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Mechanisms of Control on the Circulation of Foreign Capital, Products and People in Brazil

Quinn Smith

Olavo Franco Bernardes

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Mechanisms of Control on the Circulation of Foreign Capital, Products and People in Brazil

By Quinn Smith¹ and Olavo Franco Bernardes²

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1. Quinn Smith is a Shareholder at Gomm & Smith in Miami, Florida, and can be reached at quinn.smith@gommsmith.com.

2. Olavo Franco Bernardes is a Brazilian attorney who holds an LLM in US and Transnational Law from the University of Miami, School of Law. Currently he is the Vice-President of the International Affairs Committee of the São Paulo Bar Association (OAB/SP) and an associate at the firm Alexandre & Pina Advogados Associados. Both authors would like to thank José Samurai Saiani, partner at Machado Meyer in São Paulo, Brazil. The present article is an expansion of an article Mr. Samurai and Mr. Bernardes co-authored, entitled “Limitations on Foreign Investment in Brazil,” published in the International Law Quarterly of the International Law Section of the Florida Bar.

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I. INTRODUCTION

Brazil is a topic of extensive discussion and the growth of its economy has triggered a wave of interest and investment. In many ways, the internal workings of the Brazilian government remain a mystery. Brazil has a history of complex bureaucracy, which has led to the term “Custo Brazil,” or the additional costs associated with doing business in Brazil. This article aims to help non-Brazilian readers better understand the inner workings of the Brazilian government by detailing some of the areas where the Brazilian government exercises control, focusing on foreign capital, products, and people. By the end of this article, readers should have a solid outline for dealing with the areas of law discussed, including a better grasp of some of the legal principles and economic realities underlying the development of the country.

To achieve these aims, this article starts with a brief overview

of the Brazilian governmental framework. This portion shows how the various pieces of the governmental apparatus interact and also sets the stage for a discussion of government control on the three main topics of this article: foreign capital, goods, and people. For each topic, the article looks at the relevant statutes, regulations, and constitutional requirements, providing practical tips to comply with the cited laws.

II. A FEDERAL SYSTEM MANAGED DIFFERENTLY

The Federative Republic of Brazil is comprised of twenty-six states and one federal district, Brasília. Unlike the United States, the law limits the rights of states to legislate on many matters.³ But like in the United States, the Federal Government has the exclusive jurisdiction to legislate on “foreign exchange (VII); foreign and interstate trade (VIII); nationality, citizenship and naturalization (XIII) and emigration, immigration, entry, extradition and expulsion of foreigners” (XV).⁴ States, on the other hand, have so-called concurrent jurisdiction to legislate, among other topics, on “tax, financial and economic law.”⁵ The jurisdiction over tax is of particular importance, which this article will analyze more closely.

Brazil’s economic policies have changed quite substantially from earlier periods in its history. The country has come a long way from being a closed market economy with strong intervention, prohibition on importation, and restrictions on the remittance of foreign capital.⁶ Although some traits of the prior authoritarian government still exist, in particular a restrictive visa policy based on the national security doctrine, much of what made Brazil a closed market economy has been stricken down, notably during the 1990s.⁷

3. Article 22 of the Federal Constitution establishes the cases of exclusive jurisdiction (*competência privativa*) of the Union to legislate. Article 23 establishes the cases of a shared jurisdiction (*competência concorrente*) between the union, the states, the federal district and the municipalities. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 22 (Braz.).

4. *Id.*

5. *Id.* at art. 24.

6. In fact, Brazil had one of the closest economies in the western hemisphere. Huge spending and government loans led for the country to explode in debt during the 80s. The so called, “lost decade”. WERNER BAER, *THE BRAZILIAN ECONOMY: GROWTH AND DEVELOPMENT*, 75-98 (6th ed. 2008).

7. Strong measures to open the economy started to be put in place by Fernando Collor de Mello (1990-1992), during his time in office and later expanded and better organized in a nationalization plan by Fernando Henrique Cardoso (1995-2003).

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Doing business in Brazil can still be difficult. Bureaucracy is a fact of life; the government consistently imposes new demands on the private sector.⁸ For example, it may take a corporation 120 days to become fully operational,⁹ compared to five days in the US.¹⁰ Despite regulatory hurdles, the country is doing well. Brazil has risen to international prominence, and will be hosting both the 2014 FIFA World Cup and the 2016 Summer Olympics. Economic growth is robust, increasing at a four and a half percent rate in 2011.¹¹ According to different indices, Brazil is the sixth¹² largest economy in the globe,¹³ quickly moving to fifth.¹⁴ Brazil has even seen increased presence in the realm of international affairs, with diplomatic prominence and an increasingly solid reputation.¹⁵

Foreign investment continues to soar. Brazil currently stands out in the world economic scenario as it is in a privileged position in terms of investments, receiving more than US \$50 billion in the first three trimesters of 2011.¹⁶ The country has recently placed

Public concessions during the terms of Mr. Luiz Inácio Lula da Silva (2003-2011) and his successor, Dilma Rousseff (2011 to present) have been stalled, although there was an extensive use of Public-Private Partnerships (*Parcerias Público-Privadas*), a type of administrative concession during their term in office. See Generally Francis Anuatti-Neto et al., *Costs and Benefits of Privatization: Evidence from Brazil*, INTER-AM. DEV. BANK (June 2003).

8. Derek Adams, *Bureaucracy Imposes Losses to Companies in Brazil*, VEJA (Sep. 11, 2010, 11:04 a.m.), <http://www.veja.abril.com.br/noticia/economia/burocracia-excessiva-impoe-perdas-as-empresas-no-brasil>.

9. Stuar Grudgingz, *Analysis – Brazil Must Slay Bureaucracy to Grow Faster*, THOMSON REUTERS (June 21, 2010) <http://in.reuters.com/article/2010/07/21/idINIndia-50301020100721>.

10. *Government Statistics, > Time Required to Start Business > Days (Most Recent) by Country*, NATION MASTERS, http://www.nationmaster.com/graph/gov_tim_req_to_sta_a_bus_day-time-required-start-business-days (last visited Oct. 23, 2012).

11. *IMF elevates growth rate to 4.5%. And Warns of Overheating and Inflation Risk*, VEJA, (Jan. 25, 2011, 09:07 a.m.) <http://veja.abril.com.br/noticia/economia/fmi-eleva-previsao-de-crescimento-do-pais-em-2011-para-4-5-e-alerta-para-risco-de-inflacao-e-superaquecimento>.

12. Phillip Inman, *Brazil's economy overtakes UK to become world's sixth largest*, (Mar. 6, 2012) <http://guardian.co.uk/business/2012/mar/06/brazil-economy-worlds-sixth-largest>.

13. List of Countries by GDP (Nominal), WIKIPEDIA, [http://en.wikipedia.org/wiki/List_of_countries_by_GDP_\(nominal\)](http://en.wikipedia.org/wiki/List_of_countries_by_GDP_(nominal)) (last visited Oct. 23, 2012).

14. *Id.*

15. Philip Inman, *Brazil overtakes UK as sixth-largest economy*, THE GUARDIAN, Dec. 25, 2011, available at, <http://www.guardian.co.uk/business/2011/dec/26/brazil-overtakes-uk-economy>.

16. *Brazil attracts record amount of foreign investment in 2011*, INVEST IN BRAZIL, <http://www.investinbrazil.biz/investmentbrazil/2011/10/brazil-attracts-record-amount-of-foreign-investment-in-2011/> (last visited Oct. 23, 2012).

fifth after the US, China, Hong Kong, and Belgium in terms of receiving foreign investment, according to the World Investment Report 2011 issued by the United Nations Conference on Trade and Development (UNCTAD).¹⁷ Additionally, remittances of profit are also peaking, amounting to the record value of US \$5,109 billion just for the month of August, 2011.¹⁸

These different historical notes and economic figures illustrate a country in flux. Brazilian law can sometimes feel heavy-handed because of past of closed economic policies and strong central government control. The country's recent incredible economic performance has changed many laws and the legal culture. This growth has created a legal system opening to the world in a number of areas.

III. FOREIGN CAPITAL IN BRAZIL

A. *The Free Market Economy in the 1988 Brazilian Constitution*

The Brazilian Constitution establishes free enterprise as the basis of its economic order (article 170, CF) while maintaining a strong social orientation.¹⁹ In accordance with the dictates of social justice and to ensure a life of dignity to everyone,²⁰ the Brazilian Constitution includes the following principles: national sovereignty (I); private property (II); the social function of property (III); free competition (IV); consumer protection (V); and environmental protection (VI).²¹ The basic principle underlying foreign investment is Article 172, which states that “[t]he law shall regulate, based on the national interest, foreign capital investments, shall encourage reinvestments and shall regulate the remittance of profits.”²² In addition, Article 5 of the Constitution applies to foreign capital by guaranteeing particular rights. Article 5 establishes the principle of equality, providing equal protection and equal rights to all citizens and foreigners residing inside Brazilian

17. United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2011 4* (2011), available at <http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf>.

18. Nakaganda Fernando and Eduardo Rodriguez, *Remittance of Profit Hits Record in August of the Month*, (Sept. 23, 2011, 12:27 p.m.), <http://economia.estadao.com.br/noticias/economia+geral,remessa-de-lucros-em-agosto-bate-recorde-do-mes,85370,0.htm>.

19. CONSTITUIÇÃO FEDERAL [C.F.] art. 170 (Braz.).

20. *Id.*

21. *Id.* at art. 172.

22. CONSTITUIÇÃO FEDERAL [C.F.] art. 172 (Braz.).

territory.²³ The principle of equality applies to foreign and national capital, treating both equally.²⁴

This definition and guarantee of treatment is important. Especially concerning laws regarding taxation, any tax that treats foreign capital differently is per se unconstitutional because it violates principles of equal protection under the laws and equality of treatment.²⁵

B. Definition of Foreign Capital

To determine the application of these constitutional guarantees, it is important to understand the definition of “foreign capital.” Law 4.131, from September 3, 1962, and its regulatory decree, Decree 55.762, from February 17, 1965, define foreign capital as, “the goods, machinery and equipment entering in the country, without an initial relocation of assets, destined to the production of assets and services, as well as financial or monetary resources entered to be applied to such activities, belonging to individuals or legal entities, residing or headquartered abroad.”²⁶ These laws pre-date the 1988 Brazilian Constitution, which accepted the above definition.²⁷

C. Registration of Foreign Capital

Once defined as foreign capital, investors must follow further procedures to ensure its protection under the law. All foreign capital in the form of foreign direct investment (investimento estrangeiro direto) must be registered with the Brazilian Central Bank. In order to regulate the capital that enters the country, Law

23. *Id.* at art. 5 (stating “[a]ll persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property. . .”).

24. This does not mean there cannot be regulations for foreign capital in the country, particularly in certain strategic areas of the economy, given public interest. Jose Samurai Saiani and Olavo Franco Bernardes, *Limitations on Foreign Investments in Brazil*, 29:4, *THE INT’L L. Q.*, 70-74 (2011).

25. There might be regulations set by law on the entrance and exit of foreign capital as shall be seen in subsequent chapters.

26. Lei No. 4.131, art. 1, de 3 de Setembro de 1962, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 07.11.1962 (Braz.); Decreto No. 55.762, art. 1, de 17 de Fevereiro de 1965, available at http://www.planalto.gov.br/ccivil_03/decreto/antrgos/ds5762.htm.

27. Acts that pre-date the Brazilian Constitution may be declared unconstitutional by the Supreme Court by a judicial measure named *Arguição de Descumprimento de Preceito Fundamental - ADPF*. Acts that are posterior to the 1988 Federal Constitution may be declared unconstitutional by the so-called *Ação Direta de Inconstitucionalidade - Adin*.

