

**International
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Foreign Direct Investment Regimes

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1 Foreign Investment Policy

1.1 What is the national policy with regard to the review of foreign investments (including transactions) on national security and public order grounds?

The Brazilian Constitution generally forbids any form of discrimination between national and foreign investors, with a few exceptions expressly provided by special law. The Brazilian Government has been gradually removing such restrictions as the Brazilian economy is heavily dependent on foreign investment to fuel its growth and infrastructure opportunities, and currently several strategic sectors (such as energy, telecom, and oil and gas) have significant levels of foreign investment.

Some few sectors remain restricted, mainly:

- Nuclear energy, aerospace and post office: no foreign investment is allowed.
- Journalism and broadcasting (open TV): foreign participation is limited to 30% of voting and equity capital of the operating entity.
- Ownership and lease of rural properties and operations in border properties (particularly mining): foreign investors cannot have direct or indirect corporate control of the operating entity.

There is no Brazilian equivalent to the Committee on Foreign Investment in the United States (CFIUS) or any similar control body to review foreign investments on national security grounds.

Foreign investments (in both equity and debt instruments) generally need to be registered with the Brazilian Central Bank electronic system, which is simply a declaratory registry. There are no restrictions for repatriation, and foreign companies are currently subject to capital gain taxes at a lower rate than Brazilian companies (15–22.5% for foreign companies, as opposed to 34% for Brazilian companies). Dividends are paid on a tax-free basis.

1.2 Are there any particular strategic considerations that the State will apply during foreign investment reviews? Is there any law or guidance in place that explains the concept of national security and public order?

As described above, Brazil does not have a foreign investment review on national security grounds.

The Brazilian Government holds a golden share in very few companies that were privatised in the past and, in accordance with the rights of such golden shares, the Brazilian Government may hold a veto right on the relevant company's change of

control, in addition to other limited matters. This was exactly the case with Embraer, the Brazilian iconic airplane manufacturer. In late 2015, The Boeing Company manifested its interest to acquire Embraer's control. The Brazilian Government did not agree with such transaction and eventually approved the carve out of the commercial aviation business unit from the defence and private jet business units. The plan was for The Boeing Company to hold 80% of the new company that would own and operate the commercial aviation business unit, while Embraer would own the remaining 20%. The veto right was justified by national security grounds, as Embraer is an important supplier and partner of the Brazilian Air Force. This deal, however, did not close and was eventually abandoned by both parties.

1.3 Are there any current proposals to change the foreign investment review policy or the current laws?

As mentioned above, the Brazilian Government has been gradually removing the remaining restrictions over foreign investments, including on cable television (2011), healthcare (2015), fintechs and aviation (2018). In 2019, the requirement of a Presidential Decree for increasing foreign investment in financial institutions was also removed (although foreign investment in financial institutions still requires approval from the Brazilian Central Bank).

2 Law and Scope of Application

2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security and public order? Does the law also extend to domestic-to-domestic transactions? Are there any notable developments in the last year?

Brazil does not have a foreign investment review on national security grounds. However, foreign investment in a few sectors is restricted on national security grounds (as described above).

Moreover, foreign investment in a few other specific sectors may require approval by specific regulators (for instance, the increase of foreign ownership in financial institutions requires approval from the Brazilian Central Bank). In these cases, the review is conducted by the applicable regulatory agency on a technical basis and not oriented by national security concerns.

Foreign investments (in both equity and debt instruments) generally need to be registered with the Brazilian Central Bank electronic system, which has a declaratory nature and does not require any kind of approval by any governmental authority.

Also, transactions that involve a concentration act may be subject to pre-closing approval by the Brazilian Antitrust authority (*Conselho Administrativo de Defesa Econômica*) if the underlying transaction meets certain requirements (essentially, the test is whether one party has recorded revenues higher than BRL 750 million in Brazil in the last fiscal year, and, cumulatively, any other party has recorded at least BRL 75 million). If the investor has no previous revenue in Brazil (directly or through its affiliates), no antitrust approval is required. In any event, the Administrative Council for Economic Defence (CADE) carries out its review on a technical basis with no discrimination between national or foreign players.

