



**VIRTUAL TRADE MISSION TO BRAZIL**

**SPONSORED BY**

**U.S. DEPARTMENT OF TRANSPORTATION FEDERAL TRANSIT ADMINISTRATION,  
AMERICAN PUBLIC TRANSPORTATION ASSOCIATION, AND  
U.S. COMMERCIAL SERVICE**

**PARTICIPATING IN GOVERNMENT PROGRAMS IN THE TRANSPORTATION SECTOR**

**- THE BRAZILIAN PERSPECTIVE -**

**1 General Regulatory Framework for Becoming a Transport Company or  
Building or Operating Infrastructure for the Transportation Sector**

*1.1 Domestic transportation and its Permits*

Law No. 10233<sup>1</sup> establishes the Brazilian Agency for National Land Transportation (“ANTT”) and the Agency for National Waterway Transportation. According to its Article 29, companies willing to provide transportation services by road, rail and waterway and engage in the infrastructure industry concerning such services must first be incorporated under Brazilian laws, and, second, be authorized by the respective agency (concession, permit or license).

The following require a concession:

a) Operating the railroads, highways, navigable waterways and organized ports that make up the infrastructure of the National Transportation System, and

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<sup>1</sup> Law No. 10233 of 5 June 2001 is available at [http://www.planalto.gov.br/ccivil\\_03/leis/leis\\_2001/110233.htm](http://www.planalto.gov.br/ccivil_03/leis/leis_2001/110233.htm) >, accessed 2 September 2009.

b) Railroad transportation of passengers and cargo associated with the operation of railroad infrastructure.

The following, among others, require authorization:

- a) Highway transportation of passengers under the charter system;
- b) Construction and operation of terminals for private use;
- c) Waterway transportation;
- d) Unscheduled railroad transportation of passengers, not associated with the operation of infrastructure, and
- e) Construction and operation of a Small-Scale Public Port Facility.

The following require a permit:

- a) Scheduled highway transportation of passengers;
- b) Scheduled railroad transportation of passengers not associated with infrastructure.

Concessions to be granted by the ANTT and ANTAQ to build or operate infrastructure, whether or not preceded by a public work, or for providing railroad transportation services associated with the operation of infrastructure, will be exclusive in regard to their object and will be preceded by a public tender.

The permits to be granted by ANTT and ANTAQ will apply to the provision of scheduled passenger service that does not depend on the operation of the infrastructure used and is not exclusive on the routes on which it is operated. This also must be preceded by a public tender.

### 1.2 *Bidding Process*

It follows the general rules of Law 10233, as well as specific ANTT and ANTAQ regulations and the bid notice/tender documents.

### 1.3 *General Characteristics of Public Concessions*

To serve its purpose in encouraging Brazilian economic development through the construction of infrastructure to transport people and cargo, the Brazilian government has at its disposal legal tools such as the concession of a public-service preceded by the construction of a public work, which is provided for in article 2(III) of Law 8987/95.

The concession of a public-service preceded by the construction of a public work is conceptualized by article 2(III) of Law 8987/95 as the “construction, whether in whole or in part, maintenance, reform, expansion or improvement of any work of public interest, delegated by the government authority granting the concession, through a public tender, done by the competitive method, to a corporate entity or consortium of companies that demonstrates the capacity to carry it out, on its own account and risk, such that the concessionaire’s investments is remunerated and amortized through the operation of the service or of the work for a predetermined length of time.”

Certain characteristics that flow from the model described deserve emphasis. The first is the absolute necessity of a public tender, done by the competitive method, to select the proposal that best serves the public interest. Article 15 of Law 8987/95 lists the criteria that can be used to choose the concessionaire. Among the criteria, these stand out: (i) the lowest tariff; (ii) if the amount of the tariff is established by the call for bids, the best technical proposal, and (iii) a combination of the criteria of lowest tariff and best technical proposal.

The second is the form of remuneration. In the case of highway infrastructure projects, the concessionaire is remunerated through the commercial operation of the highway, or

in other words, by charging tolls for their use. These tolls are calculated based on the concessionaire's costs to build the highway, highway maintenance, the time the concession will last for the amortization of the costs and remuneration of the concessionaire, and the concessionaire's rate of return, among other factors. We also point out the possibility of other, accessory sources of income being provided for in the concession contract as a way to encourage the affordability of the toll charged of users.

Once the selection process is completed, the government and the winning company (or consortium) sign a public contract – an administrative contract – that formalizes the commercial relationship between the government authority and concessionaire, even though the parties are at different legal levels, established by the public interest that legitimizes and provides the basis for all activity of the Brazilian state.

Because they are administrative contracts, concession contracts are governed by public law rules, which guarantee the government entity granting the concession certain prerogatives, such as the unilateral right to amend and rescind the contracts, audit power and the right to impose sanctions, as well as specific prerogatives regarding the object of the contract such as the reversion of the concessionaire's assets to the government authority granting the concession at the end of the concession period, strict liability for the concessionaire in relation to users, taking, intervention, compulsory use of the concessionaire's personnel and *materiel*, and direction and control over the performance of the service.

#### *1.4 General Characteristics of Public-Private Partnership*

##### **Brazilian Federal Law 11079/04**

A Public Private Partnership (PPP) is a concession agreement, in the sponsored or administrative forms. A Sponsored Concession is a concession of public services or public works, where direct payments from the public sector are made, in addition to users' payments. This kind of concession demands prior legislative decree if more than

70% of revenues are paid by the public partner. An Administrative Concession is a contract for the direct or indirect provision of services to the government, even when it involves carrying out construction works or supplying and installing fixed assets.

