



29TH ANNUAL OUNCE OF PREVENTION SEMINAR

Weathering the
Rough Seas of
Regulation



Chasing International Procurement Markets

Alan W. H. Gourley

Maysa Verzola

Adelicia R. Cliffe

Mitigating Int'l Contracting Risk

- Foreign Intermediaries
- Offset Obligations
- Investment Protection
- International Arbitration

Foreign Intermediaries

- Payment Terms
 - Contingent Fees are lawful!
 - Cost Allowability & Reporting are the issues
- Brokering Activities
 - US & EU
 - DDTC Preparing Final Rule
 - Narrows persons and activities
 - Start of brokering remains unclear
- Anti-corruption compliance & due diligence
 - Compliance certifications are not enough!

Offset Obligations

- Understanding Performance
 - What earns credits?
 - How calculated?
 - Nature of involvement with local partner (Are you investing?)
- Corruption Risks
 - *See Due Diligence and Corruption Risk in Offset Programmes (TI-UK 2012)*

Anti-Corruption

- DOJ's increased willingness to pursue foreign intermediaries
 - Also use Money Laundering statutes
- DOJ/SEC Guidance on FCPA (Nov 2012)
 - Compendium of prior government guidance and positions
- DOJ Opinion 12-01 (Sept 18, 2012)
 - Royal family member not acting as a Foreign Official

Investment Protections

- How do you get protections?
 - Bilateral Investment Treaties (BITS) & some multilateral regimes
 - Plan investment to take advantage
- What protections?
 - Expropriation
 - National Treatment/Most Favored Nation
 - Fair & Equitable Treatment
 - Full Protection & Security
- Enforcement through Investor-State arbitration

International Commercial Arbitration

- Think before you sign!
 - Institutional vs. Ad Hoc
 - Choice of Law/Site of Arbitration
 - Number, qualifications and process for selecting arbitrators
 - Interim measures
- No one size fits all

Brazil: Land of Opportunity



Maysa Abrahão Tavares Verzola

mverzola@tozzinifreire.com.br

How big is Brazil?

Brazil in numbers



- Territorial Area:**
8,515,767 km²
- Coastline:**
7,367 km
- Population:**
194 million
- Form of Government:**
Democratic Republic,
with a presidential system
- Nominal GDP:**
R\$: 4.4 trillion
US\$: 2.25 trillion
- GDP per capita in:**
R\$: 22.4 thousand
US\$: 11.4 thousand
- Risk rating by major agencies:**
Moody's: Baa2
S & P: BBB
Fitch : BBB

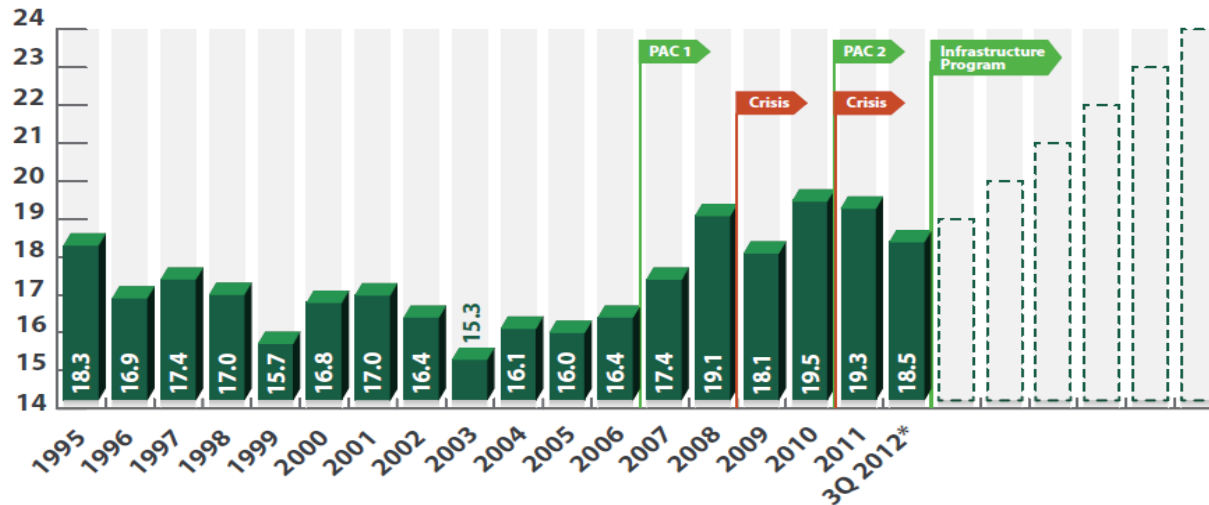
*Source: Brazilian Institute of Geography and Statistics (IBGE) and Brazilian Central Bank
Produced by: Ministry of Finance*

