to resolve cases.

4 This problem was acknowledged openly in Constitutional Amendment No. 45 of 8 Dec. 2004, which added a new subsection LXXVIII to Art. 5 with the following precatory provision: "Everyone is assured that judicial and administrative proceedings will end

within a reasonable time and the means to guarantee that they will be handled speedily."

5 The most famous is a dispute about a 1907 soccer championship that was not ultimately resolved until 1996. Daniela Trejos Vargas, *Civil Justice in the Americas: Lessons from Brazil*, 16 FLA. J. INT'L L. 19 (2004).

6 See World Bank Report, *supra* note 2, at 111.

7 Gustavo Sampaio Valverde, *Potential Advantages and Disadvantages of Arbitration v. Litigation in Brazil: Costs and Durations of the Procedures*, 12 L. & BUS. REV. AM. 515 (2006).

8 Even a jury verdict acquitting an accused can be appealed by the prosecutor. There are, however, a few cases where the appeal is heard by the trial judge or a three-judge panel of the court of first instance, such as a decision of a small claims court. Sergio Bermudes, *Administration of Civil Justice in Brazil*, in CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES ON CIVIL PROCEDURE 347, 350 (Adrian A.S. Zuckerman ed., 1999).

9 If the trial judge refuses to permit an appeal, the party wishing to appeal can seek appellate review of that order by filing a bill of review (*agravo de instrumento*) with the appellate tribunal. Except in a few specified cases, filing a bill of review does not suspend the appealed judgment.

10 Only in a few exceptional cases does an appeal fail to suspend the appealed judgment. C.P.C., art. 520.

11 *Id.*, art. 475.

12 *Id.*, art. 530.

13 CONST. OF 1988, art. 105(III).

14 Regimento Interno do S.T.J., art. 266.

15 CONST. OF 1988, art. 102(III).

16 See Keith S. Rosenn, *Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society*, 38 AM. J. COMP. L. 773, 777-801 (1990).

17 Regimento Interno do S.T.F., art. 333.

18 C.P.C., art. 543-A § 3.

19 CONST. OF 1988, art. 102 §3 (added by Amend. 45 of 8 Dec. 2004, art. 1).

20 C.P.C., art. 543-A § 4.

21 *Id.*, art. 543-A § 5.

22 S.T.F. Statistics, *supra* note 2.

23 C.P.C., arts. 527 (III) and 558.

24 *Id.*, art. 527(II), as amended by Law No. 11.187 of 19 Oct. 2005. The reform has not had the desired effect. Since there are no penalties for bringing a direct interlocutory appeal that should have been retained, attorneys continue to take their chances with the appellate courts, which often hear them anyway.

25 Sergio Bermudes, *supra* note 8, at 350.

26 Emenda Regimental No. 24 of 8 May 2008; Emenda Regimental of 28 Nov. 2008. A statute enacted in 2010 transformed the interlocutory appeal taken from a decision refusing to permit an extraordinary appeal from a separate appeal into a procedure

that permits appellate review on the same record as the extraordinary appeal. Law No. 12.322 of 9 Sept. 2010.

27 S.T.F. Statistics, *supra* note 2.

28 C.P.C., art. 535.

29 *Id.*, art. 538, as amended by Law No. 8.950 of 13 Dec. 1994.

30 *Id.*, art. 467.

31 *Id.*, art. 495.

32 *Id.*, art. 485.

33 Recent investigations reveal that about one-fifth of all pretrial detainees are wrongfully imprisoned. CPI SISTEMA CARCERÁRIO 221 (2009), available at <http://bd.camara.gov.br>.

34 LUIS FERNANDO DE MORAES MANZANO, CURSO DE PROCESSO PENAL 434-437 (2010).

35 *Id.* at 434.

36 CONST. OF 1988, art. 5(LVII).

37 E.g., H.C. 91676, RJ, Rep. Lewandowski, S.T.F. en banc, 12 Feb. 2009, 31 LEX S.T.F., no. 367, pp. 311-354 (2009).

38 Keith S. Rosenn, *Procedural Protection of Constitutional Rights in Brazil*, 50 AM. J. COMP. L. 1009, 1020 (2011).

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Ethanol: Sweetening the Deal Between the U.S. and Brazil

By Rafaela Vianna, Ft. Lauderdale

Introduction

During President Barack Obama's visit to Brazil on 20 March 2011, he said to the Brazilian people, "For so long, you were called a country of the future, told to wait for a better day that was always just around the corner. *Meus amigos*, that day has finally come. And this is a country of the future no more. The people of Brazil should know that the future has arrived. It is here now. And it's time to seize it."¹ During this address, President Obama also praised Brazil as an example of democracy and development and said that the decline in Brazilian poverty should inspire other countries.² He praised the relationship between the U.S. and Brazil and stressed the importance of strengthening ties between the two nations.³

Indeed, increased U.S. trade with Brazil may be one of the keys to the recovery of the U.S. economy. Exports to Brazil generate 250,000 jobs in the U.S. and half of Brazil's population is now considered middle class, creating a vast untapped market of individuals with spending power.⁴ The U.S. goal of further increasing sales of its products to Brazil may, however, generate friction with the Brazilian government.⁵ Brazil's President, Dilma Rousseff, is not satisfied with the high tariffs imposed on Brazilian products and the protectionist subsidies of U.S. goods that hamper Brazil's ability to export to the U.S.⁶ As a result of these U.S. policies, the 2010 trade deficit with the U.S. was Brazil's largest with any nation.⁷

In 2009, Brazil won a major dispute with the U.S. over cotton subsidies, demonstrating that the South American nation will not simply stand by and allow a trade imbalance brought about by unfair trade practices.⁸ U.S. policy related to ethanol importation might be the next source of tension between the two nations.⁹ In the case of ethanol, however, if the U.S. plays it right, the commodity could actually improve the country's relationship with



Brazil. Brazilian-made ethanol is a proven success, but U.S. protectionism prevents Brazil from exporting it on a large scale to the U.S. Eliminating subsidies and tariffs can enhance the relationship between the countries by reducing the Brazilian trade deficit and promoting an image of U.S. fair trade. More importantly for the U.S., ending ethanol subsidies will reduce its federal outlays.