4.131 of 1962 attributed such function to the Credit and Currency Bureau (Superintendência da Moeda e do Crédito or “SUMOC”). On March 31, 1965, the then recently created Brazilian Central Bank (Banco Central do Brasil or “BACEN”) took over the role.²⁸ The BACEN issues a certificate of registration, reflecting the amount invested in foreign currency and its equivalent in national currency.²⁹ Such certification is necessary and obligatory for future remittances of profit abroad, repatriation of capital invested and registration of reinvestment of profits.³⁰

The registration requirement includes the following: a) foreign capital that enters the country under the form of direct investment or loans, whether in regular currency, or assets; b) remittance made abroad as capital gain, profits, dividends, interests, as well as royalties for the payment of technical assistance, or of any other title that implies transfer of profits abroad; c) reinvestment of foreign capital profits; d) changes in capital of monetary gain of companies proceeding of agreement with the legislation at stake; and the foreign capital and respective reinvestment of profits already existing in the country on September 27, 1962.³¹

Registration is a simple procedure that can be done electronically using a BACEN registration program (Registro Declaratório Eletrônico or RDE).³² Given the nature of the registration, the person registering is legally responsible for any incorrect or incomplete information.³³ Non-residents can register through representatives, normally the company receiving the foreign investment.³⁴

The registration of foreign capital must be in the currency of the country of origin, and when reinvesting the profits from the initial investment of foreign capital, the investor must carry out

28. Lei No. 4.131, de 3 de Setembro de 1962, D.O.U. de 07. 11.1962 (Braz.).

29. Decreto No. 55.762, art. 4, de 17 Fevereiro de 1965, *available at* http://www.planalto.gov.br/ccivil_03/decreto/antigos/ds55762; Resolution no. 003844, de 24 Marcha de 2010, *available at* <http://www3.bcb.gov.br/normativo/detalharnormativo.do?nz110241928method=detalharNormativo>.

30. Lei no. 4.131, art. 3, de 3 de Setembro de 1962, D.O.U. de 07.11.1962 (Braz.); Decreto No. 55.762, art. 3, de 17 Fevereiro de 1965, *available at* http://www.planalto.gov.br/ccivil_03/decreto/antigos/d55762.htm.

31. Lei no. 4.131, art. 3, de 3 de Setembro de 1962, D.O.U. de 07.11.1962 (Braz.).

32. Resolution no. 003844, de 24 Marcha de 2010, *available at* <http://www3.bcb.gov.br/normativo/detalharNoramtivo.do?n=11002411928method=detalharnormativo>.

33. *Id.*

34. Resolution no. 3844, Annex I, de 23 Marcha de 2010, *available at* <https://www3.bcb.gov.br/normativo/detalharnormativo.do?n=110024192&method=detalharnormativo>.

the same registration process.³⁵ This registration must be in the Brazilian national currency and in the currency of the country to which it would be remitted.³⁶ The registration of reinvestment should be made simultaneously in national currency and in the currency of the country for which it could be issued.³⁷ Reinvestments of profits are subject to the exchange rates at the time of the registration of the reinvestment.³⁸ If the capital is represented by an asset, registration must use the price of the country of origin, and in the lack of satisfactory proof, according to values estimated based on market price by the recipient company.³⁹ Once registered, the foreign capital has the protection given under the Constitution and the foreign investor is able to both repatriate and reinvest that capital.

D. Exchange rates and Additional Information

Crucial to determining the amount of protection given foreign capital is the issue of setting the exchange rate. In terms of exchange rates (US Dollar-Real/Euro-Real), there are two rates authorized by the BACEN: the commercial/financial rate (*câmbio comercial/financeiro*) and the tourist rate (*câmbio turístico*). For foreign investments, the commercial rate normally applies.⁴⁰ In addition, it is important to observe that investments can be made in two ways, either by foreign exchange contracts or by international transfers in the Brazilian national currency (*Transferências Internacionais em Moeda Nacional* or “TIMN”).⁴¹

The registration process is a fairly easy process that foreign investors should not forget. Not only does registration provide protection under the law, failure to register (or correctly register) for-

35. Lei 4.131, art. 5 § 1, de 3 de Setembro de 1962, D.O.U. de 07.11.1962 (Braz.).

36. Resolution no. 003844, de 24 Marcha de 2010, *available at* <http://ww3.bcb.gov.br/normativo/detalharNoramtivo.do?n=11002411928method=detalharnormativo>.

37. Decreto No. 55.762, art. 4, de 17 Fevereiro de 1965, *available at* http://www.planalto.gov.br/ccivil_03/decreto/antigos/ds55762.

38. *Id.*

39. Lei No. 4.131, art. 4, de 3 de Setembro de 1962, D.O.U. de 07.11.1962 (Braz.).

40. The National Monetary Council (Conselho Monetário Nacional – CMN) issued a resolution in 2005, Resolução CMN 3.265/2005, unifying both the Free Rates Market (known as “commercial rate”) and the Fluctuant Rates Market (known as “touristic rate”), thereby creating one single rate in the country. However, the term “touristic rate” (*câmbio turístico*) is still used to address differences in rates as applied in the hospitality sector. *See e.g., Taxa de cambio*, BANCO CENTRAL DO BRASIL, <http://www.bcb.gov.br/?TAXCAMFAQ> (last visited Oct. 29, 2012).

41. *See e.g.* Circular No. 3.607, de 3 Agosto de 2012, D.O.U. de 8.06.12 (Braz.) (stating “[t]he provisions of this article shall apply to transactions in foreign exchange. . .”).

foreign capital and reinvestment can lead to heavy fines and taxes assessed by the relevant agencies.⁴²

E. Remittance, Repatriation and Reinvestment of Foreign Capital

Once duly registered, the next step involves how to move foreign capital—either sending it back to the investor or reinvesting in Brazil. The movement of foreign capital can vary based on the type—either indirect/market investments or direct investments.

i. Indirect/Market Investments

Foreign investments in Brazil can be divided in two types: direct and indirect (also known as market investments).⁴³ The article does not discuss this second type of investment, except to note it is not welcome under the current system. Indirect or market investment (*investimento indireto ou de mercado*) is the so-called (and criticized) speculative capital (*capital especulativo*).⁴⁴ It is known for entering and leaving the country fast, normally by a mere matter of rumors on the particularities of the given country. Some call this investment “hot money” or “smart money,” and government authorities perceive, especially given the recent prominence of the country, this type of investment as something to be tolerated, but never fully accepted.⁴⁵ Its existence can come in many forms as it is defined by the National Monetary Council (*Conselho Monetário Nacional – CMN*) Resolution n° 2.689/2000, which defines indirect investments, among others, as companies’ debentures, shares, bonuses and stocks owned by foreigners not residing in Brazil and obtained by operations in the financial and/or stock market.⁴⁶ The BACEN has consistently cast a skeptical

42. See Lei No. 4.131, art. 58, de 3 de Setembro de 1962, D.O.U. de 07.11.1962 (Braz.); Decreto No. 55.762, art. 42, de 17 de Fevereiro de 1965, D.O.U. de 2.18.1965 (Braz.).

43. *Economia Glossario*, PORTAL BRASIL, http://portalbrasil.net/economia_glossario.htm (last visited Oct. 29, 2012); Paolo Melchor, *Empresa mercantil estrangeira no Brasil: conceito, autorizacao para instalacao e funcionamento funcionamento e investimentos*, AMBICO JURIDICO (Aug. 10, 2002), http://www.ambito-juridico.com.br/site/index.php?n_link=revista_artigos_leitura &artigo_id=4718.

44. See *Governo brasileiro aumenta a dependencia do capital especulativo financeiro para fechar as suas contas*, JORNAL CAUSA OPERARIA (July 4, 2012), http://www.pco.org.br/conoticias/ler_materia.php?mat=30320

45. See Patricia Carvalho, *Incentivo a economia nacional*, JUS NAVIGANDI (July 1, 2000), <http://jus.com.br/revista/texto/770/incentivo-a-economia-nacional>.

46. See *Economia Glossario*, PORTAL BRASIL, http://www.portalbrasil.net/economia_glossario.htm (last visited Oct. 29, 2012).

eye on this type of investment.

ii. Direct Investments

Direct investments (*investimentos diretos*) are, in the definition of leading scholar José Eduardo Carneiro Queiroz, “investments as direct foreign participation in certain types of national businesses and exposition to highly identifiable risks, as long as not made through the stock market.”⁴⁷ These are the kind of investments the country wants, since they are perceived to generate jobs.⁴⁸

iii. Remittance of Profits from Direct Investment

Until 1996, profits earned in Brazil and remitted abroad were subject to withholding taxation of fifteen percent (the same rate that generally applies to corporations).⁴⁹ Currently, the profits or dividends are calculated using as a basis the results generated starting in January 1996, paid or credited by legal entities taxed under the real, presumed or arbitrated profit, are not subject any longer to the withholding of income tax and are not part of the basis of calculation of the beneficiary’s income tax, residing in the country or abroad (Lei n° 9.249/95, art. 10).⁵⁰

As mentioned before, companies established with foreign capital or foreigners residing in Brazil are subject to the same taxes as Brazilian companies or nationals.⁵¹ If a company wants to remit money abroad, it may do so at the end of its fiscal year after pay-

47. Jose Eduardo Carneiro Queiroz, O regime jurídico do capital estrangeiro no Brasil e as recentes alterações na regulamentação in, ASPECTOS ATUAIS DO DIREITO DO MERCADO FINANCEIRO E DE CAPITAIS (Roberto Quiroga Mosquera ed., 2000).

48. See Fernando Peixoto Frutuoso, *Definição jurídica do capital estrangeiro ingressante no mercado nacional*, JUS NAVIGANDI (Oct. 29, 2009), <http://jus.com.br/revista/texto/13753/definicao-juridica-do-capital-estrangeiro-ingressante-no-mercado-nacional> (stating “[f]oreign investment has key importance in Brazilian economic growth. . .”).

49. Corporations, no matter how profitable, still pay that particular rate. See *Aliquotas do Imposto de Renda de Pessoas Juridicas Tributadas pelo Lucro Real, Presumido ou Arbitrado Juridicas*, RECEITA FEDERAL, <http://www.receita.fazenda.gov.br/aliquotas/tribpj.htm>.

50. Lei No. 9.249, de 26 de Dezembro de 1995, D.O.U. de 27.12.1962 (Braz.).

51. Once a foreign capital based company is established in the country, it is treated as any other national company. This acts in accordance with the Principle of Tax Equity (*Princípio da Igualdade Tributária*). There might be, however, restrictions to foreign capital on certain activities of the economy as we shall see further in this article. See George L. Salis, *A Brief Introduction to the Principle of Tax Equity* (Aug. 13, 2007), <http://aafm.us/article1967.html?id=214>.

ing the proper contributions and taxes to the government.⁵² Also, the taxpayer (in this case, a foreign company established in Brazil), when remitting the money abroad, is responsible for proving the payment of any income tax due.⁵³ These remittances can be made beforehand, along with the anticipated distribution of profits and dividends, as long as authorized in the company's statute or by-laws (which can happen by end of a trimester, quarter, semester, etc.).⁵⁴

Remittances in foreign currency do not depend on any previous authorization by governmental authorities (both into and out of the country).⁵⁵ All the investor has to do is remit its investment through a banking establishment and operate using the official rate.⁵⁶

iv. Reinvestment of Profits from Direct Investment

Reinvestment of profits includes the profits generated by national companies that are reinvested in the same company that generated them or in another sector of the economy (Art. 7º, Lei 4.131/1962).⁵⁷ To reinvest profits, the foreigner investor must register those profits as foreign capital.⁵⁸ In other words, it must act in the same way when it performed the initial investment, increasing the company's basis of calculation for tax purposes (including for future repatriations).⁵⁹

v. Repatriation of Foreign Capital from Direct Investments

According to Article 690, II, of the 1999 Income Tax Regulation Rules (*Regulamento do Imposto de Renda de 1999 – RIR/*

52. Lei No. 4.131, de 3 de Setembro de 1962, D.O.U. de 07.11.1962 (Braz.).

53. *Id.* at §1.

54. Lei No. 6.404, de 15 de Dezembro de 1976, D.O.U. de 12.17.1976 (Braz.); Instrução Normativa SRF No. 93, art. 48, sec. 7-8 de 24 de Dezembro de 1997, D.O.U. de 12.29.1997 (Braz.).

55. Lei No. 4.131, art. 9, de 3 de Setembro de 1962, D.O.U. de 07.11.1962 (Braz.); see also FOREIGN CITIZENS, http://www.stfadvogados.adv.br/i_en_estrangerios.php?Foreign-Capital-in-Brazil&cod=15 (last visited Oct. 29, 2012).

56. See *Assessoria de Relações Internacionais: Capital Estrangeiro*, PREFEITURA DE SALVADOR, http://www.relacoesinternacionais.salvador.ba.gov.br/index.php?option=com_content&task=view&id=232&Itemid=9/.

