

**LEGAL CERTAINTY  
GUIDE FOR FOREIGN  
INVESTORS IN BRAZIL**



 INVESTMENT GUIDE TO  
**BRASIL 2018**

# LEGAL CERTAINTY GUIDE FOR FOREIGN INVESTORS IN BRAZIL





**LEGAL  
CERTAINTY  
GUIDE FOR  
FOREIGN  
INVESTORS  
IN BRAZIL**

## INTRODUCTION

7

# PART 1

## 1. DEFINITIONS

9

- 1.1. Foreign investment according to the Brazilian law 10
- 1.2. Foreign investor 11

# PART 2

## LEGAL FRAMEWORK ON FOREIGN INVESTMENT

13

## 2. INTERNATIONAL LEGAL FRAMEWORK ON FOREIGN INVESTMENTS: COOPERATION AND FACILITATION INVESTMENT AGREEMENT (CFIA)

- 2.1. What is CFIA? 15
- 2.2. Advantages of CFIA 15
- 2.3. CFIAs signed by Brazil 16
- 2.4. Main provisions 17

## 3. NATIONAL LEGAL FRAMEWORK

- 3.1. The inflow of foreign capital into Brazil 21
- 3.2. Legal basis for national and foreign investments 22
- 3.3. Types of business organizations 23
- 3.4. Tax system 24
- 3.5. Public contracts and acquisitions 25

# PART 3

## DISPUTE PREVENTION PROCEDURE AND SETTLEMENT OF INVESTMENT DISPUTES

27

### 4. INTERNATIONAL PREVENTION AND DISPUTE SETTLEMENT PROCEDURES

- 4.1. Relation between the investor and Brazil: the importance of corporate governance to prevent controversies 29
- 4.2. Dispute settlement 30
- 4.3. Regulatory coherence 31

### 5. NATIONAL PREVENTION MECHANISMS AND A SYSTEM FOR RESOLVING DISPUTES

- 5.1. The Brazilian Judiciary 33
- 5.2. Brazilian dispute settlement and precedent decisions regime under the New Civil Procedure Code 34
- 5.3. Legal international cooperation 35
- 5.4. Alternative methods of dispute resolution in Public Administration 36
- 5.5. Arbitration and Public Administration 37



# INTRODUCTION

Brazil is noted for being an attractive country for receiving capital, offering conditions that are conducive for investing. The country boasts rare and abundant natural resources, optimal climatic conditions and a vast territorial coverage – strategic elements that bolster economic development. According to the Brazilian Institute of Geography and Statistics (IBGE), Brazil has 207.7 million inhabitants spread among five regions (North, Northeast, Midwest, South and Southeast), resulting in a diversified and vast consumer market eager to procure services and goods from a variety of sectors.

Open to business opportunities, Brazil boosted its productive capacity in 2017 and reached its lowest foreign account deficit since 2009. Electricity, commerce and financial services were sectors that experienced expressive gains and were featured in macro-economic indices. Mining and the oil and gas sectors featured strong performances. In addition, according to the Federal Government's economic database, industrial production in these sectors rose compared to 2016, highlighted by coking coal, petroleum derivatives, chemicals and metallurgy.

Between January and February 2017, Brazil invested US\$ 6.9 billion in services. From that amount, gas and electricity received US\$ 5 billion, commerce US\$ 832 million and financial services US\$ 201 million.

Within the same period, agribusiness and mineral extraction totaled R\$ 1.6 billion, jointly with extraction of metallic minerals (US\$ 1 billion), mining (US\$ 162 million) and oil and natural gas (US\$ 362 million). These figures underline our potential for building wealth and attracting investments.

Strategic legal measures have been adopted since 2015 to ensure a more favorable environment for investments. Over the last decade, Brazil consolidated its *policy space* through Cooperation and Facilitation Investments Agreements (CFIAs). Moreover, the internal law system has gone through significant changes with the New Procedural Civil Code, an innovative set of rules regarding public biddings and the Public Administration's participation in alternative methods for dispute settlement.