For Once, Sweets May Be Better for us Than Vegetables

Although the U.S. and Brazil began the energy-independence movement with similar goals, the two countries have achieved widely different results. The 1973 oil crisis forced countries to explore new energy alternatives, including ethanol replacement for gasoline.¹⁰ There is a fundamental difference between ethanol produced in Brazil and ethanol produced in the United States—Brazilian ethanol is made from sugarcane while U.S. ethanol is made from corn.

Cultivated since the days of colonization,

sugarcane historically has been one of Brazil's main agricultural products. Brazil's climate and conditions are perfect for cultivation of the plant on a large scale, with accompanying environmental benefits. The substantially low cost of using sugarcane to produce ethanol explains the success of Brazilian ethanol. Brazil, however, is not the largest producer of ethanol. While Brazilian production is 28 billion liters annually, American production reaches 49 billion liters annually.¹¹ The low cost of sugarcane-based ethanol production allows Brazil to compete in the global market without the large investment in subsidies that U.S. corn-based ethanol requires because corn-based ethanol in the U.S. is significantly more expensive to produce.

The U.S. Problem

The U.S. has spent vast sums trying to end its economic crisis, with very little success. The dilemma is how to stimulate the faltering U.S. economy while making budgetary reductions. Yet the U.S. continues to implement expensive subsidy policies to protect its domestic production from competition. The Brazilian cotton case exposed U.S. trade programs as expensive obstacles to free and fair trade that unnecessarily complicate U.S. relations with the rest of the world.¹² Also, some food-crisis problems are related to ethanol production in the United States. The International Monetary Fund (IMF) estimates that U.S. ethanol production is responsible for half of the increase in global demand for corn in the last three years, with further implications for finances related to food and feed.¹³

Agricultural interventionism in the United States dates back to the 1930's, in the context of the New Deal, where subsidies were created for the production of specific commodities and were intended to insulate domestic producers from market conditions.¹⁴ Withdrawing these subsidies can come at high political costs; hence the difficulty in changing the status quo.¹⁵ An

analysis by the United States Department of Agriculture (USDA) suggested that the U.S. would be unable to match Brazil's low-cost production of sugarcane ethanol,¹⁶ creating an environment of subsidies in the United States for ethanol. To meet the U.S. need for ethanol as energy, the U.S. government is required to subsidize corn ethanol production at a cost of \$6 billion to taxpayers.¹⁷ By contrast, the low cost of sugar-based ethanol production in Brazil allows the country to compete in the global market without the need for hefty protective subsidies to ethanol producers.¹⁸

The Brazilian Solution

The Brazilian economy's solid performance during the financial crisis, including its 7.5% growth in 2010, has contributed to the country's transition from regional to global power.¹⁹ This growth is expected to continue in the 4% to 5% range, which will bolster the Brazilian economy from the world's eighth-largest to the fifth-largest in the coming years.²⁰ Brazil is the fifth-largest country in the world by population (190 million) and by land mass.²¹ Larger than the continental United States, it occupies over half of the South American continent.²²

As the second leading ethanol-producing country after the United States, Brazil actively promotes ethanol as a renewable fuel worldwide.²³ The Brazilian National Alcohol Program, *PróAlcool*, was established to stimulate the production of alcohol to meet the needs of domestic and foreign policy and automotive fuels.²⁴ According to the decree creating *PróAlcool*, the production of alcohol from sugarcane should be stimulated by expanding the supply of raw materials, with special emphasis on increased agricultural production; modernization and expansion of existing distilleries; and installation of new production units, free-standing or attached to plants, and storage units.²⁵ The price of sugar in the international market was rapidly declining at the time *PróAlcool* was created, making sugar an obvious, cost effective way to produce ethanol without the need for subsidies.²⁶

Though Brazilian sugar ethanol is a proven, inexpensive answer to ethanol produc-

tion, U.S. protectionism prevents Brazilian ethanol from entering the U.S. market and, consequently, requires the U.S. government to subsidize corn ethanol production to meet the demand for ethanol.²⁷

Trends in U.S.-Brazil Relations

Reduction of trade barriers, such as customs duties or tariffs and measures such as import bans or quotas that restrict quantities selectively, is an obvious means of encouraging trade.²⁸ Brazil's complaint regarding the unfair treatment of ethanol because of tariffs and protectionist subsidies should not go unheeded, or it may lead to another WTO case and additional strain upon the invaluable relationship between the United States and Brazil.

Subsidies for agricultural production in the U.S. represent at least two major barriers to the growth of Brazilian agribusiness. First, U.S. subsidies for domestic production contribute to reduction in imports of agro-industrial products, which are largely bought in Brazil.²⁹ Second, the U.S. is a large economy and when its production generates exportable surpluses, there is increased supply of agricultural products in international markets.³⁰ As a traditional agricultural exporter, Brazil depends upon its exports to continue the generation and maintenance of economic growth that the U.S. is depending on to climb out of the economic pothole.³¹

Conclusion

Ethanol can sweeten the deal between the United States and Brazil if the U.S. will eliminate corn ethanol subsidies and high ethanol tariffs, which would allow for the entry of a constant supply of Brazilian sugar-based ethanol. The current U.S. import tariff on Brazilian ethanol is fifty-four cents per gallon.³² The lowering of trade barriers is an obvious method of encouraging trade between Brazil and the United States, a move that seems necessary to help the latter's economy. The United States can surely take a step toward helping itself by removing protectionist tariffs on Brazilian goods and eliminating corn ethanol subsidies, thereby demonstrating

good will to Brazil's government and to consumers. If the United States does not eliminate subsidies for corn-based ethanol and continues the era of inequality between the nations, Brazil may form stronger ties with nations like China.³³

Though President Obama's visit to Brazil was considered to be economically positive for both nations, the President does not have the power to make these changes alone. The U.S. Congress has the power to regulate commerce, and in order to take advantage of Brazilian ethanol and ensure good relations between the nations, Congress needs to act.³⁴