57. Lei No. 4.131, art. 7, § 1 de 3 de Setembro de 1962, D.O.U. de 07.11.1962 (Braz.).

58. Lei No. 4.131, art. 5, § 1 de 3 de Setembro de 1962, D.O.U. de 07.11.1962 (Braz.).

59. See *id.*

99),⁶⁰ the repatriation of foreign capital can be made at any time back to the country of origin, however it has to be duly registered before the BACEN. If the amount of capital to be repatriated is larger than the amount of capital initially registered, such difference shall be considered capital gain, and therefore subject to the fifteen percent corporate income rate.⁶¹

vi. Particularities of Sending Money Abroad

Different taxation treaties between Brazil and other countries may permit for the income to be taxed only once and restituted if taxed twice.⁶² Given the withholding exception, the payer/sender located in national territory is responsible for deducting the income tax, not the receiver of the income located abroad.⁶³ According to the latest income tax rules, brackets may vary from fifteen percent to twenty-five percent, depending on the purpose of remittance (payment for services, capital gain, etc.).⁶⁴ In general the rule goes the opposite way—the provider of services is responsible for deducting and paying income taxes.⁶⁵ Another exception is for employees. The employer is responsible for deducting all taxes and social contributions due to the employee at the time of payment.⁶⁶

Regarding remittance of profits, given the double taxation

60. Decreto No. 3.000, de 26 de Marco de 1999, D.O.U. de 29.03.1999 (Braz.).

61. All capital entered in the country receives a registration certificate. See Lei No. 4.131, art. 3, de 3 de Setembro de 1962, D.O.U. de 07.11.1962 (Braz.); Resolucao No. 2.337, de 28 de Novembro de 1996, D.O.U. de 11.29.2006 (Braz.).

62. As of 2012, Brazil currently has tax treaties with the following nations: South Africa, Germany (suspended since 2006), Argentina, Austria, Belgium, Canada, Chile, China, Korea, Denmark, Ecuador, Spain, Philippines, Finland, France, Hungary, India, Israel, Italy, Japan, Luxemburg, Mexico, Norway, Netherlands, Peru, Portugal, Eslovaquia, Czech Republic, Sweden and Ukraine. See *Double Taxation Conventions*, SECRETARIA DE INGRESOS FEDERALES DE BRAZIL <http://receita.fazenda.gov.br/principal/ingles/acordo/duplatributdefault.htm> (last visited Nov. 8, 2012).

63. Other withholding exceptions are capital gains, governmental prizes (lotteries, rifles, etc.) and employment wages. See *Imposto de Renda Retido na Fonte - IRRF*, RECEITA FEDERAL, <http://www.receita.fazenda.gov.br/pessoajuridica/irrf/conceito.htm> (last visited Oct. 29, 2012).

64. See *Aliquotas do Imposto sobre a Renda Retido na Fonte- exercicio de 2007 ate o exercicio de 2011*, RECEITA FEDERAL, <http://www.receita.fazenda.gov.br/aliquotas/contribfont.htm> (last visited Oct. 29, 2012).

65. See Instrucao Normativa RFB No. 1.117, art. 48, § 7 and 8 de 30 de Dezembro, D.O.U. de 12.31.2010 (Braz.); *Instrucao Normativa RFB no. 1.117, de 30 de dezembro de 2010*, RECEITA FEDERAL, <http://www.receita.fazenda.gov.br/legislacao/Ins/2010/in11172010.htm> (last visited Oct. 29, 2012).

66. See *Double Taxation Conventions*, SECRETARIA DE INGRESOS FEDERALES DE BRAZIL, <http://receita.fazenda.gov.br/principal/ingles/acordo/duplatributdefault.htm> (last visited Nov. 8, 2012).

rule, profits remitted abroad are not taxed, because they have been taxed before, when there is a distribution of profits and dividends.⁶⁷ The profits have to be declared in the legal entity's annual income tax declaration.⁶⁸ Also given recent rules promulgated by the Central Bank, all companies retaining foreign capital must declare the exact amount before that institution, until November 1, 2011 (Circular 3,559 of 19 September 2011).⁶⁹

Finally, it is worth mentioning that the remittance of foreign currency abroad for the purposes of investments by Brazilian entities is totally tax-free (Articles 8, 9 and 10, Resolution n° 3.568/2008, part of the International Exchange and Capital Market Regulation – *Regulamento do Mercado de Câmbio e Capitais Internacionais - RMCCI*).⁷⁰ Under the previous rules, transactions above US\$ 5 million required previous approval by the BACEN.⁷¹

vii. Conclusions

The repatriation of foreign capital has changed significantly since 1996. The Brazilian government exercises strong control on the repatriation of capital, requiring investors to first invest “foreign capital” by registering it according to the rules of the BACEN. This registration is crucial—it helps set the basis for taxation and allows a company to reinvest the capital tax-free under certain circumstances. This article does not fully cover the impact of double-taxation treaties, but when combined with the proper registration of foreign capital, double taxation treaties can provide a method to repatriate foreign capital at a reduced tax rate. In sum, foreign investors should take care to register their foreign capital and document how it is invested or remitted, making sure to evaluate the applicable taxation treaties and rules and regulations of the Brazilian government and its agencies, especially because those rules and regulations can change with little notice.

IV. LIMITATIONS ON FOREIGN INVESTMENTS IN BRAZIL

No discussion of the registration and repatriation of foreign

67. See, e.g., *Direct and Indirect Investment in Brazil: Remittance, Repatriation, and Reinvestment*, SMITH INTERNATIONAL LAW, <http://smintl.com/2011/10> (“[a]s previously mentioned foreign remittances were subject to a 15% tax bracket until 1996”).

68. *Receita: toda remessa ao exterior tera de ser informada*, A TARDE (May 17, 2010), <http://www.atarde.com.br/economia/noticia.jsf?id=2481934>.

69. Circular No. 3.559, de 19 Setembro de 2011, D.O.U. de 20.09.11 (Braz.).

70. Circular No. 3.607, de 3 Agosto de 2012, D.O.U. de 8.06.12 (Braz.).

71. See Bacen No. 3.3037, de 31 de Maio de 2001, D.O.U. de 6.1.2001 (Braz.).

capital would be complete without discussing some of the key limitations of foreign investment imposed by the Brazilian government.

A. Overview

Despite the record number of recent foreign investments in the Brazilian economy and the high level of remittance, limitation on foreign investments in certain areas of the Brazilian economy is a current fact, particularly given some historical positions by Brazilian political parties.⁷² Under the current economic system, there is no limitation on remittances from abroad.⁷³ This, however, was not always the case. In fact, one of the motivations behind the 1964 Military Coup that overthrew the government of former President João Goulart was Law No. 4,131 of September 3, 1962, which restricted remittances abroad by foreign companies to only 10%.⁷⁴

The current Federal Constitution, approved on October 5, 1988, is a product of partial consent achieved by the left and the right political parties in an attempt to seek national conciliation after twenty-years of a non-democratic regime.⁷⁵ As it affects for-

72. As previously mentioned, privatizations started becoming a full reality in the mid-90s. Although under a Military Regime (1964-1985) and later a center-right administration (1985-1990), the country was a closed market economy. One thing both the left and right historically agreed was that the country should have a strong intervenient state. Importations until the 90s were forbidden. Or as the former president, Fernando Henrique Cardoso once said, "We are bound by prejudice. The word privatization, in Brazil, is a curse word". "Nós estamos presos ao preconceito. A palavrprivatização, no Brasil, é palavrão." Alessandra Alves, *Nos estamos presos ao preconceito. A palavra privatizacao, no Brasil, e palavrao*, COLEGIO VISAO (June 10, 2010), <http://www.visaoportal.com.br/noticia/400>.

73. In this sense, "A Ditadura Envergonhada" (The Ashamed Dictatorship), from the award-winning journalist Elio Gaspari, regarding the first moments of the Military Coup is highly recommended. See *generally* ELIO GASPARI, *A DITADURA ENVERGONHADA* (2000).

74. Law No. 4,131/1962 is still in force, but has been modified along history. 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. See Lei No. 4.131, art. 28 § 1, de 3 de Setembro de 1962, D.O.U. de 07.11.1962 (Braz.), available at https://www.planalto.gov.br/ccivil_03/leis/l4131.htm.

75. Many discussions on the pros and cons of the 1988 Federal Constitution happened in the occasion of the celebration of the twenty years of that document. See *Generally Seminário 4 - Vinte Anos da Constituição Federal (1988/2008)* IPEA (Aug.19, 2010, 9:21 AM), http://www.ipea.gov.br/portal/index.php?option=com_content&view=article&id=2796&Itemid=2. In this sense it is interesting to observe by the end of 2008, with merely 20 years of existence and 250 articles, the Federal Constitution had already fifty-seven amendments – currently it has 70. See *Presidência da República, Casa Civil, Subchefia para Assuntos Jurídicos, Emendas*

eign investment, many of the restrictions on foreign activities and investments in the country approved by the 1988 Constitutional National Assembly later proved to be counterproductive. For this reason, these restrictions were removed by different constitutional amendments, mainly enacted during the administration of Fernando Henrique Cardoso (1995-2003) through his government's privatization reforms.⁷⁶

One example of this type of change is the prior paragraph 3 of article 178 of the Federal Constitution, which established the monopoly of transportations along the Brazilian coast to national vessels. As a consequence of this provision, Brazil was excluded from the international shipping market. Recently, Constitutional Amendment (*Emenda Constitucional - EC*) no. 7 of August 15, 1995, excluded this rule, but the change of the rule over time illustrates the current direction of the Brazilian legal climate.⁷⁷ However, there are many restrictions to foreign investments that historically were part of the Brazilian political scene and are still valid under the current system, as shown below.

B. Restriction on Certain Investments

Both the Federal Constitution and other laws establish restrictions or impediments to the participation in 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.⁷⁸

i. Mining and Gas

The first and historically most significant restriction to foreign investments was in the mining and gas sectors. Until the

Constitucionais, available at http://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/quadro_emc.htm. In comparison, the United States with a Constitution with more than 200 years, 7 articles and 27 amendments.

76. The President, a former sociologist turned politician, enacted a serious of reforms gathered in the so called *Programa Nacional de Desestatização - PND* (National Desestatization Program) listed in Law N° 9.491/1997. See Lei No. 9.491, art. 1, de 9 de Setembro de 1997, D.O.U. de 09.09.1997, (Braz.), available at https://www.planalto.gov.br/ccivil_03/leis/19491.htm.

77. The Amendment still allows for statutes to regulate the sector in favour of national vessels. See Emenda Constitucional No. 7 de 15 de 08.1995, available at http://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc07.htm.

78. Pre-1988 laws were accepted in the system by the 1988 Federal Constitution, which, as previously mentioned, when enacted originally created a dichotomy between social and conservative ideas, predicting a free market system, with strong-some say too strong-state protections.

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enactment of Law No. 9,478 of August 6, 1997, *Petróleo Brasileiro S.A. - Petrobras*, a mixed capital company⁷⁹ widely known as the Brazilian oil tycoon company,⁸⁰ had exclusive rights to operate on the Brazilian continental sea.⁸¹ Upon the approval of such Law, private companies were allowed to explore for oil provided that they were granted a concession permit by the National Oil Agency.⁸²

As a result, both national and foreign private companies now jointly operate in the oil industry.⁸³ Indeed, rules have been made more flexible in order to allow foreign mining and oil companies to operate under concession in territories owned by the Federal Government, such as the territorial sea, hydraulic energy, and mineral resources (including those of the subsoil, regardless of whether they are located underneath private property or not), as provided by Article 20 of the Federal Constitution.⁸⁴ Nevertheless, some of the prior restrictions survive. Petrobras still owns exclusive rights to refine and distribute new discoveries, as well as the ethanol distribution within the country.⁸⁵

79. Mixed capital companies are legal entities controlled by governmental bodies and incorporated by legal authorization. The capital of such companies is composed of both private and governmental investments. However, the majority of its voting capital shall always be kept by a governmental body or legal entity. Article 9th, Law No. 5.662/ 1971. See Lei No. 5.662, art. 8-9, de 21 de Junho de 1971, D.O.U. de 21.06.1971, (Braz.), available at https://www.planalto.gov.br/ccivil_03/leis/15662.htm.

80. Petrobras is currently the 34th largest company in the world. See CNNMONEY, <http://money.cnn.com/magazines/fortune/global500/2011/snapshots/6325.html> (last visited Oct. 27, 2012).

81. As well as opening the oil market to private companies under the concession regime, Law No. 9.478/1997 determined the creation of 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, implemented an oil fund to support social and economic development in the country. See Lei No. 9.478, ch. IV, de 8 de Junho de 1997, D.O.U. de 07.08.1997, (Braz.), available at https://www.planalto.gov.br/ccivil_03/leis/19478.htm.