The situation described above supports Brazil's interest in fostering an ideal legal environment for investments and economic development. Accordingly, this Legal Certainty Guide for Foreign Investors in Brazil seeks to present an overview of our national and international legal framework for investors interested in establishing cross-border relations with our country.



DAIR

# DEFINITIONS

# FOREIGN INVESTMENT ACCORDING TO THE BRAZILIAN LAW

As stated in the Profit Remittance Law (No. 4,131/62), foreign capital is defined as the goods, machinery and equipment imported into Brazil without an initial expenditure of foreign currency, for the production of goods or services, as well as financial or monetary resources that enter the territory for economic purposes, as long as they belong to private individuals or legal entities residing, domiciled or based in a foreign country.

The Central Bank of Brazil provides two types of foreign investments<sup>1</sup>:

- ▶ **Foreign direct investment (FDI):** long-term investments used in a country other than that of the investor, which seeks to influence the corporate management of company constituted according to the Brazilian law, and which involves the direct or indirect participation of a private individuals or legal entities residing, domiciled or headquartered in a foreign country;
- ▶ **Portfolio investment:** foreign transactions involving Brazilian or foreign currency linked to foreign investments through investment funds (equities, shares, derivatives, debentures). Unlike FDIs, it is not directly allocated to local production cycle. The total amount of the remittance must abide by the limits and standards prescribed by the Brazilian Securities Commission.

The Profit Remittance Law regulates FDI flows, which intend to create or expand the productive capacity or the acquisition of companies in the process of being privatized. These types of assets exhibit low liquidity compared to portfolio investments.

---

#### Endnotes:

1. Central Bank of Brazil, Circular nº 3,689, from 16th, December, 2013.

# FOREIGN INVESTOR

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

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

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

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

PAID

# LEGAL FRAMEWORK ON FOREIGN INVESTMENT



# INTERNATIONAL LEGAL FRAMEWORK ON FOREIGN INVESTMENT: COOPERATION AND FACILITATION INVESTMENT AGREEMENT (CFIA)

Economic growth, more access to capital and empowerment of legal and finance institutions characterized the past decade. This favorable environment resulted in a broadening of our *policy space* and Brazil became one of the most important countries in defining a new legal and institutional framework on investments.

# WHAT IS CFIA?

The Cooperation and Facilitation Investment Agreement (CFIA) is a bilateral or plurilateral international agreement used to establish advantageous conditions for promoting investments between the national investors of the signatory parties.

CFIA constitutes a new investment regulatory framework developed by Brazil to further the internationalization of Brazilian companies and attract FDI to Brazil.

As a result of a joint effort between public and private sectors, CFIA establishes its foundation on institutional governance and risk mitigation, dispute prevention and settlement clauses and thematic agendas to promote and facilitate investments.

CFIA contains some elements of traditional Agreements on Reciprocal Promotion and Protection of Investments, such as a non-discrimination clause, direct expropriation, transfer of funds and compensation for war losses and civil unrest. On the other hand, it innovates in adopting fresh definitions, like cooperation and facilitation, a new institutional structure constituted by the Joint Committee and the *Ombudsman*, along with the main corporate values of the current generation, such as transparency, corporate social responsibility, compliance and anti-corruption actions.

# ADVANTAGES OF CFIA

CFIA provides specific clauses to protect the environment and to promote sustainability.

In accordance with other branches of economic international law, it provides a section regarding treatment rules, which includes national treatment and most favored nation, principles present in WTO multilateral agreements.

Within the context of the WTO, TRIMs (Agreement on Trade-Related Investment Measures) provides investments measures and GATS (General Agreement on Trade in Services) establishes provisions related to services as investments. Seeking to refrain from adopting investment measures that demand performance requirements, TRIMs do not permit investments measures that might distort or restrict trade in goods. According to GATS, Commercial Presence (Mode 3) is an investment because the service provider of a country will establish its business in a foreign territory to render its services in a particular sector.

Moreover, CFIA provides mechanisms to prevent and to solve litigious. To prevent controversies, CFIA counts to the Joint Committee to guide the parties to a consensual solution. If the conflict remains, it may solved by an ad hoc arbitration only between States (“SSDS” *State - State Dispute Settlement system*). Whereas the Investor-State arbitration results only, in mostly cases, in payment of damages, SSDS arbitration contributes to reduce costs with excessive litigation, to confer credibility to the enforcement of decisions and to reestablish the conformity of the measure with agreement’s provisions.



