

Latest developments on restrictions on foreign control of Brazilian rural land

有关对外资收购巴西农村土地的限制的最新发展

Certain restrictions on the acquisition and lease of rural land in Brazil by foreigners have been enacted, which also apply to Brazilian companies controlled by foreign capital. Recent developments in the interpretation of these limitations may alter the way they have been applied so far.

已经出台了对外国人收购和租赁巴西农村土地的部分限制，这些限制同时也适用于由外资控制的巴西公司。最近，有关这些限制的解釋的最新发展，可能改变其（迄今为止）被适用的方式。

Introduction

Ownership of rural land by foreigners has been a major issue in Brazil for decades. According to the Federal Constitution of Brazil, foreigners in Brazil shall be granted the same property rights as Brazilians. On the other hand, the Constitution states that statutory law shall limit the purchase and lease of rural land by foreigners, whether individuals or corporate entities. Furthermore, it establishes that a case-by-case basis method shall be used to determine whether or not further authorisation is required from the Brazilian National Congress.

Over the last thirty years a substantial quantity of legislation has been passed, imposing strict limitations on foreign control of Brazilian rural land. Presently, these limitations on rural land acquisition and leases apply not only to foreign individuals residing in the country and foreign entities authorised to operate in Brazil, but also to legally registered Brazilian entities controlled by foreign capital. Foreign individuals not resident in Brazil, and foreign entities not authorised to operate in Brazil, are not permitted to either acquire or lease rural properties.

This article deals with the current legal situation concerning foreign ownership of rural land in Brazil. It focuses specifically on active restrictions on the acquisition and lease of rural land by foreign entities authorised to operate in Brazil and also by Brazilian entities controlled by foreign capital.

It is important to point out that these limitations are imposed both on direct transfers of assets and indirectly, through other corporate transactions, such as mergers, incorporations or other changes of control that would affect the legal ownership of the rural property in question.

Foreign entities authorised to operate in Brazil

Law 5709/71 establishes that foreign entities authorised to operate in Brazil are only permitted to acquire or lease rural land if their principal objective behind the transaction is to support the implementation of agricultural, cattle-raising, industrial or land settlement projects. In addition, these projects must be linked to the corporate purpose of the foreign company and must be given prior authorisation by: the Brazilian Ministry of Agriculture, Livestock and Supply (*Ministério da Agricultura, Pecuária e Abastecimento* - MAPA); the regional administrative bodies with jurisdiction over the land; and also, in proposed industrial projects, by the Brazilian Ministry of Development, Industry and Foreign Trade (*Ministério do Desenvolvimento, Indústria e Comércio Exterior* - MDIC). Moreover, according to Law 5709/71, each acquisition or lease transaction aimed at implementing such projects is also subject to a prior individual review procedure by the National Institute for Rural Settlement and Agrarian Reform (*Instituto Nacional de Colonização e Reforma Agrária* - INCRA). In practice, this is a complex procedure that ultimately hinges upon the decision of MAPA, which is made by its depending entity INCRA.

Furthermore, transactions relating to rural land of over 100 Undefined Exploration Modules (*Módulos de Exploração Indefinida* - MEI, a unit of measure that varies in size depending on the municipality where the property is located) must also be submitted to the Brazilian National Congress for approval. In addition, the following restrictions are also in place: (i) no more than 25% of the total area of a municipality may be controlled by foreigners; and (ii) no more than 10% of the municipality may be held by foreigners of the same nationality. Notwithstanding, the President of Brazil may, by specific decree, authorize the acquisition or lease of rural land beyond the provisions of Law 5709/71 to develop projects that are prioritized by the Government.

Any transaction that breaches the provisions set out under Law 5709/71 will be rendered void and the respective land registry office shall not proceed with the registration of the relevant agreements and/or deeds.

Brazilian entities controlled by foreign capital

Until 1995, the legislation in force on the acquisition of rural property by foreign entities authorised to operate in Brazil was applied equitably to any such legal entity duly incorporated under Brazilian Law controlled by foreign capital. However, in 1995, the distinction between Brazilian entities based on the foreign or Brazilian origin of the capital was removed from the Brazilian Constitution and therefore the respective limitations previously in force were eliminated.

Since this constitutional distinction ceased to exist, INCRA followed a different interpretation on enforcing the restrictions under Law 5709/71. This approach was reflected in the legal opinions (*pareceres*) GQ 22/1994 and GQ 181/1998 issued by the Federal Attorney-General of Brazil (*Advocacia Geral da União* - AGU), which recognised the legality of any acquisitions of rural land by Brazilian entities controlled by foreign capital. It should be duly noted that the AGU's opinions are legally binding on the land registry offices and on any other administrative bodies required to carry out any procedures in accordance with Law 5709/71.

In the subsequent years this legal approach helped to nurture a liberal environment in which any company incorporated under Brazilian Law controlled by foreign capital was entitled to acquire rural land without these restrictive and mandatory limitations imposed by Law 5709/71.

However, in August 2010, the AGU issued a new binding legal opinion (CGU/AGU 01/2008) which overrode the previous ones. The new legal opinion returns to the old approach by assimilating the statutory restrictions on the acquisition and lease of rural property by foreigners to transactions implemented by Brazilian entities controlled by foreign capital. Although this is a controversial issue, this opinion considers that a company is controlled by the shareholder (or group of shareholders) who: (a) holds rights which assure, on a permanent basis, the majority of votes in the deliberations of the general meetings as well as the power to elect a majority of the directors of the company; and (b) actually makes use of its power to direct the activities of the corporation and to orient the operation of the corporate bodies of the company.

Current situation

Although the Brazilian authorities have not changed their position on the matter, recent information has come to light which indicates a shift in the opinion of certain members of the Brazilian National Congress. The latter are pushing for the removal or easing of restrictions on the acquisition and lease of rural land by foreigners.

Additionally, there is an ongoing legal debate on whether or not these restrictions also applies to other forms of agreements that allow foreigners to explore rural land such as sharecropping, surface rights, etc.

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