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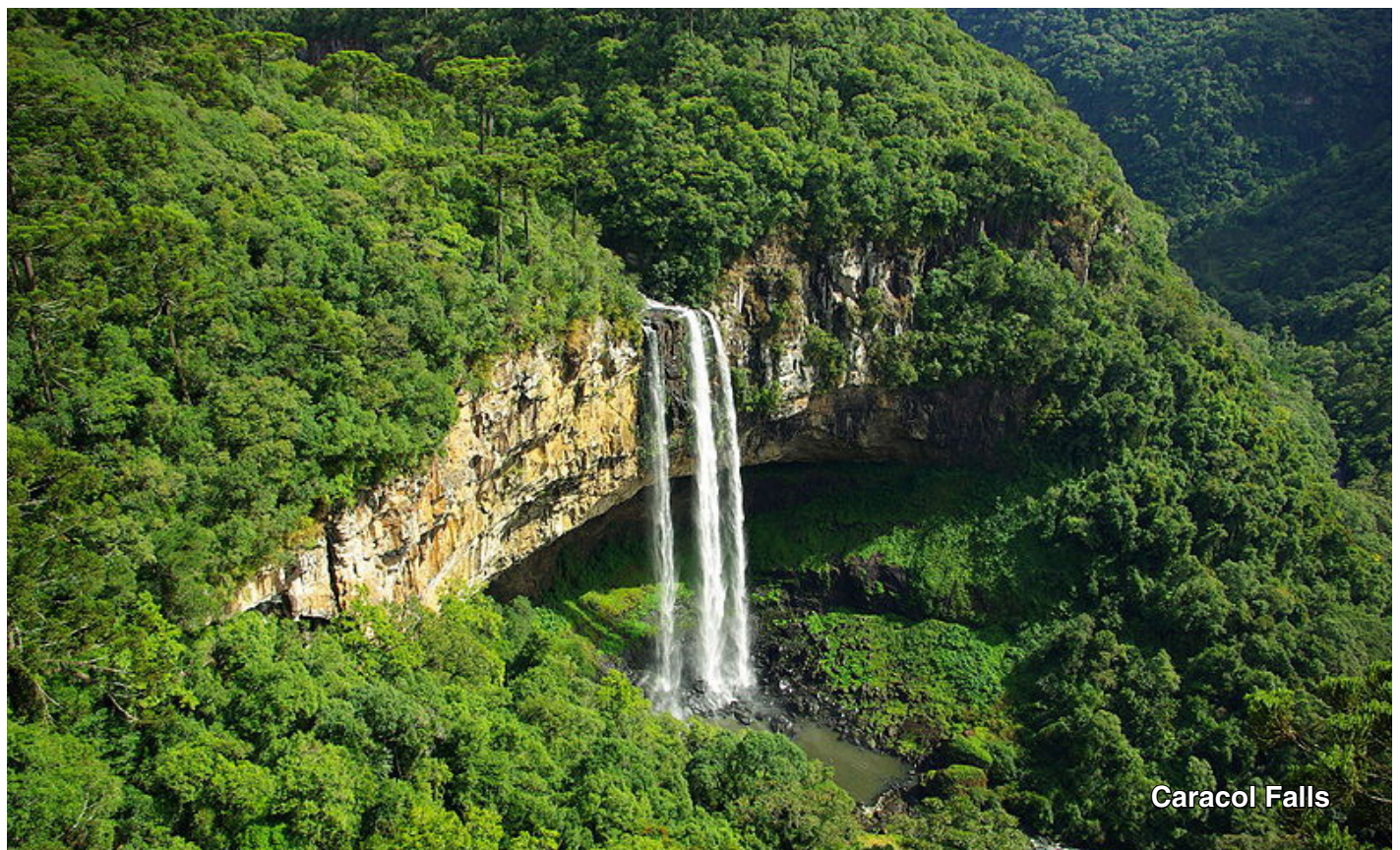
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Caracol Falls

Limitations on Foreign Investments in Brazil

By José Samurai Saiani, São Paulo, and Olavo Franco Bernardes, Miami

Historical Background

Among the many reasons to count Brazil as an emerging economic power is the high level of foreign investment taking place there. From the U.S. alone, Brazil has received US\$32 billion for the first half of 2011. According to a recent World Investment Report issued by the United Nations Conference on Trade and Development (“UNCTAD”), Brazil ranks fifth in investments after the U.S., China, Hong Kong and Belgium.¹ Additionally, remittances of profit have never been so high, amounting to a record value of over US\$5.1 billion just for the month of August.²

Under the current economic system, there is no limitation on remittances from abroad, a matter that historically has been a source of disagreement among parties across the political spectrum and foreign investors. In this regard, it is interesting to observe that one of the factors behind the 1964 military coup that overthrew the government of former President João Goulart was Law No. 4,131 of 3 September 1962,³ which limited remittances abroad by foreign companies to only 10%.

The Federal Constitution of 1988, a product of compromise by the various political parties, was an attempt to seek national conciliation after twenty years of a non-democratic regime. Many of the restrictions placed on foreign activities and foreign investments by the 1988 Constitutional National Assembly later proved to be counterproductive and, for this reason, were stricken by different constitutional amendments. These amendments were enacted primarily during the centrist administration of Fernando Henrique Cardoso (1995-2003), in the context of privatization reforms that occurred in the country during his government.

One of the previous restrictions worth noting was paragraph 3 of Article 178 of the Constitution, which established a monopoly of transportation along the Brazilian coast for national vessels. As a consequence, Brazil was shut out from the international shipping market. The rule was stricken down by Constitutional Amend-

ment (*Emenda Constitucional - EC*) No. 07 of 15 August 1995.⁴ Many restrictions on foreign investments that historically were part of the Brazilian political scene are still valid, however, as we shall see below.

Restrictions on Certain Investments

Both the Constitution and some laws set forth restrictions or impediments regarding certain kinds of investments by foreign born, non-naturalized individuals or companies in which the majority of the corporate capital is owned by foreign investors.

Mining and Gas

The first and historically most significant restriction to foreign investments is in the mining and gas sectors. Until the enactment of Law No. 9,478 of 6 August 1997, *Petróleo Brasileiro S.A. (Petrobras)*, a mixed capital company⁵ widely known as the Brazilian oil tycoon company, had exclusive rights to operate on the Brazilian continental sea.⁶ Under the law, private companies are allowed to explore for oil provided they are granted a concession permit by the National Oil Agency.⁷ As a result, both national and foreign private companies are now involved in the oil industry. Indeed, rules have been loosened to allow foreign mining and oil companies to operate under concession in territories owned by the federal government, such as the territorial sea, and to pursue hydraulic energy potentials and mineral resources (including those of the subsoil, regardless of whether they are located on private property or not), as provided by Article 20 of the Constitution. Nevertheless, *Petrobras* still has exclusive rights to the refinement and distribution of new findings, as well as to the distribution of ethanol within the country.