Government Spending

Increased investment as a government priority

One of the main challenges of the Brazilian economy is increasing its investment rate. As of 2008 it has reached new heights, which have fluctuated between 18% and 20% of GDP. The goal of the Government is to increase gross fixed capital formation even further in order to ensure sustainability to the acceleration of economic growth.

Gross Fixed Capital Formation, as % of GDP



* 4-Quarter accumulated up to 3rd quarter of 2012











Source: Brazilian Institute of Geography and Statistics (IBGE)

Produced by: Ministry of Finance

Major Investment Programs

Large investment programs

Several major infrastructure programs were announced over the last two years, with investments adding around US\$ 235 billion over the coming years, not to mention the major urban infrastructure works required for the 2014 World Cup and the 2016 Olympics.

Investment in scheduled concessions (estimate)	US\$ billion
Logistics	121.0
Roads 	21.0
Railways 	45.5
Ports 	27.3
High Speed Train (TAV) 	17.8
Airports 	9.4*
Energy	74.0
Hydro 	39.9
Wind, Biomass and Small Hydro 	19.0
Thermal 	1.4
Distribution 	13.7
Oil & Gas 	40.0
Total	235.0

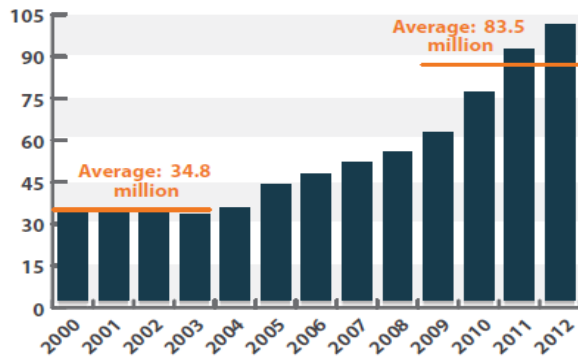
* Includes estimated investment in regional airports
In January 2013, the exchange rate was approximately US\$ 1 = R\$ 2.00

Source: National Logistics & Planning Company (EPL), Energy Research Company (EPE), Ministry of Mining and Energy (MME) and Ministry of Finance
Produced by: Ministry of Finance

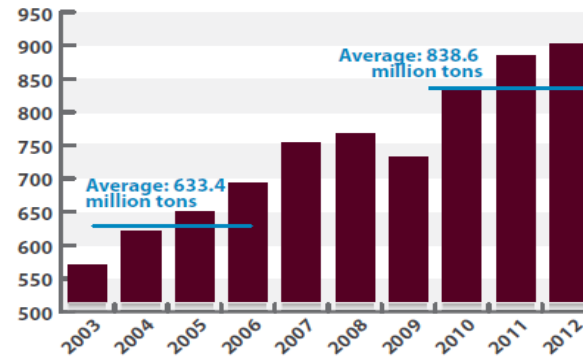
Infrastructure Demand - Transportation

Demand for infrastructure

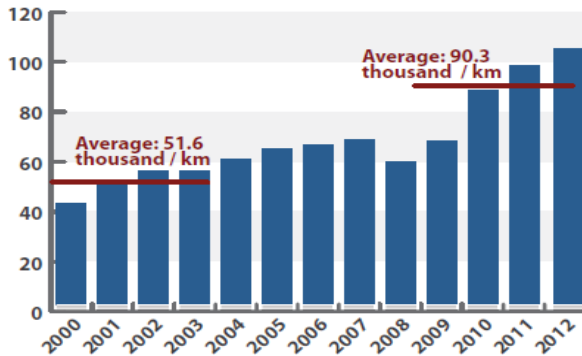
Airline industry, in million passengers



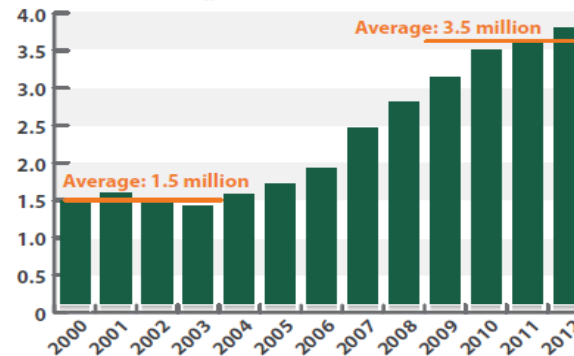
Total cargo handling in ports, in million tons