# CFIAs SIGNED BY BRAZIL

CFIA is a successful treaty model. Until now, according to the Ministry of Foreign Affairs, Brazil signed investment treaties with Angola, Chile, Colombia, Malawi, Mexico, Mozambique and Peru (in the form of a broader economic trade agreement chapter).

In 2017, through an innovative initiative, Mercosur signed the Cooperation and Facilitation Investment Protocol (CFIP), a mechanism designed to encourage mutual investments through the adoption of treatments standards rules for investors, the cooperation between States in promoting a favorable business environment and the investment facilitation mechanism.

CFIP represents a milestone for the Mercosur in the international economic market. In addition to its importance as a regional regulatory instrument, it offers a fresh new trade agenda that is capable of intensifying the capital flow and attracting investments opportunities to South America.

# MAIN PROVISIONS

CFIA provides a legal framework that aims to guarantee a propitious business environment for investing in Brazil.

## DEFINITIONS

The definitions clause establishes limits to investment protection for foreign and national investors.

In this context, the word "Investment" means a direct investment of an investor of one Party, established or acquired in accordance with the laws and regulations of the other Party that, directly or indirectly, allows the investor to exert control or a significant degree of influence over managing the production of goods or provision of services in the territory of the other Party.

An "Investor" is a national, permanent resident or enterprise of a Party that has made an investment in the territory of the other Party.

A "Measure" is considered to be any action adopted by a Party, whether in the form of law, regulation, rule, procedure, decision, administrative ruling, or any other form capable of affecting that investment.

The definitions may vary according to the treaty, which does not mean any significant modification in the purposes or essence of the CFIA.

## NON-DISCRIMINATORY PROVISIONS

This clause essentially means that foreigners and nationals are treated equally. The most important rules are the principle of national treatment and the most favored nation provision.

In accordance with the national treatment, Parties commit to assure the same advantages and rights to foreign investors that are provided to the national citizens.

Most favored nation grants to the investments or investors of the other Party treatment no less favorable than that it accords, in like circumstances, to the investments or investors of any non-Party.

Non-discriminatory clause will not apply if any treatment, preference or privilege result from:

- ▶ Provisions relating to investment dispute settlement contained in an investment agreement or an investment chapter of a commercial agreement; or
- ▶ Any agreement for regional economic integration, free trade area, customs union or common market, of which a Party is a member on the date in which the CFIA enters into force.

## DIRECT EXPROPRIATION

In order to avoid arbitrary or discriminatory measures and to protect the States' right to regulate, CFIA provides specific rules regarding direct expropriation.

Taking the provisions of Brazilian Constitution and international human rights treaties into account, the validity of a direct expropriation for CFIA is conditioned to the due process of law. In this sense, nationalization or investment expropriation will only be considered a proper measure if it is subjected to an administrative process founded on public utility or social interest and conditioned to pay the investor a fair compensation that is not below fair market value.

Contrary to investment promotion and protection agreements (IPPAs), CFIA does not provide indirect expropriation.

## COMPENSATION FOR LOSSES

This provision assures that investors are paid a compensation or restitution if their investments sustain losses within the territory due to war or other armed conflict, revolution, a state of emergency, insurrection, riot or any other similar events. The State must pay as soon as possible and in an equitable manner.

## TRANSPARENCY

Goods practices are essential for ensuring a predictable and reliable investment environment.

To achieve this purpose, CFIA is committed to facilitating transparency in Brazilian public institutions. It is incumbent on the parties to exchange information about investment opportunities and provide access to any legal or administrative regulations concerning CFIA.

## TRANSFER OF FUNDS

An investor is free to transfer funds abroad at any time and without unnecessary delay. However, in adverse legal situations such as criminal infractions or bankruptcy, government authorities may avert these transfers.