82. In this context, the recently enacted Law No. 12.351 of December 22, 2010, is also worth mentioning, as it established a new regime for future licensing on the exploration and production of oil, natural gas and other related products, consisting on a shared production regime, applicable to the pre-salt areas. Law No. 12.351 also implemented an oil fund to support social and economic development in the country. See *Generally* Lei No. 12.351 de 22 de Dezembro de 2010, D.O.U. de 23 de Dezembro de 2010, (Braz.), available at https://www.planalto.gov.br/ccivil_03/_ato2007-2010/2010/lei/112351.htm.

83. See Lei No. 9.478, art. 68-A, de 8 de Junho de 1997, D.O.U. de 07.08.1997, (Braz.), available at [https://www.planalto.gov.br/ccivil_03/leis/19478AL DA UNIA.htm](https://www.planalto.gov.br/ccivil_03/leis/19478AL%20DA%20UNIA.htm).

84. See *id.* at art. 21; see also *id.* at art. 20.

85. See *Competição: Quebra do monopólio não arranha supremacia da companhia no país*, Folha online (March 10, 2003), <http://www1.folha.uol.com.br/folha/especial/2003/petrobras50anos/fj0310200307.shtml>.

ii. Telecommunications

Another historical restriction on foreign capital is related to telecommunications services. According to Article 21 of the Federal Constitution, the performance of services and activities in this sector is reserved to the federal government.⁸⁶ Private companies may also explore such activities, but they must have previously received an authorization, concession or permission subject to regulations set forth on specific law.⁸⁷ In this context, Article 222, *caput*, of the Federal Constitution limits the ownership of newspaper companies, sound broadcasting companies, and sounds and images broadcasting companies to natural-born or naturalized Brazilian citizens that have resided in the country for at least ten years.⁸⁸ As to corporate shareholders, Article 222, paragraph 1, establishes that foreign companies may have no more than thirty percent of the voting and total capital of the above-mentioned companies.⁸⁹ In sum, significant restrictions still exist related to the telecommunications industry.

iii. Transportation

There are also restrictions on foreign capital in the transportation sector.⁹⁰ According to Law n. 7,565 of December 19, 1986 (Brazilian Airspace Code), the participation of foreign capital in aviation companies that explore domestic airspace routes is limited to a minority stake of up to twenty percent of the total capital of the company.⁹¹ Similarly, Article 1 of Law n. 6,813 of July 10,

86. CONSTITUIÇÃO FEDERAL [C.F.], art. 21 (Braz.).

87. See generally Lei No. 9.472 de 16 de Julho de 1997, D.O.U. de 17.07.1997, (Braz.), available at https://www.planalto.gov.br/ccivil_03/leis/19472.htm.

88. CONSTITUIÇÃO FEDERAL [C.F.], art. 222 (Braz.).

89. *Id.* Those recent changes were enacted in 2002 by Constitutional Amendment (*Emenda Constitucional – EC*) No. 36 of May 28, 2002. Before the enactment of such Amendment, foreign individuals and companies were forbidden altogether from participating in that sector. See Emenda Constitucional No. 36, de 28 de Maio de 2002, available at http://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc36.htm. Additionally, the recently approved Law No. 12.485 of September 12, 2011, has abolished the restriction on the ownership of cable TV by foreigners. See Lei No. 12.485 de 12 de Setembro de 2011, D.O.U. de 03.09.2011, (Braz.), available at https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/12485.htm.

90. The transportation sector historically has been perceived as essential for national strategic reasons. It is interesting to mention that until the 1990s importation of foreign vehicles was also forbidden in Brazil.

91. Legislative Bill No. 6,716 of December 23, 2009, which has already been approved by the Senate and is currently under discussion in the House of Representatives, proposes the elevation of the allowed percentage of foreign capital from twenty percent to forty-nine percent. See Projeto de Lei No. 6716 de 23

1980, established the same restriction for the participation of foreign companies in the highway transport of freight. This provision has been abolished upon the enactment of Law No. 11.442 of January 5, 2007, but the restrictions on ownership of aviation companies continue to exist.⁹²

iv. Healthcare

Article 199, paragraph 3 of the Federal Constitution provides limitations on foreign investments in the healthcare sector, prohibiting the direct or indirect participation of foreign capital in companies operating in the healthcare sector.⁹³ However, such provision is not absolute because there is an exception for such prohibition based on the regulations set forth in law.⁹⁴ As a result of these different conclusions, it is difficult to define the extent to which foreign capital can act.⁹⁵ For instance, foreigners may par-

Decembre de 2009, available at <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=465324>.

92. See generally Lei No. 11,442 de 5 de Janeiro de 2007, D.O.U. de 07.01.2007, (Braz.), available at http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2007/lei/l11442.htm.

93. "Health assistance is open to private enterprise". (. . .) "Paragraph 1 - Private institutions may participate in a supplementary manner in the unified health system, in accordance with the directives established by the latter, by means of public law contracts or agreements, preference being given to philanthropic and non-profit entities". (. . .) "Paragraph 2 - The allocation of public funds to aid or subsidize profit-oriented private institutions is forbidden". (. . .) "Paragraph 3 - Direct or indirect participation of foreign companies or capital in health assistance in the country is forbidden, except in cases provided by law". (. . .) "Paragraph 4 - The law shall provide for the conditions and requirements which facilitate the removal of organs, tissues and human substances for the purpose of transplants, research and treatment, as well as the collection, processing and transfusion of blood and its by-products, all kinds of sale being forbidden." See CONSTITUIÇÃO FEDERAL [C.F.] art. 199 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm.

94. The applicable rules to this subject include Law No. 9.656 of June 3, 1998, which regulates private health care plans and health insurance sectors, and also the regulations issued by the National Health and Sanitation Agency (*Agência Nacional de Vigilância Sanitária – ANVISA*). See Lei No. 9.656 de 3 de Junho de 1998, D.O.U. de 04.06.1998, (Braz.), available at https://www.planalto.gov.br/ccivil_03/Leis/L9656.htm.

95. According to Carlos Ari Sundfeld and Jacintho Arruda Câmara, in order to define the extent of the restriction of foreign capital on the health sector, it should be taken into consideration that the purpose of such restriction was to preserve the activities taken as essential to the protection and recuperation of health from contrary interests. In view of this, the authors state the importance of understanding the distinction between: (i) health assistance (services of assistance or medical treatment, which are directly aimed to protect or recover from health conditions); (ii) 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 (iii) auxiliary services or support assistance services. In view of the aforesaid, the

ticipate in health insurance plans and family planning services, but not in the direct management of hospitals.⁹⁶

There are several bills proposed by the Federal Senate, currently under discussion in the National Congress, aimed at better regulating the health sector, given the pressing needs and popular appeal involved in the matter, especially because the health assistance services in the country are commonly found to be in a critical situation.⁹⁷

v. Other Areas

Finally, it should be noted that the participation of foreign capital in companies of the nuclear energy,⁹⁸ post offices,⁹⁹ telegraphs, and airspace sectors is completely prohibited by both Article 21 Federal Constitution and other applicable laws.¹⁰⁰

restriction provided in Article 199, paragraph 3, would apply solely to the activities related to the first item. See CARLOS ARI SUNFELD & JACINTHO ARRUDA CÂMARA, *Participação do Capital Estrangeiro no Setor de Saúde*, 6 *Revista de Direito Público da Economia* 39-57 (2008).

96. Law No. 8.080/90 regulates the health sector. Article 23 of that law imposes the limitations on foreign participation. See generally Lei No. 8.080 de 19 de Setembro de 1990, D.O.U. de 20.09.1990, (Braz.), available at https://www.planalto.gov.br/ccivil_03/leis/18080.htm.

97. Recently, the Federal Senate organized a “Health Week” in which 47 bills involving different aspects of the sector were debated. See generally *Semana da saúde no Senado tem 47 projetos em pauta*, SENADO FEDERAL PORTAL DE NOTÍCIAS (April 25, 2011, 7:09 PM) <http://www.senado.gov.br/noticias/semana-da-saude-no-senado-tem-47-projetos-em-pauta.aspx>. The main bill on the participation of foreign companies in the health sector is Legislative Bill n. 6,482 of April 4, 2002, which has been waiting for many years to be voted by the House of Representatives. See Projeto de Lei No. 6,482 de 4 de Abril de 2002, available at <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=465324>.

98. However, the nuclear power plants Angra I and II, were mostly financed by foreign capital, in a time foreign capital was severely restricted in the country, for instance. In this opportunity, the country relied heavily on foreign assistance, in particular what was then West Germany for the construction of its nuclear program (for further information on this, See Generally GLOBAL SECURITY.ORG, <http://www.globalsecurity.org/wmd/world/brazil/nuke.htm>, (last visited Oct. 12, 2011). Further, the Alcântara Airspace Basis has developed many partnerships with different countries, particularly Russia.

99. It is interesting to observe that companies like FedEx and UPS are not considered direct competitors to the Post Office Service (*Empresa Brasileira de Correios e Telegrafos*), as they are logistic companies that are not allowed to be used for the dispatch of letters, post cards and telegrams. See *Empresa Brasileira de Correios e Telegrafos*, The Brazil Business (July 15, 2011, 4:05 PM), *Correios e Telegrafos*, <http://thebrazilbusiness.com/article/empresa-brasileira-de-correios-e-telegrafos>.

100. Law No. 4.118 of August 27, 1962 and other pertinent laws and decrees regulate the nuclear sector. See Generally Lei No. 4.118 de 27 de Agosto de 1962, D.O.U. de 19.09.1962, (Braz.), available at https://www.planalto.gov.br/ccivil_03/leis/

Nevertheless, in practical terms it is still possible for these activities to be financed by foreign capital, like financing through private banks, showing discrepancies in the current legislation.¹⁰¹ Additionally, there are no restrictions as to the participation of foreign capital in companies producing parts or components used in the nuclear and airspace sectors.¹⁰²

C. *Limitations on Rural Property*

As previously mentioned under the current system, there is no distinction between foreign and national capital, as both are subject to the same type of taxation, and given that both foreign and national capital are granted equal protection and equal treatment in what concerns their assets and investments inside national territory. Such treatment fits the interpretation of Article 5, *caput*, of the Federal Constitution, which establishes full equality between national and foreign individuals.¹⁰³ Notwithstanding, due to reasons of national sovereignty, national integrity, public safety, and national interest, foreigners may have some of their investment restricted as to certain aspects and areas. It is also important to observe that Article 172 of the Federal Constitution provides mechanisms for the restriction on certain foreign investments.¹⁰⁴

In addition, such restrictions do not conflict with the concept

l4118.htm. Law No. 6.538 of June 22, 1978 and other pertinent laws and decrees regulate post office and telegraph services. *See Generally* Lei No. 6.538 de 22 de Junho de 1978, D.O.U. de 23.06.1978, (Braz.), *available at* https://www.planalto.gov.br/ccivil_03/leis/l6538.htm. Finally, Law No. 7.565/ 1986 (Brazilian Airspace Code – *Código Brasileiro de Aeronáutica*) regulate the aerospace sector. *See Generally* Lei No. 7.565 de 19 de Dezembro de 1986, D.O.U. de 20.12.1986, (Braz.), *available at* http://legislacao.planalto.gov.br/legisla/legislacao.nsf/Viw_Identificacao/lei%207.565-1986?OpenDocument.

101. Article 23 of Law No. 4.118/1962 grants authorization for the National Nuclear Energy Commission (*Comissão Nacional de Energia Nuclear*) to acquire nuclear parts and funds through different sources. Article 24 of that law imposes penalties for the clandestine importation of nuclear parts and exportation of the same. *See* Lei No. 4.118, art.23, de 27 de Agosto de 1962, D.O.U. de 19.09.1962, (Braz.), *available at* https://www.planalto.gov.br/ccivil_03/leis/l4118.htm. The Airspace Sector has its limitations set in article 181, 205 and 214 of Law No. 7.565/ 1986. *See* Lei No. 7.565, arts. 181, 205, and 214, de 19 de Dezembro de 1986, D.O.U. de 20.12.1986, (Braz.), *available at* https://www.planalto.gov.br/ccivil_03/leis/l7565.htm.