Telecommunications

Another historical restriction on foreign capital is related to telecommunication services. According to Article 21 of the Constitution, the performance of services and activities in this sector is reserved to

the federal government. Private companies may also explore such activities, provided that they have been previously granted authorization, concession or permission to do so, subject to regulations set forth by specific law. In this regard, Article 222 of the Constitution limits the ownership of newspaper companies, sound broadcasting companies, and sound and image broadcasting companies to natural born or naturalized Brazilian citizens who have been residing in the country for at least ten years. As to corporate shareholders or quotaholders, paragraph 1 of the same Article establishes that foreign companies may have no more than 30% of the voting and total capital of the above mentioned companies.⁸

Transportation

There are also restrictions on foreign capital in the transportation sector. According to Law No. 7,565 of 19 December 1986 (Brazilian Airspace Code), the participation of foreign capital in aviation companies with domestic airspace routes is limited to a minority stake of up to 20% of the total capital of the company.⁹ Similarly, Article 1 of Law No. 6,813 of 10 July 1980 established the same restriction for the participation of foreign companies in the transport of highway freight. Such provision was abolished, however, by enactment of Law No 11,442 of 5 January 2007.

Health

Article 199, paragraph 3, of the Constitution provides limitations on foreign investments in the health sector, prohibiting the direct or indirect participation of foreign capital in health care companies. Such provision is not absolute, however, as it is subject to regulations set forth in law.¹⁰ As a result, difficulties have arisen in defining the extent to which foreign capital may participate in the health sector.¹¹ For instance, foreigners may participate in health insurance plans and family planning services but not in the direct management of hospitals.

Several bills proposed by Brazil's Senate and currently under discussion in the

National Congress are attempts to better regulate the health sector, a priority given the pressing needs and public interest involved. Indeed, health services in the country are commonly thought to be in a critical situation.¹²

Other areas

Finally, it should be noted that the participation of foreign capital in companies involving nuclear energy,¹³ post offices,¹⁴ telegraph, and airspace sectors is completely prohibited by both the Constitution (under Article 21) and applicable laws.¹⁵ Nevertheless, in practical terms it is still possible for these activities to be financed by foreign capital—for example, through private banks—a legislative incongruence. Additionally, there are no restrictions on the participation of foreign capital in companies producing parts or components used in the nuclear and airspace sectors.

Limitations on Foreign Investments in Rural Property

Article 172 of the Brazilian Constitution, states:

The law shall regulate, based on the national interest, foreign capital investments, shall encourage reinvestments and shall regulate the remittance of profits.

Thus, Article 172 of the 1988 Brazilian Constitution incorporates both Law No. 4,131 of 3 September 1962 and its regulatory decree, Decree No. 55,762 of 17 February 1965, establishing the rules applicable to foreign capital in the country.

Under the current system, there is no distinction between foreign and national capital with regard to taxation, given that both foreign and national capital are granted equal protection and equal treatment as to their assets and investments inside national territory. Such treatment comports with Article 5 of the Constitution, which establishes full equality between national and foreign individuals.

Notwithstanding the foregoing, due to reasons of national sovereignty, national integrity, public safety and national inter-

est, foreigners may have some of their investment restricted. Notably, such restrictions do not conflict with the concept of equality of treatment and protection mentioned above. Indeed, they are forms of regulation of investments, not an exclusion of such, and a practice that accords with the Constitution's concern for the public and collective interest as well as social rights.

General Considerations

We now turn to the primary focus of this article: existing limitations on foreign investments in relation to the acquisition of real property inside Brazilian territory.¹⁶

The ownership of rural property in Brazil has always been a matter of debate, just as in many other Latin American countries. Brazil still has—albeit less now than ten years ago—one of the highest concentrations of wealth in the world, often attributed to the numerous *latifundios* (properties covering large land tracts) and even unproductive plots of land.¹⁷ In this context, foreign involvement in the Brazilian economy, especially through the acquisition of land for crops, preservation and scientific purposes, has always been viewed suspiciously by some parts of society.¹⁸ An episode worth remembering in this regard is the destruction of Monsanto's laboratories in 2003 by members of the Landless Rural Workers' Movement (*Movimento dos Trabalhadores Rurais Sem Terra – MST*).¹⁹ Thus, it behooves all foreign buyers and developers of land to demonstrate benevolent intent: "Caesar's wife must be above suspicion."

The Social Purpose of Land

Ownership of land in Brazil is not an absolute right. The first restriction imposed on property is that one does not own what is above or below the ground ("ad coelum et ad inferos," or "to heaven and to hell," as the Romans put it). Therefore, the airspace above one's property and the mineral resources underneath it belong solely to the federal government (Article 20, IX, of the Constitution).

Another restriction is that property has to be used in accordance with the social function of the land. As a consequence, a

landowner may be disappropriated from, or lose, the property if it is verified that he or she is not using land in accordance with the standards set forth both by the Constitution and its related legislation. In this regard, Article 186 provides:

The social function is met when the rural property complies simultaneously with, according to the criteria and standards prescribed by law, the following requirements:

I - rational and adequate use;

II - adequate use of available natural resources and preservation of the environment;

III - compliance with the provisions that regulate labour relations;

IV - exploitation that favours the well-being of the owners and workers.

Thus, while an owner may have the right to charge for the use of his or her property for a certain activity, if the owner refuses to allow the use of such property, the owner may suffer disappropriation (the loss of the property upon the payment of compensation by the government) or expropriation (the loss of the property without government compensation), depending on the case. Expropriation may occur if illegal activities—such as those involving illegal drugs—are engaged in, and such expropriation may affect the right to the entire property, not just a segment of it. Law No. 4,504 of 30 November 1964 (enacted, ironically, during the first year of the military regime) and Law No. 8,629 of 25 February 1993, regulate disappropriation for public use and necessity and social interest.

In addition, pursuant to Article 191 of the Constitution, private property that has not been explored for any particular use may result in adverse possession (*usucapião*) by an occupying third party.²⁰ Importantly, plots of land owned by the federal and the state governments are not subject to adverse possession, even if they have not been used for any particular purpose. These unproductive, unused, plots of land are the so-called *terras devolutas* (fallow lands).²¹ These underused lands have been at the center of a long conflict in rural areas,²² and many of the famous *favelas* (illegal shanty

towns) were built on such properties.