## CORPORATE SOCIAL RESPONSIBILITY

CFIA determines that investors must make efforts to attain the highest level of sustainable development, which includes environmental protection, employment relations, health and adopting corporate governance principles and practices.

## INVESTMENT MEASURES FOR COMBATING CORRUPTION AND ILLEGAL ACTIVITIES

In an effort to comply with the United Nations Convention against Corruption and the Inter-American Convention against Corruption, Brazil is taking all measures necessary to detect, prevent and deter fraudulent conveyance and, consequently, to reinforce international cooperation to retrieve illegal assets from abroad.

With this in mind, CFIA's determine that Parties adopt good corporate governance practices and reinforce measures to combat criminal actions, such as corruption, money laundering and terrorist financing.

In accordance with this purpose, the treaty only protects licit investments.

## INVESTMENT FACILITATION

Compared to traditional investment agreements, CFIA has established the role of the *Ombudsman*, a consultant governmental body tasked with supporting the investor in any question regarding the agreement. In Brazil, the *Ombudsman* shall be under the auspice of the Chamber of Foreign Trade – CAMEX.

Federal Decree No. 8,863/2016 provides more information about the *Ombudsman's* functions and legal attributions.

# NATIONAL LEGAL FRAMEWORK

# THE INFLOW OF FOREIGN CAPITAL INTO BRAZIL

The section pertaining to economic and financial order within the Brazilian Constitution grants the freedom of economic activities for everyone, allowing all citizens the right to exercise any activity for economic purposes except as otherwise stipulated by law.

It should be pointed out that the Brazilian Constitution does not distinguish between foreign or national companies. However, for national security reasons, some sectors fall within the competence of the Federal Union: currency, postal service, broadcasting, electricity, telecommunications, airports and air navigation services, transportation infrastructures (roads and ports), interstate and international passenger transportation. Despite that, private companies can join the petroleum exploration market through concession agreements.

The Profit Remittance Law (No. 4,131/62) regulates the repatriation of funds, outward remittance and the acquisition of currency for royalties and services and dialogues with the National Financial System Law (No 4,595/1964). Both legislations expressly recognize the Central Bank of Brazil as the institution responsible for regulating and supervising the foreign investments that are received in Brazil.

The Central Bank of Brazil is charged with adopting measures to retain the purchasing power parity, administer currency convertibility and maintain adequate reserves, along with refining the financial system when required. According to the Resolution No. 4,373/2014, the Central Bank of Brazil is obliged to analyze any non-resident investor operating in the financial and capital market.

## FOREIGN EXCHANGE CONTROL

In accordance with Capital Markets Law, the National Monetary Council regulates and the Central Bank of Brazil controls access to the exchange market.

To preserve convertibility during periods of instability in the balance of payments, the Central Bank of Brazil is allowed to restrict the access to the Brazilian financial system by companies that operates in the international stock market.

## FOREIGN CAPITAL REGISTRATION

The Profit Remittance Law and the Foreign Exchange Law (No. 11,371/2006) expressly determines that the Central Bank is responsible for registering any foreign capital entering Brazil. The party receiving foreign capital is required to register this in their accounting statements.

Capital is registered in native currency and the reinvestment of profits will be effected in the native currency and in the currency from where it it could have been remitted, according to the exchange rate applied as of the reinvestment date. Investors have thirty days from the date that the capital enters the country to initiate the registration process in Brazil.

After this process, the Central Bank issues a certificate of registration with the total amount of invested currency and the corresponding amount in Brazil currency. The certificate of registration is required for profits remittance, repatriation and dividend reinvestments.

## DIVIDEND REINVESTMENT PLAN

Defined as dividends obtained by national companies reinvested in the same company that yielded them or in another domestic sector of the economy.

To reinvest dividends, the investor must register the investment as foreign capital, which increases the tax basis for future dividend remittances or reinvestments.

# LEGAL BASIS FOR NATIONAL AND FOREIGN INVESTMENTS

The Brazilian legal system does not make a distinction between foreign or national investors.

The legal debate over possible restrictions to foreign investors ended in 1995, when the legislator revoked article 171 of Brazilian Constitution that, founded on the concepts of corporate control and a majority of voting shares, had once distinguished a private national company from a national capital corporation.