102. *See* Lei No. 4.118, art.23, de 27 de Agosto de 1962, D.O.U. de 19.09.1962, (Braz.), *available at* https://www.planalto.gov.br/ccivil_03/leis/l4118.htm. *See* Lei No. 7.565, arts. 181, 205, and 214, de 19 de Dezembro de 1986, D.O.U. de 20.12.1986, (Braz.), *available at* https://www.planalto.gov.br/ccivil_03/leis/l7565.htm.

103. CONSTITUIÇÃO FEDERAL [C.F.], art. 5 (Braz.).

104. *Id.* at art 172.

of equality of treatment and equal protection to foreigners and nationals mentioned above.¹⁰⁵ Indeed, these restrictions are forms of regulation of investments and not an exclusion of these, a practice which is in accordance with the Constitution, widely known for its concern of the public and collective interest, as well as for social rights.¹⁰⁶ An excellent example of these conflicting forms of treatment is the limitation on ownership of rural property by foreigners.¹⁰⁷

Rural property in Brazil has always been a matter of debate, just as in many other countries throughout Latin America. Brazil still has one of the highest concentrations of income inequality in the world, with significant blame assigned to the large number of *latifundios* and unproductive plots of land.¹⁰⁸ In this context, the foreign hand on the Brazilian economy, especially by the acquisition of land for crops, preservation, and scientific purposes, has always been seen with a suspicious eye by part of the society in general.¹⁰⁹ 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*).¹¹⁰ As a matter of law and perception, many foreign investors follow the maxim, "Caesar's wife does not only have to be honest, but to appear honest."

105. *Id.* As previously mentioned, the 1988 Federal Constitution allows for the restriction of foreign capital on certain activities (article 172). This does not conflict with the free market economy principle, because other equally important principles include national sovereignty and public interest.

106. The 1988 Federal Constitution is known as the "Carta Cidadã" (Citizen Chart) for its emphasis on human rights.

107. In this context, Article 190 of the Federal Constitution provides the following: "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." See CONSTITUIÇÃO FEDERAL [C.F.] art. 190 (Braz.).

108. See Robert Plummer, *Brazil Reduces Poverty but Industry Feels The Strain*, BBC NEWS, BBC (May 12, 2011, 7:01 P.M.), <http://www.bbc.co.uk/news/mobile/business-13295170>; Chris Kaul, *Brazil Hates To Bid Lula Farewell*, L.A. TIMES, Oct. 2, 2010, <http://articles.latimes.com/2010/oct/02/world/la-fg-brazil-election-20101002>; *The Economy Ascendancy of Brazil: What it Means for US Companies*, JPMORGAN.COM, ts.jpmorgan.com/directdoc/perspective_brazilrising-jpm.pdf (last visited Oct. 29, 2012).

109. *The Letter to the People from the 5th MST National Congress*. LAND RESEARCH ACTION NETWORK (June 18, 2007), http://www.landaction.org/article.php?id_article=170.

110. *Brazil Activists Target Monsanto*, BBC NEWS, BBC (June 3, 2003, 10:24 PM), <http://news.bbc.co.uk/2/hi/americas/2961284.stm>.

i. The Social Purpose of Land

Ownership of land in Brazil is not an absolute right.¹¹¹ The first restriction imposed to property is that one does not own what is above or below the ground (*ad coelum et ad inferos* – to heaven and to hell, as the Romans used to put it).¹¹² Therefore, the airspace above one's property and the mineral resources underneath it belong solely to the Federal Government.¹¹³ The second restriction is that property must be used according to the social function of the land. As a consequence, a landowner may have his or her property expropriated if it is verified that they are not using the land in accordance to the standards set forth both by the Constitution and its related legislation.¹¹⁴ In this regard, Article 186 provides the following:

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 labor relations; IV: exploitation that favors the well-being of the owners and workers.¹¹⁵

As a result, while one may have the right to charge for the use of property for the exploitation of a certain activity, if a landowner refuses to allow the use of such property, expropriation may result, consisting of the loss of the property upon the payment of compensation by the government. Alternatively, in certain instances the government can take the property without compensating the landowner.¹¹⁶ In this instance, expropriation without compensation may occur in the event of the practice of illegal activities—such as the growing of materials and industry of ille-

111. These authors believe in the theory that there is no absolute right. Even the most sacred right, the right to live, may be taken on certain limited occasions as in an act of self-defense, or on certain occasions, by the police when performing certain duties (justifiable homicide).

112. Brazilian law is heavily influenced by different civil law European countries, all whom to a greater extent have their general principles based on the Roman law. See generally Osvaldo Agripino de Castro, Jr., *Helping to Trade with Brazil: A General Overview on Brazilian Law*, http://www.adsadvogados.adv.br/imprimir_artigo.php?id=11 (last visited Nov.7, 2012).

113. CONSTITUIÇÃO FEDERAL [C.F.], art. 20, IX (Braz.).

114. *Id.* at art. 5, XXIV, art. 243.

115. *Id.* at art. 186.

116. Decreto-Lei No. 3.365, de 21 de Junho de 1941, D.O.U de 18.7.1941; Lei No. 8.257, de 26 de Novembro de 1991, D.O.U. de 27.11.1991.

gal drugs—and may affect the right to the entire property, instead of only a segment of it.¹¹⁷

Law n. 4,504 of November 30, 1964 (curiously enough, enacted during the first year of the Military Regime) and Law n. 8,629 of February 25th, 1993 regulate expropriation for public use and necessity and social interest. In addition, as per Article 191 of the Federal Constitution, private property that has not been explored for any particular use may suffer adverse possession (*usucapião*) in favor of an occupying third party.¹¹⁸

It is important to note that plots of land owned by the federal and state governments cannot be subjected to adverse possession, even if they have not been used for any particular purpose.¹¹⁹ These unproductive, unused plots of land are the so-called *terras devolutas* (fallow lands).¹²⁰ Due to the underuse of these lands, they have been at the center of a long and historical conflict in rural areas.¹²¹ Furthering the conflict is the fact that many of the famous *favelas* (illegal shanty towns) were built on such property.¹²²

117. Lei No. 8.257, de 26 de Novembro de 1991, D.O.U. de 27.11.1991 (reproducing CONSTITUIÇÃO FEDERAL [C.F.], art. 243 (Braz.)).

118. Lei No. 10.406, de 10 de Janeiro de 2002, D.O.U. de 11.1.2002; Lei No. 10.257, de 10 de Julho de 2001, D.O.U. de 11.7.2001.

119. This is a practice that has roots in 1850, when the Land Act (Lei da Terra) prevented a serious land reform in the country by maintaining in the hands of the state, with no adverse possession effects whatsoever, lands that did not belong to particulars. See Lei No. 601, de 18 de Setembro de 1850, COL. LEIS REP. FED. BRASIL, 11 (1, t. 11): 307, Setembro 1850 (Braz.).

120. CONSTITUIÇÃO FEDERAL [C.F.], art. 22, II, art. 26, IV (Braz.). Generally speaking, *terras devolutas* are pieces of land located in the bordering 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.

121. It is relevant that for a piece of land to be considered *terra devoluta*, it should be registered as so in the competent Real Estate Registry Office. In view of this, in the event a claim for adverse possession is filed, the State cannot argue that the conflicting lands are *terras devolutas*, unless it can prove so by presenting the respective 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, Ag No. 514.921/MG, Relator: Pres. Min. Humberto Gomes de Barros, de 17 de novembro de 2005, DIÁRIO DA JUSTIÇA de 5.12.2005, 317 (Braz.).

122. The so called “*favelas*,” a term that has been used since the Canudos War (1897) when poor peasants in the dry Northeast region emigrated to wealthier areas. See *Over 11 Million Brazillions Live in Slums*, VEGA, <http://veja.abril.com.br/noticia/>

ii. Proof of Residence

Based on the above restrictions, ownership of rural land only occurs under limited circumstances. According to Article 1 of Law n. 5,709 of October 7, 1971, only foreign individuals with residence fully regularized or foreign entities authorized in Brazil may acquire property.¹²³ The law does not mention permanent or provisory residence, just proof of residence in the national territory.¹²⁴ As such, the foreigner has to present his proof of residence before the respective Brazilian Taxpayers' List (*Cadastro de Pessoa Fisica – CPF*, for individuals, *Cadastro Nacional de Pessoa Juridica – CNPJ*, for legal entities), including proof of residence or proof of incorporation within the national territory and other documents.¹²⁵

iii. Legislation Restricting and Regulating Foreign Controlled Properties

Restrictions on foreign controlled property can come in many forms, as the Brazilian Federal Constitution does allow for statutes to regulate and limit property owned by foreigners. In this sense, Article 190 is crucial, as it provides: “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.”¹²⁶ It should be noted that Article 190 has accepted all legislation on the matter prior to the 1988 Federal Constitution, meaning Law n. 4,504 of November 30, 1964, the so called Land Statute (*Estatuto da Terra*), basis for acquisition of rural property; Law n. 5,709 of October 7, 1971 and its regulation, Decree n. 74,965 of November 26, 1974, which establishes the basis of the legal regime for the acquisition of rural property by foreigners; and Law n. 6,634 of May 2, 1979, and Decree n. 85,064 of August

brasil/mais-de-11-milhoes-de-brasileiros-vivem-em-favelas (last updated December 21, 2011).

123. As we shall see, the concept of a foreign entity established in Brazil is has been recently changed.

124. Lei No. 5.709, de 7 de Outubro de 1971, D.O.U. art. 9, II de 11.10.1971 (Braz.).

125. *Id.*

126. For the sake of curiosity, these are the so-called *normas constitucionais de eficácia contida* (constitutional norms of restricted efficiency), meaning that although its application its immediate, infra-constitutional legislation may better regulate it. *Eficácia da Norma Constitucional*, SHVOONG.COM, <http://pt.shvoong.com/law-and-politics/constitutional-law/745446-efic%C3%A1cia-da-norma-constitucional> (last visited November 1, 2012).

26, 1980, ruling on borderline strips and other areas restricted to foreigners.¹²⁷

iv. Main Restrictions on the Acquisition of Real Property by Foreigners

Based on these laws, several restrictions on foreign ownership of land emerge. One of the main restrictions for foreign investments is the prohibition of the participation of foreigners in the land located at borderline strips (*faixas de fronteira*) to an extent of 150 km inland (as provided by Article 1 of both Law n. 6,634/1979 and Decree n. 85,064/1980). Those restrictions are also applicable to coastal zones and areas deemed of national security by the National Security Council, which are determined by the government.¹²⁸ Further, as provided by Article 7, Law n. 5,709/1971 and Article 34, Decree n. 85,064/1980, borderline strips and national security zones may only be explored by foreigners upon an authorization of the National Security Council.¹²⁹

Coastal zones (*zonas costeiras*) are always considered territory of the federal government (more specifically of the Marines), regardless of whether they concern foreign or individual citizens and legal entities.¹³⁰ 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.¹³¹

Other restrictions introduced by Law n. 5,709/1971 and recently defined by the Federal Attorney General's Legal Opinion (*Parecer do Advogado Geral da União - AGU*) n. LA-01 of August 19, 2010, include the following:

- (a) Prohibition of foreign individuals or legal entities to own more than $\frac{1}{4}$ of the total rural land surface of the territory of municipalities; additionally, in any case, foreigners originally from

127. Through its history Brazil has had seven constitutions (1824, 1891, 1934, 1937, 1946, 1967 and 1988). Each constitution may accept (receptionar) legislation enacted under a previous constitutional system.

128. Please observe that most of those acts were enacted during the times of the Military Regime when the concept of National Security was widely used.

129. The National Security Council (*Conselho de Segurança Nacional*) created in 1937 (during the *Estado Novo*) and strengthened in 1969 (during the Military Regime) has lost importance with the redemocratization of the country, finally being replaced by the National Defense Council (*Conselho de Defesa Nacional*) by the 1988 Constitution. See generally CONSTITUIÇÃO FEDERAL [C.F.] (1988) (Braz.).

130. Coastal zones are one of the greatest examples where foreign property in Brazil can be restricted and limited.

131. In Brazil is what it is known as *Concessão de Uso* (Right to Use) granted by the government. Therefore, no adverse possession can ever take place.