Proof of Residence

According to Article 1 of Law No. 5,709 of 7 October 1971, only foreign individuals with an established residence may acquire property. The law does not mention permanent or provisory residence, just proof of residence in the national territory. The foreigner has to present proof of enrollment before the respective Brazilian Taxpayers' List (*Cadastro de Pessoa Fisica – CPF*, for individuals, *Cadastro Nacional de Pessoa Juridica – CNPJ*, for legal entities), proof of residence or proof of incorporation within the national territory and other documents (Article 9 of Law No. 5,709/1971).

Legislation Restricting and Regulating Foreign Controlled Properties

As the Brazilian Constitution allows statutes to regulate and limit property in foreign hands, restrictions on foreign-controlled property can come in many forms. In this regard, Article 190 should be noted:

The law shall regulate and limit the acquisition or lease of rural property by foreign individuals or legal entities, as well as it shall establish the cases in which it will depend on an authorization by the National Congress.

Article 190 has accepted all legislation on the matter prior to the 1988 Constitution, meaning Law No. 4,504 of 30 November 1964, the so-called Land Statute (*Estatuto da Terra*), which is the basis

for acquisition of rural property; Law No. 5,709 of 7 October 1971 and its regulation, Decree No. 74,965 of 26 November 1974, which establishes the basis of the legal regime for the acquisition of rural property by foreigners; and Law No. 6,634 of 2 May 1979, and Decree No. 85,064 of 26 August 1980, ruling on border strips and other areas restricted to foreigners.

Restrictions on the Acquisition of Real Property by Foreigners

One of the main restrictions for foreign investments is the prohibition regarding land located at border strips (*faixas de fronteira*) up to 150 kilometers inland (as provided by Article 1 of both Law No. 6,634/1979 and Decree No. 85,064/1980). Those restrictions are also applicable to coastal zones and areas deemed by the National Security Council to involve national security. Further, as provided by Article 7, Law No. 5,709/1971, and Article 34, Decree No. 85,064/1980, border strips and national security zones may be explored by foreigners only upon authorization by the National Security Council.

Coastal zones (*zonas costeiras*) are always considered territory of the federal government, regardless of whether they concern foreign or individual citizens and legal entities. As such, although it is possible for part of these areas to be leased to foreigners or nationals, they can never be sold or in any way transferred to third parties.

Other restrictions introduced by Law No. 5,709/1971 and recently defined by the

Federal Attorney General's Legal Opinion (*Parecer do Advogado Geral da União - AGU*) No. LA-01 of 19 August 2010, are as follows:

- Prohibition of foreign individuals or legal entities to own more than one-fourth of the total rural land surface of the territory of municipalities; additionally, in any case, foreigners originally from the same nationality cannot altogether own more than 40% of the territory of a municipality.
- Binding obligation of foreign entities to explore agricultural and development projects in accordance with their statutes or bylaws.
- Limitation of areas to foreign entities: foreign or national companies with a majority of foreign capital, are allowed to acquire real property only up to 100 rural units (*módulos rurais*).²³ Acquisitions involving higher amounts than that shall be preceded by an authorization of the National Congress. It is important to note that these rural units may vary from 5 to 100 hectares depending on the municipality.²⁴
- Limitation of areas to foreign nationals: foreign individuals may acquire only up to 50 rural units in property in continuous or discontinuous areas, provided that they have been granted a previous authorization by the National Institute for Colonization and Agriculture Reform (*Instituto Nacional de Colonizacao e Reforma Agraria – INCRA*).
- Areas in border strips, as previously mentioned, may not be acquired by foreigners or foreign-controlled companies, unless they have received prior authorization from the National Security Office (*Gabinete de Seguranca Nacional*).
- Lease: all limitations, regulations and restrictions applicable to real property acquired by foreign individuals are also applicable to leases.

These rules shall be applied in case of transfer, merger, or assignment of real property.

The acquisition of rural property by foreign legal entities and individuals is conditioned upon authorization by the Na-

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tional Congress, whenever such properties involve lands of more than 100 rural units (for legal entities) or 50 rural units (for individuals). The acquisition of lands of less than three rural units does not require prior authorization from public authorities.

Federal Attorney General's Legal Opinion LA-01 of 19 August 2010 gives relevant importance to notaries and clerks around the country. Although an Attorney General Opinion is not a law, Article 40 of the Complementary Law (*Lei Complementar*) No. 73 of 10 February 1993 states that AGU's opinions that were published and signed by the President of the Republic are binding on the federal administration. The main amendment introduced by the Legal Opinion was the equalization of national companies with a majority of foreign capital to foreign companies. Another relevant issue discussed by the Legal Opinion was the constitutionality of Article 1, paragraph 1, of Law No. 5,079/1971.

The interpretation set forth in the Legal Opinion, however, has not always prevailed. After enactment of Constitutional Amendment No. 6 of 15 August 1995, which abolished the definitions of national companies and national companies of national capital, Legal Opinion CQ 181/98 provided that, although the Constitution allows for different treatment of foreign and national capital, limitations and restrictions on companies with majority capital owned by foreigners could only be imposed by law.

The problem now is that many notaries and clerk offices are not registering real property containing any percentage of foreign participation (which was not the Legal Opinion's original intent) under fear they may face problems ahead. In any case, the Legal Opinion, as publicly declared by Federal Attorney General Luiz Inácio Lucena Adams, shall not be retroactive but shall be applicable only to future registrations. In this sense, in the name of the rule of law and vested rights, the Legal Opinion has created two types of properties that can be owned by foreigners: existing properties that were duly acquired under previous rules (the 1994 and 1998 Legal Opinions); and new acquisitions subject to the current rules (post-August 2011).

One of the problems lately identified in connection with Legal Opinion LA-01/2010 concerns a situation in which the parties have already entered into a commitment for the purchase and sale of real property, with all applicable formalities. Upon the issuance of the Legal Opinion, some foreign purchasers have decided to cease payments, arguing that they would not be able to register the ownership of the land anyway. As the commitment has been registered in the Real Estate Registry, however, the sellers likewise could not make full use of such property. As a result, several claims have been filed before the local courts for the annulment of the commitment.