Currently, the Brazilian legal system defines a private national company as an organization founded according to the law and based in Brazil (article 60 of Federal Decree No. 2,627/1940). Therefore, a foreign investor meeting the requirements for registration has the right to receive the same treatment as any Brazilian investor.

# TYPES OF BUSINESS ORGANIZATIONS

Foreign legal entities are companies constituted and organized according to the legislation in the foreign country where it is based. Brazilian Civil Code, commercial legislation (mainly Law No. 6,404/76 and Federal Decree No. 2,627/1940), and administrative legal acts establish the rules to manage them.

The individual or legal entity who practices professional organized economic activity is considered a businessperson or a business entity for legal purposes, except for those performing non-profit operations involving scientific, intellectual or artistic activities, in case of those activities do not integrate element of business.

The company's article of association formalizes the institution of business entities and establishes each parties' rights and duties. To give publicity to the constitution act and to any business transaction related to the management of the entity, all relevant documents are required to be registered at the Boards of Trade in the state where the branch or establishment is located.

A private limited company is an organization regulated by a contract that establishes duties, rights and the value of shares to each partner. Partners are jointly responsible for all the actions made by the company until capital is paid-in by all investors.

Joint-stock companies are entities regulated by the Federal Law No. 6,404/1976 and aims to obtain dividends or interest capitalization to distrib-

ute to shareholders. They can be closed or opened companies, depending on whether they can negotiate their portfolio in the capital market.

Unregistered companies are organizations that lack an article of association or a company registration. Two types of these companies include unregistered partnerships or joint ventures. When no power limiting agreement exists, all stakeholders are jointly and non-limitedly responsible for management and corporate obligations.

Joint ventures partnership present two kinds of partners, ostensible and unidentified partners. They are established solely for conducting a specific undertaking for a determined time. Apart from the ostensible partner, the company involves the "hidden" partners who contribute capital or other inputs exclusively toward the ostensible partner, pursuant to the corresponding articles of association, which also record their status as creditors. In the event that the ostensible partner declares bankruptcy, the participating partners become creditors of the former with no priority or preference rights.

Brazilian legislation also regulates non-profit associations, foundations, and cooperatives, which feature specific purposes.

Lastly, the individual limited liability company refers to the person that controls the totality of the paid-capital that isn't below a hundred times the highest minimum salary in Brazil.



# TAX SYSTEM

The Brazilian Constitution confers power to the three levels of government (Federal, States and Municipality) to levy duties, subdivided into taxes, fees, betterment fees, contributions and compulsory loans.

The collection of fees is based on the exercise of police power by the Public Administration on the effective or potential use of public and divisible services offered to the taxpayer.

The taxation of betterment fees arise from an economic advantage caused by the appreciation of a tax payer's real state property due to a construction project carried out by the Public Administration.

Social contributions are mechanisms to regulate the intervention of the State in the economic domain, the interests of specific professional or economic categories or the financing of social security.

In the case of an urgent and relevant social interest, such as disaster or war, the Federal Government can levy compulsory loans from the citizens.

The Federal Constitution establishes limits on taxation, such as:

- ▶ **Levying or raising a tax without legal provision;**
- ▶ **Applying a tax based on previous facts;**
- ▶ **Deploying taxes in a confiscation instrument;**
- ▶ **Treating taxpayers unequally in the same situation;**
- ▶ **Using taxes to restrict the free movement of people.**

The taxes levied by the Federal Government are Personal Income Tax (IRPF), Corporate Income Tax (IRPJ), Import Tax (II), Export Tax (IE), Tax on Industrialized Products (IPI), Rural Property Tax (ITR), Tax on Financial Transactions (IOF) and Tax on Large Fortunes (IGF), without hindering the collection of other taxes and contributions, such as Social Contribution on Net Profits (CSLL), Contribution for Social Financing (COFINS), Contribution to the Social Integration Program (PIS) and Employment Security Fund (FGTS).

The taxes levied by states are Value-added Tax (ICMS), Inheritance and Gifts Tax (ITCMD), and Tax on Ownership of Automotive Vehicles (IPVA).