There have not been significant developments in any of the foregoing during the last year. However, it may be worth noting Brazil's latest developments on privatisation transactions, as highlighted in question 2.3 below.

2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught? Is internal re-organisation within a corporate group covered? Does the law extend to asset purchases?

Mainly the following sectors are restricted:

- Nuclear energy, aerospace and post office: no foreign investment is allowed at all.
- Journalism and broadcasting (open TV): foreign participation is limited to 30% of voting and equity capital of the operating entity.
- Ownership and lease of rural properties, and operations in border properties (particularly mining): foreign investors cannot, directly or indirectly, have the corporate control of the operating entity.

Such restrictions are contemplated by law and there are no committees or agencies that can provide permits or authorisations for foreign investments in such restricted sectors.

Direct asset purchases are quite rare in Brazil due to unfavourable tax consequences, but conceptually the same restrictions would also apply. In the case of rural and border properties, a foreign investor cannot have direct ownership of the property (i.e., a foreign investor would need to have a non-controlling equity stake in a Brazilian entity that owns the property).

The same restrictions would apply in the event of corporate reorganisations that may result in any such restricted ownership in the surviving entity(ies).

2.3 What are the sectors and activities that are particularly under scrutiny? Are there any sector-specific review mechanisms in place?

In very few privatised companies in which the Government of Brazil still holds golden shares and which operate in the defence industry, such as Embraer, the Government may exercise its special voting rights in order to approve any change of control, among other limited matters. The main concern relates to national security. Also, the acquisition, lease and operation of rural properties by foreign investors also require special approvals that may be affected by national security concerns.

In 2021, Brazil saw the privatisation of the energy mammoth company Eletrobras, which went from being a state-controlled listed company to being a full corporation with no controlling shareholder. The privatisation was structured as a follow-on offer of Eletrobras. As a result thereof, the Brazilian Federal Government currently holds approximately 30% of the voting shares, with no golden share or similar mechanism. However,

a special provision in the company's bylaws restricts any shareholder's (including the Federal Government) voting right to up to 10% of the company's voting stock, which significantly reduces the Government's voting power. The privatisation model of Eletrobras was generally regarded as quite successful and is being used as a role model for other privatisations such as Copel in 2023 (which was formerly controlled by the State of Paraná) and the São Paulo sewage and water treatment company (Sabesp) which is seeking to follow the same route.

Moreover, foreign investment in a few specific sectors may require approval by specific regulators (for instance, the increase of foreign ownership in financial institutions). In these cases, the review is conducted by the applicable regulatory agency on a technical basis and is not oriented by national security concerns.

2.4 Are terms such as 'foreign investor' and 'foreign investment' defined in the law?

A foreign investor is generally considered as an individual or legal entity resident, domiciled or headquartered abroad.

2.5 Are there specific rules for certain foreign investors (e.g. non-EU/non-WTO), including state-owned enterprises (SOEs)?

No, there are not.

2.6 Is there a local nexus requirement for an acquisition or investment? If so, what is the nature of such requirement (sales, existence of subsidiaries, assets, etc.)?

There are specific restrictions for the acquisition and operation of real estate properties located in border zones. Otherwise, there are no other local nexus requirements.

2.7 In cases where local presence is required to trigger the review, are indirect acquisitions of local subsidiaries and/or other assets also caught (e.g. where a parent company is acquired which has a local subsidiary in the jurisdiction)?

The restrictions will apply to any direct or indirect foreign investment, including by means of a local subsidiary or in indirect transactions.

3 Jurisdiction and Procedure

3.1 What conditions must be met for the law to apply? Are there any financial or market share-based thresholds?

The foreign investment restrictions depend on the sectors in which the target company operates, and are limited to the specific sectors mentioned above. There are no thresholds.

3.2 Do the relevant authorities have discretion to review transactions that do not meet the prescribed thresholds?

With respect to those restricted sectors, there is generally no possibility to request an approval and therefore no review process.