Further, a decision issued on 14 July 2010 by the National Council of Justice (*Conselho Nacional de Justiça – CNJ*), which is responsible for the supervision of the judicial power, has determined that notaries and clerk offices should supervise the acquisition of real property by national companies controlled by foreigners, informing the respective State Court of Appeals about any and all required registries in these circumstances. The information would then be forwarded to INCRA. Currently, around 4.3 million hectares of land are registered before the institute, but this number could be up to five times higher, taking into consideration Brazilian companies with foreign capital.²⁵

In fact, Legal Opinion LA-01/2010, which had its constitutionality questioned by specialists (who believe that the Constitution does not allow for discrimination between national and foreign capital and, therefore, have not received Law No. 5,709/1971 into the system)²⁶ has cooled foreign investors' interest in acquiring new property and in investing capital in the agribusiness and research sector.

Recent developments

In March of this year, in another attempt to limit the so-called "foreign invasion" in the purchase of rural property, the Attorney-General, without previous notice and on behalf of the federal government, decided to block sales, purchases and mergers of businesses by foreigners of Brazilian

companies that hold rural property in the country.²⁷ Future operations may be suspended by justice. Further, the Boards of Trade are also required to assist the notaries in identifying foreign capital participation in the acquisition of land by companies.

Also, it is important to realize that dark times may lie ahead for foreign rural land owners, as the National Congress is pushing for an old nationalistic piece of legislation (Legislative Bill No. 302 of 26 November 2009, former Legislative Bill No. 4,440/01 of 4 April 2011) that proposes to limit the purchase of land by foreigners in the Legal Amazon Region to up to fifteen rural units.²⁸ The bill has already been approved by the House of Representatives and is pending approval by the Senate.²⁹



J. Saiani

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O. Bernardes

Olavo Franco Caiuby Bernardes graduated from the Pontifícia Universidade Católica de São Paulo (PUC-SP) and was subsequently admitted to the São Paulo Bar. He has worked with several São Paulo firms,

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a foreign associate with Smith International Legal Consultants in Miami.

The authors wish to thank Lina Sayuri Yamaki for her contributions to this article.

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1 U.N. Conf. on Trade & Dev. [UNCTAD], *World Investment Report 2011, Non-Equity Modes of International Production and Development*, available at <<http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf>>.

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3 Law No 4,131/1962 is still in force but has been modified. It was first amended in 1964 in the wake of the military revolution. Further amendments were made in 1966, 1983, 1991, 1995, 1997, 2001 and 2006.

4 The Amendment still allows for statutes to regulate the sector in favour of national vessels.

5 Mixed capital companies are legal entities controlled by governmental bodies and incorporated by means of a legal authorization. The capital of such companies is composed of both private and governmental investments. The majority of its voting capital, however, shall always be kept by a governmental body or legal entity.

6 As well as opening the oil market to private companies under the concession regime, Law No. 9,478/1997 created the National Oil Agency (*Agência Nacional do Petróleo - ANP*), an autarky responsible for the regulation of the local oil and natural gas industry, as well as its derivatives and related products.

7 In this context, recently enacted Law No 12.351 of 22 December 2010 is also worth mentioning, as it established a new regime for future licensing of the exploration and production of oil, natural gas and related products, on a shared production regime, applicable to the *pré-salt* areas. Law No. 12.351 also implemented an oil fund to support social and economic development in the country.

8 A recent change brought about in 2002 by Constitutional Amendment (*Emenda Constitucional - EC*) No. 36 of 28 May 2002. Before the enactment of the amendment, foreign individuals and companies were forbidden altogether from participating in that sector. Recently approved Law No. 12.485 of 12 September 2011 has abolished the restriction on the ownership of cable television by foreigners.

9 Legislative Bill No. 6,716 of 23 December 2009, which has already been approved by the Senate and is currently under discussion in the House of Representatives, proposes raising the allowed percentage of foreign capital from 20% to 49%.

10 The applicable rules include Law No. 9,656 of 3 June 1998, which regulates private health-care plans and health-insurance sectors, and also regulations issued by the National Health and Sanitation Agency (*Agência Nacional de Vigilância Sanitária - ANVISA*).

11 Carlos Ari Sundfeld & Jacintho Arruda Câmara.

Participação do capital estrangeiro no setor de saúde, *REVISTA DE DIREITO PÚBLICO DA ECONOMIA*, BELO HORIZONTE, 39-57 (Oct./Dec.2008). According to Sundfeld and Câmara, in order to define the extent of the restriction of foreign capital in the health sector, the purpose of such restriction must be taken into consideration; e.g., to preserve from contrary interests those activities essential to the protection and recuperation of health. In light of this, the authors state the importance of understanding the distinction between: (1) health assistance (services of assistance or medical treatment directly aimed at protecting or recovering health); (2) activities related to the health sector or to the services of health assistance (services, commerce and industry of products used in the protection or recovering of health); and (3) auxiliary services or support assistance services. The restriction provided that Article 199, paragraph 3, would apply solely to the activities related to the first item.

12 Recently, the Federal Senate organized a “Health Week” in which 47 bills involving different aspects of the sector were debated. See <<http://www.senado.gov.br/noticias/semana-da-saude-no-senado-tem-47-projetos-em-pauta.aspx>> (last accessed 12 Oct. 2011). The primary bill intended to permit more participation of foreign companies in the health sector is Legislative Bill No. 6,482 of 4 April 2002, which has been awaiting a vote by the House of Representatives for many years.

13 The nuclear power plants Angra I and II, however, were financed primarily by foreign capital, at a time when foreign capital was severely restricted in Brazil. The country relied heavily on foreign assistance, particularly from what was then West Germany, for the construction of its nuclear program. For further information, see <<http://www.globalsecurity.org/wmd/world/brazil/nuke.htm>> (last accessed 12 Oct. 2011). Also, the Alcântara Airspace Basis has developed many partnerships with different countries, particularly Russia.

14 Interestingly, companies such as FedEx and UPS are not considered direct competitors of the post office (*Empresa Brasileira de Correios e Telegrafos*), as they are, in fact, logistic companies that are not permitted to be used for the dispatch of letters, post cards and telegrams. See <<http://thebrazilbusiness.com/article/empresa-brasileira-de-correios-e-telegrafos>> (last accessed 9 Oct. 2011).

15 Law No. 4,118 of 27 August 1962 and other pertinent laws and decrees regulate the nuclear sector. Law No. 6,538 of 22 June 1978 and other pertinent laws and decrees regulate post office and telegraph services.