Municipal taxes include a Service Tax (ISS), Property Transfer Tax (ITBI) and Urban Property Tax (IPTU).

# PUBLIC CONTRACTS AND ACQUISITIONS

Public bidding is a formal administrative procedure in which the Government selects the most efficient proposal considering price, the execution plan or specialty. Article 37 of the Federal Constitution and Federal Law No. 8,666/1993 establishes general rules for public bidding. It involves building, services, government procurement and conveyance of public properties and concessions and permissions for public services (Law No. 8,987/1995).

According to the contract value and complexity, the law classifies the procedure as competitive bidding, submission of prices, invitation, contest, auction and trading session.

Competitive bidding is used in government procurement, concessions, buildings or conveyance of public properties over R\$ 1.500.000,00, engineering construction and services above R\$ 650.000,00 and international public biddings in the absence of a supplier international database.

The submission of prices is a type of bid in which previously registered suppliers are invited to offer the best proposal for contracting engineering projects and services up to R\$ 1.500.000,00 and purchases and services up to R\$ 650.000,00.

Government adopts an invitation for low-price contracts, up to R\$ 150.000,00 for engineering related construction and R\$ 80.000,00 for other contracts. It seeks to select the best proposal among previously registered suppliers or those that, until the date of the procedure, demonstrate their intention to participate.

The contest is intended to select the best artistic and technical projects that will gain the work.

Through an auction, the Government transfers a real state property to a person who offers the best price from the minimum established by a pricing evaluation.

According to Act No. 10,520/2002, the Public Administration uses electronic or physical trading sessions for the acquisition of ordinary goods and services, except engineering services and construction. With this type, a public administrator can consult a pricing database, which contributes to economicity, transparency and selection of the best proposals.

**PAR**

DISPUTE PREVENTION  
PROCEDURE AND  
SETTLEMENT OF  
INVESTMENT DISPUTES



# INTERNATIONAL PREVENTION AND DISPUTE SETTLEMENT PROCEDURES

# RELATION BETWEEN THE INVESTOR AND BRAZIL: THE IMPORTANCE OF CORPORATE GOVERNANCE TO PREVENT CONTROVERSIES

To prevent disputes, CFIA attributes employing amicable and consensual solutions to the Joint Committee in the case of discrepancies between the parties.

The Joint Committee is a body composed of government representatives from CFIA parties. It is tasked with monitoring the implementation of agreements, sharing investment opportunities and coordinating a thematic agenda. In addition, it has the power to profer interpretative decisions that shall be binding for any future arbitration and to manage the compliance of CFIA.

The Brazilian model also establishes mechanisms that facilitate a dialogue between the Parties and the private sector through the National Focal Points (*Ombudsman*) and *ad hoc* working groups.

The focal point from each State will act as a communication channel between investors and the receiving country's government. In Brazil, the Chamber of Foreign Trade (CAMEX) shall carry out this duty.

# DISPUTE SETTLEMENT

Legal certainty is one of the strategic ways to reduce risks and to increase the reliability of investors, one of the main reasons why it is considered a key factor for foreign investors to make an investment decision in the country.

CFIA model determines that conflicts related to the agreement will only be resolved through dispute settlement mechanisms involving States (SSDS – *State-State Dispute Settlement*). This procedure seeks to reestablish respect to the standards of the Agreement.

In case a consensus can not be reached between Parties through prevention mechanisms, an arbitration court composed of three experts will be established. Arbitrators will make decisions through a majority of votes and the award will bind both parties.

# REGULATORY COHERENCE

Brazilian government has been making efforts to promote good regulatory practices. To achieve its goals for health and social welfare, regulations may not:

- ▶ Be excessive;
- ▶ Block innovation; and
- ▶ Create unnecessary barriers to trade, competition and economic efficiency.

**Regulatory Coherence Practices are meant to:**

- ▶ Enhance the use of public resources;
- ▶ Promote the democratic participation of regulated agents (corporate/private sector);
- ▶ Improve the decision process – reaching public policy goals with less disturbance to market forces;
- ▶ Accelerate the learning curve of the regulator agent: identifying and correcting mistakes before the final regulation is enacted;
- ▶ Contribute to more predictability and improving the business environment in Brazil.