3.3 Is there a mandatory notification requirement? Is it possible to make a notification voluntarily? Are there specific notification forms? Are there any filing fees?

With respect to those restricted sectors, there is generally no possibility to request an approval and therefore no review process.

3.4 Is there a 'standstill' provision, prohibiting implementation pending clearance by the authorities? What are the sanctions for breach of the standstill provision? Has this provision been enforced to date?

With respect to those restricted sectors, there is generally no possibility to request an approval and therefore no standstill concept. In case a given transaction is carried out and deemed to be in breach of Brazilian law, in a worst-case scenario the transaction may be deemed null and void in Brazil.

3.5 In the case of transactions, who is responsible for obtaining the necessary approval?

Not applicable as per the above.

3.6 Can the parties to the transaction engage in advance consultations with the authorities and ask for formal or informal guidance (e.g. whether a mandatory notification is required, or whether the authority would object to the transaction)?

Not applicable as per the above.

3.7 What type of information do parties to a transaction have to provide as part of their notification?

Not applicable as per the above.

3.8 What are the risks of not notifying? Are there any sanctions for not notifying (fines, criminal liability, invalidity or unwinding of the transaction, etc.) and what is the current practice of the authorities?

In the event one carries out a foreign investment in violation of the existing restrictions, the transaction shall be considered null and void. In addition, the parties involved will be generally liable for losses and damages incurred by third parties.

3.9 Is there a filing deadline, and what is the timeframe of review in order to obtain approval? Is there a two-stage investigation process for clearance? On what basis will the authorities open a second-stage investigation?

Not applicable as per the above.

3.10 Can expedition of review be requested and on what basis? How often has expedition been granted?

Not applicable as per the above.

3.11 Can third parties be involved in the review process? If so, what are the requirements, and do they have any particular rights during the procedure?

Not applicable as per the above.

3.12 What publicity is given to the process and how is commercial information, including business secrets, protected from disclosure?

Not applicable as per the above.

3.13 Are there any other administrative approvals required (cross-sector or sector-specific) for foreign investments?

Yes. Typically, a change of control or ownership of companies that operate in regulated sectors (such as financial institutions, telecom, energy) may require prior approval from the respective regulator or governmental agency, irrespective of whether the buyer is domestic or foreign.

4 Substantive Assessment

4.1 Which authorities are responsible for conducting the review?

Not applicable.

4.2 What is the applicable test and what is the burden of proof and who bears it?

Not applicable.

4.3 What are the main evaluation criteria and are there any guidelines available? Do the authorities publish decisions of approval or prohibition?

Not applicable.

4.4 In their assessment, do the authorities also take into account activities of foreign (non-local) subsidiaries in their jurisdiction?

Not applicable.

4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security and public order grounds? Can the authorities impose conditions on approval?

Not applicable.

4.6 Is it possible to address the authorities' objections to a transaction by the parties providing remedies, such as by way of a mitigation agreement, other undertakings or arrangements? Are such settlement arrangements made public?

Not applicable.

4.7 Can a decision be challenged or appealed, including by third parties? On what basis can it be challenged? Is the relevant procedure administrative or judicial in character?

Not applicable.

4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities and have there been any significant cases? Are there any notable trends emerging in the enforcement of the FDI screening regime?

Not applicable.



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Pinheiro Neto Advogados is a Brazilian independent full-service firm founded in 1942, and was one of the first Brazilian law firms to serve foreign clients and to specialise in corporate matters. The firm currently has 117 partners and over 350 associate attorneys, distributed in three offices in Brazil (Brasília, Rio de Janeiro and São Paulo), one office in Palo Alto, California, and one office in Tokyo, Japan.

With over 5,000 clients in almost 60 countries, the firm has grown organically, and developed a distinctive tight-knit culture, with a low associate-to-partner ratio and few lateral hires at the associate level. The firm has been recognised by the Brazilian government as the largest exporter of legal services and is widely hailed as a leading institution of the Brazilian legal market.

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- Foreign Investment Policy
- Law and Scope of Application
- Jurisdiction and Procedure
- Substantive Assessment