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20 Rural adverse possession is regulated by Law No. 10,406 of 10 January 2002, the Brazilian Civil Code (*Código Civil Brasileiro*). Urban adverse possession is regulated by Law No. 10,257 of 10 July 2001 (Statute of the City).

21 As provided by Articles 22, II and 26, IV, of the Constitution. Generally speaking, *terras devolutas* are pieces of land located in the border strips of the Federal Territories and of the Federal District that are not used by any of the federative governmental spheres (federal, state or municipal). Additionally, they cannot be validly considered to be under the possession or ownership of any particular individual or legal entity.

22 For a piece of land to be considered as *terra devoluta*, it should be registered as such in the competent Real Estate Registry Office. In the event a claim for adverse possession is filed, the State cannot then argue that the conflicting lands are *terras devolutas*, unless it can so prove by presenting the relevant official register. The prevailing understanding set forth by the Brazilian courts in case law is as follows: “Civil. Adverse possession. The State has argued that the real property object of the claim is a *terra devoluta* The absence of register on the Real Estate Registry Office does not imply in the presumption that the property is classified as *terra devoluta*. The State has the burden to prove such argument.” *AgRg in Ag 514.921/MG*, Pres. Min. Humberto Gomes de Barros, 3d panel, 17 Nov. 2005, published at DJ on 5 Dec. 2005, p. 317).

23 A “rural unit” is a unit of measure expressed in hectares intended to demonstrate the interdependence among the dimension, the geographical location of rural lands and the terms and conditions of its economic exploration.

24 Certain municipalities in the Amazon Region are as big as some European countries.

25 See <<http://www.cnj.jus.br/atos-administrativos/9444:cnj-determina-que-cartorios-controllem-compra-de-terras-por-empresas-controladas-por-estrangeiros>> (last accessed 9 Oct. 2011).

26 See *Parecer da AGU que limita a venda de terras é inconstitucional*, on: <<http://painelflorestal.com.br/noticias/legislacao/9553/parecer-da-agu-que-limita-a-venda-de-terras-e-inconstitucional>> (last accessed 9 Oct. 2011).

27 See <<http://www.conjur.com.br/2011-mar-18/agu-atencao-ministerios-compra-terras-estrangeiros>> (last accessed 9 Oct. 2011).

28 The Legal Amazon (*Amazônia Legal*) comprises the states of Acre, Amapá, Amazonas, Mato-Grosso, Rondônia, Roraima, Tocantins, Pará and a portion of the state of Maranhão.

29 See <http://www.senado.gov.br/atividade/materia/detalhes.asp?p_cod_mate=94352> (last accessed 9 Oct. 2011).

Even in the face of an increasingly unstable global economic environment, which seems capable of relapsing into recession in the next few months, Brazil's short and medium-term future looks as bright as ever. The 2014 FIFA World Cup and the

welcome economic boost for the next few years, the fact is that Brazil is already moving towards consolidating the economy of a developed country.

For the first time in its history, Brazil's economy rests upon the solid foundation of

This strong internal market, which kept the country afloat during the recession that plagued the world's leading economies, will act as the engine for Brazil's projected growth of 4% to 5% in the coming years.⁶ It should also be noted that, by the year 2017, Brazil is projected to become the emerging economic power with the largest number of millionaires. In fact, from 2010 to 2011, the number of Brazilian billionaires almost doubled, with the country now home to 30 of the world's 1,210 individuals in this exclusive club.⁷ Present and future investors will, therefore, not only be able to explore a solid middle-class market, but also take advantage of the abundant opportunities stemming from the growing pool of high net-worth consumers.

Currently the seventh largest economy in the world, Brazil is expected to overtake the United Kingdom and France to occupy the fifth position before the end of the decade.⁸ The country's international reserves—now rapidly climbing to \$400 billion⁹—supply a comfortable insulation from sudden global economic downturns and provide foreign investors a low-risk environment. Even the inflation rate, regarded by some as a possible point of instability, has reversed the rise observed in the first half of 2011 and is predicted to remain under control for the years to come.¹⁰

Indeed, Brazil appears ready to overcome this last obstacle to consolidating its status as a developed economy. The country's current base interest rate of 12%, as defined by the Central Bank's Monetary Policy Committee, not only contrasts with that of all developed economies, but also greatly differs from the interest rates of nearly all economies in the world. While Brazilian government-issued bonds pay holders at a 6% annual rate after factoring in inflation, similar investments worldwide are averaging a return of negative 0.8%. By ordering a significant increase in Brazil's primary budget surplus, President Dilma Rousseff has created the conditions for a gradual decrease in interest rates,¹¹ a policy that will bring Brazilian rates within the world average in the coming years. By the end of the decade, Brazil is likely to have interest rates that hover close to zero or



2016 Olympic Games, to be held in the city of Rio de Janeiro, alone confirm that the country will maintain the intense economic activity that has been drawing the world's attention.

For the World Cup alone, the Brazilian federal government plans to invest \$15 billion in infrastructure projects over the next two years, expecting to generate 700,000 direct and indirect jobs and a \$117 billion boost in total economic activity.³ These gigantic figures are anchored in commitments made by Brazil to the international community and are bound to remain unchanged, even in an adverse economic climate elsewhere.

In the next few years, while preparing to host the two greatest sporting events in the world, Brazil will remain a secure breeding ground for investments across a wide spectrum of economic activity. Airports, hotels, stadiums, telecommunications—no business venture is excessive and no investment possibility should go unexplored in a country that has to transform itself to receive the massive influx of four million tourists in a thirty-day span.⁴ Of course, this begs the question: After the World Cup and the Olympic Games have come and gone, can Brazil maintain this economic strength?

The answer is a most emphatic yes. While hosting the games will ensure a

a middle class that encompasses the majority of the population. Since 2003, when center-leftist President Luiz Inácio Lula da Silva took office and focused governmental attention on sponsoring a more equitable distribution of wealth, forty-million people have ascended to the middle class, a status now common to 55% of all Brazilians.⁵



World cup trophy

that dip into the negative spectrum, thereby mirroring the monetary reality of today's developed economies.

In light of Brazil's decreasing interest rates and the negative rates worldwide, investors will feel pressed to concentrate their assets in the real economy. In this respect, Brazil once again appears as one of the best bets, with vast markets and a growing middle class eager to enter the world of consumerism. In 2010, Brazilian industrial production grew 10.5%, with some sectors, such as steel, peaking at nearly 25%.¹² New oil discoveries in the Brazilian pre-salt also stand out as an unmatched opportunity for investment. As fossil fuels will account for approximately 75% of the world's increase in demand for energy during the next 20 years,¹³ Brazil's estimated 30-to-200 billion barrel pre-salt oil reserves¹⁴ are likely to supply a significant portion of the world's energy use in the period.