Given that, the Civil Cabinet, the Foreign Trade Chamber (CAMEX), the Minister of Planning, Development and Management (MPOG) and the Comptroller General (CGU) have developed programs and directives to improve regulatory practices in Brazil.

Federal Decree No. 9,203/2017 establishes the following principles for public governance:

- I – responsiveness;**
- II – integrity;**
- III – reliability;**
- IV – regulatory improvement;**
- V – accountability; and**
- VI – transparency.**

In accordance with article 4 of Decree No. 9,203/2017, the guidelines for public governance are:

- I – providing a decision-making process guided by obvious facts, legal conformity, regulatory quality, de-bureaucracy and support for the participation of society;**
- II – editing and reviewing normative acts based on good regulatory practices and legitimacy, stability and coherence in the legal system through the promotion of public audiences whenever appropriate.**

The Federal Budget Oversight Board (TCU) and Comptroller General of Brazil (CGU) shall verify the federal public bodies' compliance with the good regulatory practices in Brazil.



# **NATIONAL PREVENTION MECHANISMS AND A SYSTEM FOR RESOLVING DISPUTES**

# THE BRAZILIAN JUDICIARY

The Brazilian Constitution assures access to justice for all citizens, national or foreign, which encompasses all the necessary means to prevent and solve extra-judicial or judicial conflicts in accordance with the due process of law (contradictory and full defense).

The procedural legislation and the Federal Constitution define the jurisdiction for legal action, adopting the subject, value of the cause, territory, hierarchy or function as criteria.

The organization of Brazilian jurisdictional system involves common and specialized courts. State and Federal Courts, known as “common justice”, encompass civil, criminal and administrative lawsuits. Specialized courts deal with military, labor and electoral disputes. A party can file an appeal to a second instance tribunal and the Superior Court of Justice (for federal matters) or the Federal Supreme Court (for constitutional matters), generically referred to as “Superior Courts”.

# BRAZILIAN DISPUTE SETTLEMENT AND PRECEDENT DECISIONS REGIME UNDER THE

## NEW CIVIL PROCEDURE CODE

In response to requests for greater effectiveness, efficiency and promptness, and to establish a dialectical civil process, the Brazilian procedural system has gone through structural changes.

Through the enactment of Constitutional Amendment No. 45/2004, superior courts cemented the culture of precedent by standardizing jurisprudence, the use of binding summons, judgement of repetitive appeals and judgement of general repercussion appeals.

In March, 2016, the New Civil Procedure Code (simply named "NCPC", Law No. 13,105/2015) went into effect and introduced instruments that enhance judicial security. In this sense, it is important to highlight the provision of the procedural incident to solve repetitive lawsuits to standardize mass demands, the possibility to grant advanced court protection based on urgency or evidence and a more restricted hypothesis for access to the appeals process, reinforcing the prevalence of judicial precedents and contributing to an improvement in the decision-making process.

# LEGAL INTERNATIONAL COOPERATION

In an effort to facilitate communication between judicial authorities from different countries, the NCPJ introduced legal international cooperation mechanisms that count on the direct participation of Brazilian legal institutions, such as the Brazilian Attorney General.

Through the legal international cooperation mechanisms, the NCPJ regulates requests for practicing processual acts presented by foreign authorities, such as subpoenas, notifications, taking of evidence, homologating decisions, granting urgency in judicial measures, international legal assistance or any other judicial or extrajudicial procedure that is not prohibited by Brazilian law.

According to the procedural system, direct assistance, letter rogatory and the enforcement of foreign judgements are mechanisms for promoting legal international cooperation.

Direct assistance is the communication between a foreign body and the Brazilian central au-

thority for procedural purposes. It applies when the measure does not depend directly on a judicial decision subject to the judgement of proceedings.

A rogatory letter is a claim submitted by a foreign judicial authority to a Brazilian judicial authority for practicing a processual act. It generally depends on the *exequatur* from the Superior Court of Justice, except for an expressed provision in international treaty.