Thousand vehicles per km on highways under concession



New vehicles (buses, trucks, light commercial vehicles and cars), in million



Source: National Agency for Civil Aviation (ANAC), National Agency for Aquatic Transportation (ANTAQ), Brazilian Association of Highway Concessionaires (ABCR) and Brazilian Association of Automotive Vehicle Manufactures (ANFAVEA)
Produced by: Ministry of Finance

Public Procurements Government Contracts

GOAL: assure compliance of principle of equality + most advantageous tender to Public Administration (price and technique)

General principles:

- equality
- honesty
- abidance by the bid document
- sustainable national development
- objective judgment
- lowest price

Public Procurements in Brazil

- Different types:
 - Basic Legislation – Federal Law n. 8,666/93
 - Special Regimes – Upcoming Sporting Events
 - Permissions and Concessions – Fed. Law n. 8,987/95
 - Public-Private Partnerships – Fed. Law n. 10,079/04
 - Acquisitions by Defense Sector
 - Acquisitions by Petrobras
 - Acquisition of standardized goods

Public Procurements in Brazil

- Pre-Contract Phases:
 - Request for Tenders
 - Challenging tender documents
 - Qualifying for Tenders
 - Challenging tenders

Public Procurements in Brazil

- Post-Contract Disputes:
 - Economic-financial equilibrium
 - Contract penalties
 - Administrative penalties

Brazilian companies have some advantages:

- Minimum national content
- Preference margin of 25% in price

SOLUTION - JVs or consortia with Brazilian companies / local subsidiaries

Export Control Reform (“ECR”)

- How far have we come?
 - Rebuilding the control lists
 - Transition rules
 - “Specially designed”
- Prospects for completion

Rebuilding of the control lists

- Inching towards more positive lists
 - “Final” rules covering 3 categories
 - Aircraft and Related Articles and Gas Turbines Engines and Associated Equipment now final
 - 9 other proposed rules
 - Some difficult ones remain:
 - Cat. XI - Satellites
 - Cat. IX – Training Equipment, Cat. X – Protective Equipment
 - Cat. XII - Sensors

First final rules (“the beast”)

- April 16, 2013, State and Commerce each published first final rules:
 - 3 categories
 - “Transition” rules – 180 days and beyond
 - Common definition of “specially designed”
 - The touchstone for moderating control creep

Transition rules

- New categories/jurisdiction effective 180 days after publication
- Dual licensing
- Grandfathering of licenses
- Future of Commodity Jurisdiction (“CJ”) Determinations
- Application of Strategic Trade Authorization (“STA”) license exception to items moving from the USML to the CCL
 - Limitations and compliance requirements

“Specially designed”

- Previous lack of common terminology or of definitions
 - Led to unpredictability
 - Regulatory creep as even insignificant changes could result in capture under licensing regime – particularly USML

“Specially designed”

- New harmonized definition of “specially designed” seeks to provide objective criteria for control
- Employs a “catch and release” concept
 - “Catches” items that, as a result of development, have properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions described in the relevant USML or ECCN entry
 - “Releases” certain parts, components, accessories, attachments, and software for use from control if certain conditions are met
 - e.g., the item has the same function, performance capabilities, and the same or “equivalent” form and fit as a commodity or software used in or with an item in production and not enumerated the USML

Prospects for completion?

- Near horizon
 - Revised definition “defense services”
 - DDTC guidance on CJ requests
- Far horizon
 - Single List
 - Single Agency

Questions?

Alan Gourley

(202) 624-2561

agourley@crowell.com

Addie Cliffe

(202) 624-2816

acliffe@crowell.com

Maysa Abrahao Tavares Verzola

55 11 5089-5144

mverzola@tozzinifreire.com.br