- the same nationality cannot altogether own more than 40% of the territory of a municipality;
- (b) Binding obligation of foreign entities to explore agricultural and development projects in accordance with their statutes or by-laws;
 - (c) Limitation on foreign or national companies with a majority of foreign capital acquiring real property of more than 100 rural units (*módulos rurais*¹³²). Acquisitions involving higher amounts require 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;¹³³
 - (d) Limitation on foreign individuals acquiring more than fifty rural units in property in contiguous or noncontiguous areas, provided that they have been granted with a previous authorization from the National Institute for Colonization and Agriculture Reform (*Instituto Nacional de Colonizacao e Reforma Agraria – INCRA*);
 - (e) Limitations on foreigners or foreign-controlled companies acquiring areas on national borders, unless they have been provided with a prior authorization from the National Security Office (*Gabinete de Seguranca Nacional*);
 - (f) All limitations, regulations and restrictions applicable to real property acquired by foreign individuals are also applicable to leases; and
 - (g) These rules shall be applied in case of transfer, merger, or assignment of real property.

In addition, the acquisition of rural property by foreign legal entities and individuals is conditioned upon obtaining authorization from the National Congress, whenever such properties involve lands of more than one hundred rural units (for legal entities) or fifty rural units (for individuals). The acquisition of lands of less than three rural units does not require any kind of prior authorization from the public authorities.¹³⁴

On August 19, 2010, the Federal Attorney General issued

132. A “rural unit” is a unit of measure expressed in hectares intended to demonstrate the interdependence between the dimension, the geographical location of rural lands and the terms and conditions of its economic exploration. *See Módulo Rural*, WIKIPEDIA.ORG, http://pt.wikipedia.org/wiki/M%C3%B3dulo_rural (last visited Nov. 7, 2012).

133. Notably, some municipalities in the Amazon Region are as big as some European countries. *See* Nigel J.H. Smith, et al., *Amazonia - Resiliency and Dynamism of the Land and its People*, <http://archive.unu.edu/unupress/unupbooks/80906e/80906E05.htm> (last visited Nov. 7, 2012).

134. *See* Lei No. 5.709, de 7 de Outubro de 1971, D.O.U. de 11.10.1971 (Braz.).

Legal Opinion LA-01 (“Legal Opinion LA-01”), an important legal opinion for foreign investors as well as notaries and clerks around the country. Even though Legal Opinion LA-01 is not a law, Article 40 of the Complementary Law (*Lei Complementar*) n. 73 of February 10, 1993, states that AGU opinions published and signed by the President of the Republic are binding on the Federal Administration.¹³⁵ Legal Opinion LA-01 (like all legal opinions) therefore binds notaries and clerks, even though there is no corresponding federal statute.

The main change introduced by Legal Opinion LA-01 put national companies with a majority of foreign capital on equal footing with national companies without a majority of foreign capital. Another relevant issue established Legal Opinion LA-01 was the constitutionality of Article 1, paragraph 1, of Law n. 5,079/1971.¹³⁶ Legal Opinion LA-01 therefore harmonized the treatment of national companies based on the composition of the ownership—a helpful step for bringing certainty.

But the interpretation set forth by Legal Opinion LA-01 has not always prevailed through different periods of Brazilian history. Constitutional Amendment n. 06 of August 15, 1995, abolished the definitions of national companies and companies of national capital, but a different legal opinion issued during the term of President Fernando Henrique Cardoso, Legal Opinion CQ 181/98, provided that, although the Constitution allows the practice of different treatment to foreign and national capital, limitations and restrictions to companies where foreigners own a majority of capital could only be imposed by law.¹³⁷

The existence of these two legal opinions has created a practical problem. Many notaries and clerk offices are now refraining from registering real property containing any percentage of foreign participation (which was not the Legal Opinion’s original intent) under the fear they may face problems later.¹³⁸

Legal Opinion LA-01, as declared in public by Federal Attor-

135. On the other hand, if a legal opinion is approved but not published, it is bound to concerned notary offices, when those have knowledge of it.

136. Lei No. 5.709, de 7 de Outubro de 1971, D.O.U. de 11.10.1971 (Braz.).

137. Please observe that when Legal Opinion CQ 181/98 was published, the political party in power had a different agenda from the present.

138. CNJ *determina que cartórios controlem compra de terras por empresas controladas por estrangeiros*, Agência CNJ de Notícias, CONSELHO NACIONAL DE JUSTIÇA, <http://www.cnj.jus.br/atos-administrativos/9444:cnj-determina-que-cartorios-controllem-compra-de-terras-por-empresas-controladas-por-estrangeiros> (last visited October 9, 2011).

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ney General Luiz Inácio Lucena Adams, should not apply retroactively, but rather apply only to future registrations. Notaries are not supposed to go through past registrations, but only look ahead to future registrations.¹³⁹ In the name of the rule of law and the vested rights,¹⁴⁰ Legal Opinion LA-01 has created two types of properties that can be owned by foreigners: (i) existing properties which were duly acquired under previous rules; and (ii) new acquisitions subject to the current rules (post-August 2011). Practical problems still persist.

Lately, one of the problems identified in connection with Legal Opinion LA-01/2010 concerns the situation in which the parties have already entered into a commitment for the purchase and sale agreement of real property, with all the applicable formalities. Upon the issuance of Legal Opinion LA-01, some foreign purchasers decided to cease payments, arguing that they would not be able to register ownership of the land anyway.¹⁴¹ But, because the commitment has been registered in the Real Estate Registry, the sellers cannot make full use of such property. As a result, several claims have been filed in the local courts to annul the commitment.¹⁴²

Complicating matters further, the judiciary has entered the fray. According to a decision issued on July 14, 2010, by the National Council of Justice (*Conselho Nacional de Justiça*, or “CNJ”),¹⁴³ which is responsible for supervising the judiciary, notaries and clerk’s offices must supervise acquisitions of land property by national companies that are controlled by foreigners, and inform the respective State Courts of Appeals about any and all required registries.¹⁴⁴ The information would then be forwarded to INCRA. Currently, around 4.3 million hectares of land are registered with the institute, but this number could be up to five times

139. *Brasil impõe mais limites à aquisição de terras por estrangeiros*, TERRA, (March 16, 2011), http://economia.terra.com.br/noticias/noticia.aspx?idNoticia=201103162042_RTR_1300308142nN16161534.

140. CONSTITUIÇÃO FEDERAL [C.F.], art. 5, XXXVI (Braz.).

141. See Bernardo Barbosa Pimental Pessoa & Thiago Assumpção Henriques, *Restrições para aquisição e arrendamento de terras rurais no Brasil*, (Mar. 16, 2011), http://www.azevedosette.com.br/pt/noticias/restricoes_para_aquisicao_e_arrendamento_de_terras_rurais_no_brasil/2539.

142. See CNJ determina que cartórios controlem compra de terras por empresas controladas por estrangeiros, (Oct. 9, 2011), <http://www.cnj.jus.br/atos-administrativos/9444:cnj-determina-que-cartorios-control-em-compra-de-terras-por-empresas-controladas-por-estrangeiros>.

143. See *id.* (providing the full decision of the National Judicial Magistrate, Minister Gilson Dipp).

144. See *id.*

higher when taking into consideration Brazilian companies with foreign capital.¹⁴⁵

In addition to these conflicts, scholars have questioned the constitutionality of Legal Opinion LA-01/2010.¹⁴⁶ These scholars argue that the Federal Constitution proscribes discrimination between national and foreign capital, and that Law No. 5.709/1971¹⁴⁷ has not become a binding part of the system.¹⁴⁸ In sum, uncertainty and conflicting opinions have created a certain cooling in foreign investors' interest in acquiring new property and in investing capital in the agribusiness and research sectors.¹⁴⁹

v. Recent Developments

Opposition to foreign ownership of rural property exists in other areas as well. Most recently, in March 2011, the Attorney General, on behalf of the federal government, and in another attempt to limit the so-called "foreign invasion" of the purchase of rural property, without previous notice, decided to block foreigners from selling, purchasing, or merging Brazilian companies that hold rural property in the country.¹⁵⁰ Future operations, moreover, might be suspended by the courts. Further to this point, the Boards of Trade are also required to assist notaries in identifying companies' foreign capital participation in acquiring land.

In fact, dark times might lie ahead for foreign rural owners, as the National Congress is pushing for an old, nationalistic piece of legislation¹⁵¹, proposing to limit the purchase of land by foreigners in the Legal Amazon Region to no more than fifteen rural

145. See *Governo limita compra de terras por estrangeiros* (Aug. 24, 2011), <http://g1.globo.com/politica/noticia/2010/08/governo-limita-compra-de-terras-por-estrangeiros.html>.

146. See, e.g., Adriana Khalil Daiuto & Ana Beatriz Almeida Lobo, *Restrictions on the ownership of rural real estate property by foreigners*, INTERNATIONAL BAR ASSOCIATION, http://www.ibanet.org/Publications/Real_Estate_Newsletter/Real_Estate_Sept_2011_Brazil.aspx. (observing that interpretation of Lei No. 5.709, de 7 de Outubro de 1971, D.O.U de 11.10.1971 (Braz.) is "being practiced by means of the AGU's Opinions and not by a law enacted by the Brazilian Congress . . .").

147. Lei No. 5.709, de 7 de Outubro de 1971, D.O.U. de 11.10.1971 (Braz.).

148. See *Opinion AGU limiting land sales is unconstitutional*, NELOREMS.ORG (Sept. 10, 2010), <http://www.nelorems.org/noticias/ver/1775/parecer-da-agu-que-limita-a-venda-de-terras-e-inconstitucional.html>.

149. See *id.*

150. See *AGU quer que Ministerios fiquem atentos a estrangeiros*, FARMLANDGRAB.ORG (Mar. 18, 2011), <http://farmlandgrab.org/post/view/18324>.

151. Projeto de Lei da Câmara [PL] 302/09 (formerly Projeto de Lei da Câmara [PL] 4.440/01).

units.¹⁵² This bill has already been approved by the House of Representatives, and approval by the Senate is currently pending.¹⁵³

vi. Conclusions

Ownership of rural property, therefore, is one of the areas in which foreign investors face great resistance from the Brazilian government. Opposition is widespread, and all three branches of government have attempted to create limits on foreign ownership. At this time, there is significant legal uncertainty, which should give foreign investors pause when buying certain kinds of property in Brazil.

V. TAXATION IN BRAZIL – GENERAL ASPECTS

A. Overview

Brazil is well known for having a complicated tax system. This has been a source of some curiosity for the international community. There are some guiding principles, which foreign investors should be aware. Stated simply, a new tax should only apply to the next fiscal year, and taxing entities should avoid double taxation.¹⁵⁴ In this sense, municipalities, state governments, and the federal government may not impose taxes on the same taxable event (i.e., two rural property taxes). But there are some exceptions to both rules. For example, the taxable year must be restricted to a ninety-day period in some cases; and taxes on the same taxable event may be allowed by constitutional permission.¹⁵⁵ To better understand each level of taxation, this article starts at the federal level and moves to the municipal level.

i. Federal Taxes

In terms of competence to levy taxes, article 153 of the Federal Constitution defines taxes on the following events as federal taxes: “(I) Importation of foreign products; (II) exportation to other countries of national or nationalized products; (III) income and

152. The Legal Amazon (*Amazônia Legal*) comprises Acre, Amapá, Amazonas, Mato-Grosso, Rondônia, Roraima, Tocantins, Pará, and a portion of Maranhão.

153. See *Projectos e Materias Legislativas*, SENADO FEDERAL, *Helping to Trade with Brazil: A General Overview on Brazilian Law* http://www.senado.gov.br/atividade/materia/detalhes.asp?p_cod_mate=94352. (last visited Oct. 9, 2011).

154. Código Tributário Nacional (National Tax Code), as well as articles spread throughout the Constitution, set those principles.

155. There is currently no provision in the 1988 Federal Constitution governing annuity.

earnings of any nature; (IV) industrialized products; (V) credit, foreign exchange and insurance transactions, or transactions relating to (VI) bonds or securities; (VII) rural property; and (VIII) large fortunes.”¹⁵⁶ Section VII is pending regulation by law.¹⁵⁷ As of 2011, Brazil imposes no taxes on large fortunes. Instead, the income tax, which is solely federal, is applied on a graduate scale both for companies and individuals. The maximum bracket is 27.5%¹⁵⁸ for individuals, and 15% or 25% for legal entities,¹⁵⁹ depending on their tax structure.