The “enforcement of foreign judgements” is the recognition and enforcement in one jurisdiction of final judgments rendered in a foreign jurisdiction. It shall be required before the Superior Court of Justice, without prejudice to Brazilian judicial authorities adopt provisional acts of constrictions during this process.

If the Superior Court of Justice grants the order claimed on the rogatory letter or recognizes the enforcement of a foreign judgement, federal courts will be tasked with executing those measures.

# ALTERNATIVE METHODS OF DISPUTE RESOLUTION IN PUBLIC ADMINISTRATION

Brazil government prioritizes the settlement of disputes by consensus.

The New Civil Procedure Code stresses the importance of mediation and conciliation methods to consensually settle disputes, and conveys upon judges, lawyers, prosecutors, public defenders and public lawyers the duty of employing them before or during the judicial process.

According to Law No. 73/1993, the Attorney General possesses the authority to sign agreements involving the interests of the Federal Government.

Conflicts, such as those involving economic and financing balances for administrative contracts, can be resolved in specialized chambers dealing with the prevention and resolution of administrative disputes involving the Public Administration (Law No. 13,140/2015). At the federal level, the Attorney General has this duty through the Chamber of Conciliation and Arbitration (CCAF).

# ARBITRATION AND PUBLIC ADMINISTRATION

Recent amendment in Arbitration Law ended the discussion about the participation of Public Administration in arbitration. According to article 1 (Law No. 13,129/2015), Public Administration can participate in arbitration procedures to resolve disputes involving available property rights. This provision includes conflicts related to noncompliance with contractual obligations and reorganizing the economic financing equilibrium of a contract or economic and financing clauses.

The advent of that amendment resulted from requests by the private sector and investors to adopt dispute settlement methods that facilitate a dialectic relation between the parties as well as aim to promote celerity.

For disputes involving government entities and private companies, some public agencies are provided the express authorization for arbitration, such as the following: public utility contracts for the telecommunication sector (art. 93, Law No. 9,472/1997), petroleum (art. 43, X, Law No. 9,478/1997; art. 29, XVIII, Law No. 12,351/2010), water and land transport (art. 35, XVI, Law No. 10,233/2001) and seaports (art. 62, §1º, Law No. 12,815/2013). It is also important to highlight that the Law of Public-Private Partnerships es-

tablishes arbitration to solve contractual disputes (art. 11, Law No. 11,079/2004) and that article 15, paragraph III of Law No. 13,448/2017, referent to investment partnership contracts, expressly mentions arbitration.

Federal Decree No. 8,465/2015 regulates arbitration involving public administration and seaport companies. In that case, arbitration must be held in Brazil and in Portuguese, and will include the Attorney General's participation. To ensure the process is expedited promptly, the maximum term for the delivery of a sentence is two years.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards determines that Brazil must submit to commercial arbitration when previously stipulated in the contract. In the absence of a cooperation treaty, arbitral awards shall submit to the enforcement procedure by the Superior Court of Justice.

With respect to investments, Brazil is one of the few countries in the world that exclusively adopts State-State Dispute Settlement and provides prevention, conciliation and cooperation mechanisms through national focal points or *Ombudsman*.



**ABOUT  
THE  
ORGANIZERS  
OF  
THIS  
GUIDE**

**FEDERATIVE REPUBLIC OF BRAZIL**

**ATTORNEY GENERAL**

Grace Maria Fernandes Mendonça

**SOLICITOR GENERAL**

Sérgio Eduardo de Freitas Tapety

**INTERNATIONAL AFFAIRS DEPARTMENT**

Boni de Moraes Soares

DIRECTOR

**Coordinator**

Fernanda Menezes Pereira

**Author**

Daniela Oliveira Rodrigues

ATTORNEY FOR BRAZIL

UNIT OF DISPUTES ON INTERNATIONAL ECONOMICS LAW

**Graphic Design**

Apex-Brasil

PRINTED IN BRAZIL BY IMPRENSA NACIONAL  
2018



# LEGAL CERTAINTY GUIDE FOR FOREIGN INVESTORS IN BRAZIL