With its triad of stability, economic growth and assured markets, Brazil is now one of the holy grails of global investing. Due to the country's healthy macro-economic situation, this scenario should remain relatively unchanged in the near future, making Brazil a safe haven for the turbulent years ahead. Brazil's arrival in the group of developed economies will not only benefit the Brazilians, who will receive an unprecedented increase in their quality of life, but the global economy in general, serving as a point of stability and growth as traditional economies are affected by the aftershock of the 2008/2009 crisis and issues created by mounting public debt in European Union nations.

The excitement and economic development occasioned by the World Cup and the Olympic Games in Brazil serve as a symbol of the country's ascension to the small gathering of

global economic superpowers. Although these great events provide exceptional business opportunities in themselves, they should best be interpreted as definitive recognition, by the international community, of Brazil's capabilities. The honor of hosting in sequence the two greatest sporting events on the planet has been bestowed only on three other countries in the history of the games—the United States and Germany among them. Brazil now rightfully belongs to this select group.

Cristiano Rabelo, born in Rio de Janeiro, Brazil, is a career diplomat currently serving as Deputy Consul of Brazil in Miami and Head of the Brazilian Consulate General's Trade Bureau. He has a master's degree in diplomacy from Instituto Rio Branco, Brazil's diplomatic academy.

The information and opinions in this article reflect solely the author's personal views and do not necessarily reflect the views or policy of the Brazilian Ministry of Exterior Relations.

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13 OXFORD ANALYTICA, INC., THE IMPACT OF PRE-SALT: A LONG-TERM PERSPECTIVE, 10 (2010).

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Peter A. Quinter, Becker & Poliakoff P.A., Fort Lauderdale

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Gustavo J. Lamelas, DLA Piper LLP (US), Miami

February 15, 2012

12:00 noon – 1:00 p.m.

5 Ways Corporations Can Limit their International Liability Exposure (1403R)

Santiago A. Cueto, Cueto Law Group P.L., Coral Gables

March 15, 2012

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Managing Criminal Exposure Under the FCPA and Other Laws Impacting International Trade (1404R)

*Robert J. Becerra, Fuerst Ittleman, P.L., Miami
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Margarita P. Muina, Esq., Law Offices of Margarita P. Muina, P.A., Miami – Program Vice Chair

8:30 a.m. – 9:20 a.m.

Overview of International Tax and Estate Planning Developments

William H. Newton, III, Esq., Law Offices of William H. Newton, III, Miami

9:20 a.m. – 10:10 a.m.

Putting FATCA into Context: The International Focus on Information Exchange

Professor Patricia Brown, Director, Masters of Taxation Program, University of Miami School of Law, Coral Gables

10:25 a.m. – 11:15 a.m.

Choice of Entity Issues and International Tax Planning

Seth Entin, Esq., Greenberg Traurig, Miami

11:15 a.m. – 12:05 p.m.

Cutting-Edge Developments With Respect to Tax Fraud and Collection Considerations as Related to International Tax

Andrew H. Weinstein, Esq., Holland and Knight L.L.P., Miami
Kevin Packman, Esq., Holland and Knight L.L.P., Miami

1:30 p.m. – 2:20 p.m.

Globalization and Legal Education

Professor Patricia White, Dean, University of Miami School of Law, Coral Gables

2:20 p.m. – 3:10 p.m.

Current Issues in Estate and Gift Tax Planning for U.S. Situs Assets

Margarita P. Muina, Esq., Law Offices of Margarita P. Muina, P.A., Miami

3:25 p.m. – 4:15 p.m.

Expatriation – Current Issues and Required Disclosures

Shawn P. Wolf, Esq., Packman, Neuwahl and Rosenberg, Coral Gables

William Yates, Esq., Associate Chief Counsel (International), Internal Revenue Service, Washington, D.C.

4:15 p.m. – 5:05 p.m.

Transfer Pricing in the Current Economic Environment

Ian Gray, Esq., Economics Partners, L.L.C., Denver, CO
Robert A. Feinschreiber, Esq., Feinschreiber & Associates, Key Biscayne

5:05 p.m. – 5:10 p.m.

Closing Remarks

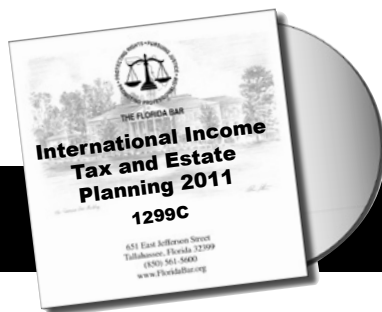
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SECTION CALENDAR

Mark your calendars for these important dates.

For more information contact: Angela Froelich: 850-561-5633 / afroelic@flabar.org

2011

Dec. 8 – WEBINAR: Managing U.S. Discovery “Assistance” in International Arbitration (1402R)
(12:00 noon – 1:00 p.m.)
Gustavo J. Lamelas, DLA Piper L.L.P., Miami

2012

Feb. 15 – WEBINAR: 5 Ways Corporations Can Limit their International Liability Exposure (1403R) (12:00 noon – 1:00 p.m.)
Santiago A. Cueto, Cueto Law Group P.L., Coral Gables

Feb. 24 – The 10th Annual International Litigation and Arbitration Conference (#1387R)
J.W. Marriott Marquis, Miami

Feb. 25 – Pre-Vis Moot
Miami

Mar. 15 – WEBINAR: Managing Criminal Exposure Under the FCPA and Other Laws Impacting International Trade (1404R)
(12:00 noon – 1:00 p.m.)
Robert J. Becerra, Fuerst, Ittlelman, P.L., Tampa
Angela Crawford, DLA Piper L.L.P., Tampa

Apr. 26 – WEBINAR: Ethics Considerations in International Dispute Resolution (1405R)
(12:00 noon – 1:00 p.m.)
Richard J. Dewitt, Dewitt Law / Resolve Disputes, Coral Gables

June 22 – Annual Seminar at The Florida Bar Convention (#1367R)
Gaylord Palms Resort, Kissimmee/Orlando