The federal government also has exclusive competence to impose compulsory loans in case of a national emergency,¹⁶⁰ and social contributions for intervention in the economic order and for certain categories of employees or employers, like unions and trade associations.¹⁶¹ Contributions are important because, in many situations, an employer may be obligated to pay several to employees over their salaries due to the company’s particular economic activity.¹⁶²

It has been more than twenty years since the federal government imposed the last compulsory loans, and many people are still fighting for proper restitution in court.¹⁶³ Given the current economic stability of the country, it is difficult to imagine the imposition of new loans. Nevertheless, the constitutional permission exists, and nothing forbids the federal government from imposing new compulsory loans by law.¹⁶⁴

156. CONSTITUIÇÃO FEDERAL [C.F.] art. 153 (Braz.).

157. Article 153, section VII of the 1988 Federal Constitution states that “[t]he Union shall have the power to institute taxes on . . . large fortunes, under the terms of a supplementary law.” CONSTITUIÇÃO FEDERAL [C.F.] art. 153 (Braz.).

158. ALIQUOTS OF THE INCOME TAX WITHHOLDING – YEAR 2007 UNTIL THE YEAR 2011 available at <http://www.receita.fazenda.gov.br/aliquotas/contribfont.htm> (last visited Sept. 3, 2013).

159. See Decreto No. 3.000, de 26 de Março de 1999, D.O.U. de 29.3.1999 (Braz.) (regulating income tax).

160. See CONSTITUIÇÃO FEDERAL [C.F.] art. 148 (Braz.).

161. *Id.* at art. 149.

162. Brazil is known for having an expensive labor force, which, to its critics, results in several tax and social contributions in addition to wages. See *Custo do empregado para o patrao e de 25%, aponta Dieese*, FOLHA DE S.PAULO (July 26, 2011), <http://www1.folha.uol.com.br/poder/949979-custo-do-empregado-para-o-patrao-e-de-25-aponta-dieese.shtml>.

163. The last was imposed in 1986. See *Empréstimos Compulsorios: Fatos geradores e circunstâncias, autorizadas da instituição*, VEM CONCURSOS (Oct. 31, 2002), http://www.vemconcursos.com/opiniao/index.phtml?page_id=1021.

164. CONSTITUIÇÃO FEDERAL [C.F.] art. 148, I (Braz.).

ii. State and Municipal Taxes

States and the Federal District have competence to levy taxes in the following areas: I) transfer by death and donation of any property or rights; II) transactions relating to the circulation of goods and to providing interstate and intermunicipal transportation and communication services, even when such transactions and provisions begin abroad; and III) ownership of automotive vehicles.¹⁶⁵ One of these taxes, called the ICMS, imposes a levy on transactions that relate to the circulation of goods and services. The ICMS taxes industrialized products, and the tax is incurred in every chargeable event, meaning the circulation of the product from place *A* to place *B*.¹⁶⁶ The ICMS is also non-cumulative, which means the tax includes each chargeable event related to the circulation of products or rendering of services, and the amount due to each taxing entity, whether it is the same state or the Federal District.¹⁶⁷

Several states use the ICMS to wage a fiscal war of sorts. Some states impose lower taxes than others and grant other benefits for companies wishing to invest in their home turf.¹⁶⁸ When considering a major investment, particularly one involving infrastructure, foreign investors should consider the incentives that are available, and, in some cases, a competent local partner can help secure further incentives.

The taxing authority of municipalities is slightly different. The municipalities have the competence to levy taxes on the following: I) urban buildings and urban real estate; II) *inter vivos* transfers, on any account, by compensable transactions of real property, by natural or physical succession, and of real rights to property, except for real security, as well as the assignment of rights to the purchase thereof; and III) services of any nature.¹⁶⁹ The municipalities get a smaller piece of the pie in terms of taxes, and many are dependent on the federal government to redistrib-

165. *Id.* at art. 155.

166. ICMS is constitutionally predicted in article 52 and IPI in article 46. See CONSTITUIÇÃO FEDERAL [C.F.] art. 52, 46 (Braz.).

167. Non-cumulatively for the IPI and the ICMS is a constitutional principle predicted in article 153, § 3, II and article 155, § 2, I, of the Federal Constitution.

168. The so-called "Tax War" (Guerra Fiscal) has been famously portrayed in the Brazilian media for years. One famous event was the transfer in 1999 of Ford Motors from the state of Rio Grande do Sul to Camaçari, Bahia given the tax incentives granted by that state. See *Ford to Build Factor in Brazil's Bahia State*, L.A. TIMES (June 17, 1999), <http://articles.latimes.com/1999/jun/17/business/fi-47381>.

169. See CONSTITUIÇÃO FEDERAL [C.F.] (Braz.).

ute a percentage of certain taxes among those federal entities.¹⁷⁰

Brazil also has a national tax code (*Código Tributário Nacional*) that better specifies the taxes, their denominations, types, taxable events, their application, and their effect on the different levels of income tax brackets.¹⁷¹ This article discusses some of the relevant taxes for foreign investors below, although all foreign investors should consult their local tax attorney—Brazilian taxing laws and regulations are known to change frequently.

iii. Taxation for Foreign Entities: Other Important Aspects

Foreign investors are subject to the payment of federal, state, and municipal taxes once they arrive in the country, and many of the details on the taxation of the repatriation of foreign capital are covered above in the article's description of controls on the repatriation of capital. But it is worth noting the absence of one of the key factors creating uncertainty for foreign investors. Because of the current economic stability achieved by the country, the government may not impose new taxes by Provisional Measure—a sort of-governmental decree that produces effects even before being voted on by the National Congress—on “pluriannual plans, budgetary directives, annual budgetary law, additional and supplementary credits; levy or retention of assets, popular savings or any other financial assets.”¹⁷² This change helps avoid the drastic last minute measures to fight inflation government took in the 1980s and early 1990s that scared investors, and produced capital flight and more economic instability as a result.¹⁷³

B. Recent Mechanisms of Control by the Federal Government

As mentioned previously, taxation on the entrance, existence, and circulation of foreign capital within the country and abroad is

170. *Id.* at art. 153, § 5, I-II.

171. The National Tax Code (*Código Tributário Nacional*) has regulated article 146 of the Federal Constitution.

172. CONSTITUIÇÃO FEDERAL [C.F.] art. 62, I-II (Braz.).

173. The country during the late 80s, early 90s, experienced different economical plans, such as *Plano Cruzado*, *Plano Bresser*, *Plano Verão*, *Plano Collor*, which changed the currency several times and tried to prevent inflation with very limited results, until finally *Plano Real* came along, and the country achieved the long-sought economic stability. See Gabriel Codas, *Conheca os planos economicos do Brasil*, VIRGULA.COM (Apr. 15, 2009, 12:00 PM), <http://virgula.uol.com.br/ver/noticia/economia/2009/04/15/200522-conheca-os-planos-economicos-do-brasil>.

a federal matter, similar to the United States' interstate commerce theory.¹⁷⁴ While the article discusses some of the other taxes above, it now turns to two other, important taxes for foreign investors: IPI, and II.

i. IPI: Similar to the ICMS but Imposed by the Federal Government

As applied by the federal government, IPI incurs in every chargeable event, meaning the transformation of the product (wine in a barrel to bottled wine, for example). Due to normative permission, the IPI incurs when a product is brought into the country, despite the fact that such product has not been transformed, but merely imported from abroad.¹⁷⁵ The entity responsible for paying such tax is the importer or someone equivalent to it, when clearing it in customs.¹⁷⁶

Different governmental decrees can raise or decrease IPI on certain products. Cigarettes, for instance, tend to have a high percentage of IPI. Its brackets are based on a chart (*tabela*), TIPI (*Tabela de Incidência de Impostos Sobre o Produto Industrializado*).¹⁷⁷ Different decrees from the President and from the Minister of Economy can decrease or increase such taxes in the same fiscal year.¹⁷⁸

ii. II: An Import Tax

The second tax is the so-called *Imposto de Importação* (II), or, importation tax. As the name suggests, this is the main tax on importation. Like the IPI, it serves as a barrier to certain products entering the country. Because it is an economical or regulatory tax used to regulate the market, its rates can vary from zero percent to 150%, merely by virtue of a governmental decree in the same fiscal year.¹⁷⁹ Oddly, the system also includes an exportation tax (*Imposto de Exportação*), which, to its critics, makes Brazil the

174. In Brazil, the Federal Constitution is extremely programmatic, meaning that it dictates competences and tribulations to different bodies of the administration. CONSTITUIÇÃO FEDERAL [C.F.] art. 22 (Braz.) (dictates the competences of the Federal Union).

175. Decreto No. 7.212, de 15 de Junho de 2010, D.O.U. de 16.12.2010 (Braz.) (observing how some constitutional and normative provisions may sometimes "bend" certain taxes rules).

176. See CONSTITUIÇÃO FEDERAL [C.F.] art. 24, I (Braz.).

177. See TABLE INCIDENCE OF IPI - TIPI (Dec. 28, 2006), <http://sijut.fazenda.gov.br/netahtml/sijut/SijutIntAsp/ATTIPI00.htm>.

178. CONSTITUIÇÃO FEDERAL [C.F.] art. 195, VI (Braz.).

179. Id. at art. 150, § 1.

only country in the world to export taxes when sending its products abroad, making Brazilian products less competitive in the world market. It is a regulatory tax, and its bracket normally varies from zero to thirty percent but can go up to 150%.¹⁸⁰

There are other taxes with smaller amounts, especially the IOF tax, which is imposed on financial transactions. The IOF is rather complex and merits further analysis outside the scope of this article. Some areas are exempt from tax. Certain products, like paper and traditions (as religious practice),¹⁸¹ given their importance, are constitutionally immune from certain taxes or all taxes.¹⁸²

VI. REGULATORY AGENCIES IN THE NEW CONSTITUTIONAL ORDER

Brazil has come a long way from being an interventionist state to being a regulatory state.¹⁸³ As mentioned in previous sections, the country has passed during President Cardoso's term through several privatizations (or public concessions) of some of its main sources of economic activities.¹⁸⁴ Those administrative concessions and permissions to its detractors allowed for the *pirateria* (piracy) and *saque* (pillage) of the country's national resources.¹⁸⁵ To its supporters, privatization allowed a more modern and efficient state and transformed defective companies into highly productive ones.¹⁸⁶

One example of the move to a regulatory state comes from the sector of telecommunications.¹⁸⁷ Obtaining a telephone line from

180. For a list of taxes incurring on importation, see INCIDÊNCIA DE TRIBUTOS NA IMPORTAÇÃO, available at <http://www.portaltributario.com.br/artigos/tributosimportacao.htm> (last visited Nov. 9, 2012).

181. See CONSTITUIÇÃO FEDERAL [C.F.] art. 150, VI (Braz.).

182. *Id.*

183. See Vanessa Elias de Oliveira, *The Judiciary and Privatizations in Brazil: Is there the Judicialization of Politics?*, DADOS, http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0011-52582005000300004 (last visited Oct. 30, 2012).

184. The country privatized large historical companies as *Companhia Vale do Rio Doce*, the whole telephone sector, among others. Its results are contested by some, and supported by others. See Manoel Donato de Almeida, *Neoliberalism, Privatization and Unemployment in Brazil (1980-1998)*, BIBLIOTECA DIGITAL DA UNICAMP, <http://cutter.unicamp.br/document/?code=000469870> (last visited Oct. 30, 2012).

185. A highly controversial book, "A Privatária Tucana", has recently been released accusing PSDB of several mismanagements of the privatization process. AMAURY RIBEIRO JR., *A PRIVATÁRIA TUCANA* (2011).

186. See Gustavo H. B. Franco, *Privatização: as novas fronteiras?*, <http://www.econ.puc-rio.br/gfranco/a26.htm> (last visited Oct. 30, 2012).

187. Some positive points of the telecommunications sector: In July, 1998, Brazil

the government in the past used to be highly expensive, bureaucratic, and could take years to obtain. This changed after Law N° 9.472, from July 16, 1997, which created a national bidding plan and the creation of Anatel, the regulatory body responsible for regulating the different companies, national and foreign, operating in the phone sector.¹⁸⁸

Now, most services that used to be under the public sphere are in private hands, or at least under public companies that have private participation.¹⁸⁹ The most public of examples of public-private cooperation is Petrobras, the symbol of national interest to some. Petrobras is a mixed capital society, meaning that the private sector may have shares in the company, although the government still controls the majority of the voting stock.¹⁹⁰

Some of the regulatory agencies worth citing are ANATEL (telecommunications), ANEEL (energy), ANCINE (audiovisual), ANAC (aviation), ANTAQ (water transportation), ANTT (land transportation), ANP (oil), ANVISA (sanitation), ANS (health), and ANA (hydraulic resources). They are federal autarkies (*autarquias*) and have the power to give fines, make recommendations, and do other activities typical of regulatory agencies. They are fully independent, both in terms of budget and structure, from their departments (*ministérios*). For example, ANATEL's director does not have to report to the Minister of Telecommunications, although they can meet to discuss operations.¹⁹¹

A very interesting and effective regulatory agency is CADE (Conselho Administrativo de Defesa Econômica).¹⁹² CADE is responsible for guiding, supervising, preventing and analyzing

counted with 5.5 million mobiles. Today are 133.1 million – a growth of 2.300%. In the same period, fix lines more than doubled, passing from 19 million to 40 million. In terms of internet, the number of user, which was 1.4 million, today surpass 40 million. Phone density jumped from 17 accesses per 100 inhabitants to 93 per 100. *VoIP : Dez anos de privatização das telecomunicações no Brasil*, VOIPCENTER, <http://www.voipcenter.com.br/modules/news/article.php?storyid=2778> (last visited Oct. 30, 2012).

188. See Lei No. 9.472, art. 186, de 16 de Julho de 1997, D.O.U. de 17.07.1997 (Braz.).

189. As mentioned by Revista Veja, a conservative leading magazine, as of 2005, more than 100 public companies have been privatized, saving a total of 90 billion dollars of public money. *Quando e como se deu o processo de privatização no Brasil?*, VEJA, <http://veja.abril.com.br/idade/exclusivo/privatizacoes/01.html> (last visited Oct. 30, 2012).

190. See CONSTITUIÇÃO FEDERAL [C.F.] (Braz.).

191. *Id.*

192. The Administrative Council for Economic Defense (CADE), a federal autarky, was created by Law 8.884, from June 11, 1994 and is affiliated to the Ministry of Justice. See Lei No. 8.884, de 11 de Junho de 1994, D.O.U. de 13.06.1994 (Braz.); O

abuses of the economic power,¹⁹³ which means regulating the anti-trust concerns, a relatively new sector in the Brazilian economy that fully developed in the 90s in the context of the privatizations.¹⁹⁴ The body has been key in avoiding or regulating key mergers and agreements, including Chocolate Garoto with Nestlé (chocolate), Antartica and Brahma (beer industry), and Camargo Córrea and Votorantim (cement).¹⁹⁵ Another example is the Brazilian Central Bank. Recently, the First Section of the *Superior Tribunal de Justiça* (Superior Court of Justice) decided that the financial sector and services, including commercial banks are to be regulated exclusively by the Brazilian Central Bank (*Banco Central do Brasil – Bacen*).¹⁹⁶ There are no limitations for foreign activities.¹⁹⁷ Foreign financial institutions may fully perform their activities in the country, as long as authorized by a decree from the Executive.¹⁹⁸

VII. IMMIGRATION POLICY

Brazil has an immigration policy still based on the national security doctrine,¹⁹⁹ meaning that foreigners wanting to immigrate into the country receive a suspicious eye from local authorities, although recent trends by the Brazilian legislature are trying to loosen that practice.²⁰⁰ As in other countries, companies wishing

Cade, CADE, <http://www.cade.gov.br/Default.aspx?d354d45ba160a0ba8e> (last visited Oct. 30, 2012).

193. See Lei No. 8.884, art. 1, 3, 7, de 11 de Junho de 1994, D.O.U. de 13.06.1994 (Braz.).

194. Remembering that until the early 90s, the country had a closed market economy. CADE, on the other hand, since the early 2000s, has been responsible for judging around 500 cases a year. *Cade Em Numeros*, CADE, <http://www.cade.gov.br/Default.aspx?d859db24e827e9401030> (last visited Oct. 30, 2012).

195. *Conselho Administrativo de Defesa Econômica*, <http://www.cade.gov.br/Default.aspx?af70b07f8d8b8dad84cc> (last visited May 15, 2013).

196. Banco de Crédito Nacional S.A. – BCN and Bradesco S/A - Recurso Especial (Special Appeal) n.º 1094218 *BC decide sobre fusão de instituições financeiras*, CONSULTOR JURIDICO, <http://www.conjur.com.br/2010-ago-30/banco-central-decide-fusao-aquisicao-instituicoes-financeiras> (last visited Oct. 30, 2012).

197. See Lei No. 4.595, de 31 de Dezembro de 1964, D.O.U. de 01.01.1965 (Braz.).

198. National institutions, on the other hand, need authorization from the Brazilian Central Bank. See Lei No. 4.595, art. 18, de 31 de Dezembro de 1964, D.O.U. de 01.01.1965 (Braz.).

199. Law No. 6.815, of August 19, 1980 regulates visas for foreigners in Brazil. Please observe that the law, written during the Military era, uses the term national security when mentioning the purpose of that act (article 2). Lei No. 6.815, de 19 de Agosto de 1980, D.O.U. de 09.12.1981 (Braz.).

200. There are several bills in National Congress waiting for approval. *Congresso tem projetos para flexibilização de vistos estrangeiros*, ECOVIAGEM, <http://ecoviagem.uol.com.br/noticias/turismo/turismo-nacional/congresso-tem-projetos-para->

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to import foreigner workers have to demonstrate that no one can perform a similar service.²⁰¹

Brazil has the following categories of visas: tourist, temporary (several types), permanent, diplomatic and official.²⁰² Recently, the Brazilian diplomacy has adopted the reciprocity principle.²⁰³ Brazil only demands tourist visas for countries demanding tourist visas of Brazilian citizens.²⁰⁴ One great point of disagreement between Brazil and the U.S. are visa issues. Brazilians are now the highest spending tourists per capita in the U.S., but U.S. visa restrictions are as strictly applied to Brazilian tourists as they are to the citizens of any other Latin American country.²⁰⁵

There are only three U.S. consular offices in Brazil, besides the embassy in Brasilia,²⁰⁶ creating a waiting list of up to 10

flexibilizacao-de-vistos-14619.asp (last visited Oct. 30, 2012). PL 5655/2009 from the Executive Power, the main project regarding the matter, removes the term "national security," replacing it with terms like "migration policy," "human rights" and "international relations."

201. National Immigration Council (*Conselho Nacional de Imigração*)'s Resolução Normativa 64/ 2005, along with Law 6.815/1980, and its regulatory Decree 86.715/1981 regulate the matter. Lei No. 6.815, de 19 de Agosto de 1980, D.O.U. de 09.12.1981 (Braz.); Decreto No. 86.715, de 10 Dezembro de 1981, D.O.U. de 10.12.1981 (Braz.). *As exigências para estrangeiro vir trabalhar no Brasil*, CONSULTOR JURIDICO, http://www.conjur.com.br/2006-jan-30/exigencias_estrangeiro_vir_trabalhar_brasil (last visited Oct. 30, 2012).

202. Visa Types in Brazil. *Brazilian Visa Types*, PASSPORTVISASEXPRESS.COM, http://www.passportvisasexpress.com/visa_services/brazil/country_news/brazilian_visa_types (last visited Oct. 30, 2012).

203. The Reciprocity Principle is invoked by the International Law. Article 4th, V, of the Federal Constitution, predicts the equality among states and reciprocity greatly derives from that. Or as Celso de Albuquerque Mello, citing Decaux, puts it, reciprocity is the mean, and equality the result. *TÍTULO I - DOS PRINCÍPIOS FUNDAMENTAIS*, ANGELFIRE.COM, <http://www.angelfire.com/ar/rosa01/direito123.html> (last visited Oct. 30, 2012).

204. Brazil currently exempts visas for the following countries: Andorra, Argentina, Austria, Bahamas, Barbados, Belgium, Bolivia, Bulgaria, Czech Republic, Chile, Colombia, Costa Rica, Croatia, Denmark, Ecuador, Finland, France, Guatemala, Guyana, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Liechtenstein, Luxembourg, Malaysia, Monaco, Morocco, Namibia, Netherlands, New Zealand, Norway, OSM Malta, Panama, Paraguay, Peru, Philippines, Poland, Portugal, San Marino, Slovakia, Slovenia, South Africa, South Korea, Spain, Suriname, Sweden, Switzerland, Thailand, Trinidad and Tobago, Tunisia, Turkey, United Kingdom, Uruguay, Vatican and Venezuela. Consulate General of Brazil in Chicago, *Visa Requirements by Country*, <http://www.brazilconsulatechicago.org/en-2-10-102.html> (last visited May 15, 2013).

205. Tim Rogers, *Let Them In: How Brazilians Could Help the U.S. Economy*, TIME.COM, <http://www.time.com/time/world/article/0,8599,2075717,00.html> (last visited Oct. 30, 2012) (explaining how Brazilians nowadays are the higher spending tourists in the US).

206. Consulates are based in São Paulo, Rio de Janeiro and Recife, besides the embassy (and consulate) in Brasilia. *Websites of U.S. Embassies, Consulates, and*

months for a Brazilian to apply or have a visa denied.²⁰⁷ Following this practice Brazilian officials ask for extensive paperwork, including a letter of recommendation, for US citizens travelling into the country.²⁰⁸ A couple of years ago, a local judge caused international frenzy when he ordered that U.S. tourists have their fingerprints and mug shots taken in Brazilian entrance ports, justifying it as reciprocal treatment among the nations.²⁰⁹ This practice is no longer in force.²¹⁰

Another reciprocity practice worth mentioning is the recent entrance denial to some Spanish tourists.²¹¹ Spain does not ask for tourist visas from citizens of the EU zone, due to reciprocity terms. The tourists were denied entry on the grounds that they had failed to fulfill their entrance conditions, carried a certain amount of dollars or euros, or failed to provide a specific address.²¹² Notably, Brazil has had some diplomatic clashes with Spain, due to the harsh treatment that country gives to Brazilian citizens wishing to enter in the country and the high number of Brazilians illegally present in Spain, especially those working as female prostitutes.²¹³

VIII. CONCLUSIONS

In its move from a central, interventionist state to a modern,

Diplomatic Missions, U.S. DEPARTMENT OF STATE, <http://www.usembassy.gov/> (last visited Oct. 30, 2012).

207. Rogers, *supra* note 205.

208. To see the requirements, check the Brazilian Consulate website in Miami. *Tourist Visa – VITUR*, CONSULATE GENERAL OF BRAZIL IN MIAMI, <http://miami.itamaraty.gov.br/en-us/tourist.xml> (last visited Oct. 30, 2012).

209. Ernest Barteldes, *Brazil's Fingerprinting: Good to Catch Sex Tourists*, BRAZZIL.COM, <http://www.brazzil.com/2004/html/articles/feb04/p114feb04.htm> (last visited Oct. 30, 2012).

210. An interesting case that happened was an US pilot that when having his mug shot taken, presented his middle finger. He was arrested for *desacato à autoridade* (contempt to authorities). Larry Rohter, *Brazil Jails American Airlines Pilot Over Fingerprinting Snub*, THE NEW YORK TIMES, <http://www.nytimes.com/2004/01/15/world/brazil-jails-american-airlines-pilot-over-fingerprinting-snub.html> (last visited Oct. 30, 2012).

211. *Brasil dificulta a entrada de espanhóis pelo princípio de reciprocidade*, ESTADAO.COM.BR, <http://www.estadao.com.br/noticias/cidades,brasil-dificulta-a-entrada-de-espanhois-pelo-principio-de-reciprocidade,834197,0.htm> (last visited Oct. 30, 2012).

212. Clarinha Glock, *Brazilian Immigrants Weather Crisis in Spain*, GLOBALISSUES.COM, <http://www.globalissues.org/news/2010/07/27/6429> (last visited Oct. 30, 2012).

213. Alex, *Brazilians Are Spain's Favourite Treat*, VICE.COM, http://www.vice.com/en_uk/read/brazilians-are-spains-favourite-treat (last visited Oct. 30, 2012).

regulatory state, Brazil is currently in a state of flux that requires close attention to legal rules and regulations. While the process for importing and moving foreign capital has become similar, registration is key to avoid surprises. The tax system remains challenging to understand and manage, but there are benefits for foreign investors, especially those seeking to develop the local market. Other areas of the economy remain deadlocked for foreign investors as the Brazilian government deals with its transition to a regulatory state. As discussed quite deeply, the purchase of rural land is definitely a complex issue. Finally, the move to a regulatory state has seen continued tension in immigration policy. While recent reforms are in the works, it may be years before Brazil has an open immigration policy.

In the authors' conclusion, the research shows a government in transition with some vestiges of the past remaining. In this sense, the Brazilian government has failed to create a fully liberal state, and remnants of authoritarianism still exist. But the government has taken several steps in pursuit of a more open society. The future still has new surprises, but it is safe to say Brazil walks towards a more modern outlook by the day.