### Legal Regime

- Mandatory Terms:
  - The term of the contract (between 5 and 35 years, including renewals)
  - Penalties applicable in case of non-compliance with contractual obligations
  - Risk sharing among the parties
  - The forms of remuneration and adjustment of contract amounts
  - The objective criteria for evaluating the performance of the private partner (SLA agreements)
  - Default events by public partner and the method by which guarantees are enforced
  - Performance guarantees by the private partner
  - The sharing of the economic gains resulting from the reduction of credit risk
  - Reversibility of assets
  
- Additional Terms:
  - Events authorizing the transfer of SPC share control to project funders (step-in rights)
  - The possibility of public sector payment being made directly to project funders
  - Compensation of project funders for early termination of the contract
  - The payment provided by the Public Administration shall necessarily be preceded by service delivery (the Public Administration may pay the private sector partner for the portion of the service that is made available)
  
- Special Purpose Company

Before contract award, bidders must set up a special purpose company. SPC transfer of control is contingent on authorization by the public administration. SPC may be a

publicly traded corporation. The public administration cannot control the SPC, except in case of private partner's default.

### Characteristics

- Guarantees:
  - Attachment of governmental revenues
  - Creation or use of special funds established in law
  - Surety bonds from insurance companies not controlled by the administration
  - International guarantee agencies or financial institutions not controlled by the government
  - Guarantees provided by a guarantee fund or by a state-owned enterprise set up for this purpose
  - Other means permitted by law
- PPP may not be signed:
  - If the contract value is less than R\$20 million
  - If the term for the provision of services is less than 5 (five) years
  - If the sole scope of the contract is the supply of labor, the supply and installation of equipment or the execution of public works

## **2 Exporting to Brazil**

### *2.1 Possibility of temporary tariff reduction on the basis of CAMEX Resolution No. 35 of 22 of November 2006*

According to Article 1 of CAMEX Resolution No. 35,<sup>2</sup> imports of capital goods and IT goods (*bens de informática e telecomunicações*, including their parts and components) that are not produced in Brazil may be subject to temporary import tax reduction. These goods

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<sup>2</sup> CAMEX Resolution No. 35 of 22 November 2006 is available at <[http://desenvolvimento.gov.br/arquivos/dwnl\\_1196254408.pdf](http://desenvolvimento.gov.br/arquivos/dwnl_1196254408.pdf)>, accessed 2 September 2009.

are referred to as “BK” or “BIT” in the document which provides for the Common External Tariff (“TEC”) of Mercosur.<sup>3</sup> According to Article 3(1) of Resolution No. 35, only Brazilian importing companies or associations are entitled to apply for import tax reductions. Exporters from the US could informally suggest and/or assist Brazilian importers in the process of applying for such benefit, but could not apply for the benefit themselves. In the event that an US exporter is also commercially established in Brazil, it would then qualify as a Brazilian company and could be entitled to apply for the benefit on its own name.

The preliminary phase and the decision phase of the proceedings before the Secretariat of Development of Production of the Ministry of Development, Industry and External Trade would take approximately forty days, although this may take longer in the event that the Secretariat requires further documents from the applicant.

To the extent that transportation goods are classified as BK or BIT goods in the TEC, they are potentially entitled to the benefit referred to above. Moreover, transportation-related BK or BIT goods may already be subject to a tariff reduction if they are already included in the Temporary Tariff Reduction List.<sup>4</sup> Examples of transportation-related good listed are integrated systems of production of electronic controls of anti-lock brakes. It is also probable that the Brazilian government might be interested in granting such tariff reductions in the near future to modernise transportation of persons and goods for the World Cup in 2014.

## 2.2 *Mercosur*

Should US investors involved in the transportation industry have companies incorporated in Mercosur and should such companies produce transportation-related goods originating from another Mercosur country, their goods may be exempted from

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<sup>3</sup> The BK and BIT goods’ list is available at <<http://www2.desenvolvimento.gov.br/arquivo/secex/tec/tecunivbkebit.zip>>, accessed 2 September 2009.

<sup>4</sup> This list is available at <<http://www2.desenvolvimento.gov.br/arquivo/secex/tec/Extarifarios.zip>>, accessed 2 September 2009.

certain import duties. This is because, as Mercosur is a free trade agreement, most products traded between another Mercosur country (namely Argentina, Paraguay and Uruguay) and Brazil do not pay import duties.

### 2.3 *Preferential treatment to transit-related goods originating in ALADI<sup>5</sup> countries*

Certain transportation-related goods are subject to preferential treatment in light of preferential trade agreements concluded between Brazil and ALADI states. For instance, imports of passenger cars for trains (wagons) are normally subject to a 14% tariff. Should US investors in the market for transportation goods have companies incorporated in Bolivia, Chile, Colombia, Ecuador, Peru and Venezuela, their goods may be subject to a tariff reduction ranging between 70% to 100% of the 14% tariff.

### 2.4 *Customs restrictions*

#### 2.4.1 Exemption from prior authorization

Generally, importation of capital goods and IT goods are exempted from prior authorization by Brazilian authorities. However, imports of certain transportation-related goods, such as tractors, vehicles for more than ten passengers and towing equipment, are subject to prior authorization by the IBAMA,<sup>6</sup> the Department of External Trade (“DECEX”) and others.<sup>7</sup> Therefore, it is crucial to examine, on a case-by-case basis, whether requirements of this type apply to any given product.

#### 2.4.2 Used goods

As a general rule, imports of used goods are not allowed into Brazil. There are, however, various exceptions to the rule as far as capital goods are concerned. For instance, the

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<sup>5</sup> The Contracting Parties of the Latin American Association of Integration (“ALADI”) are the Mercosur Member States, Bolivia, Chile, Colombia, Cuba, Ecuador, Mexico and Peru.

<sup>6</sup> Brazilian Institute for the Environment and Renewable Natural Resources.

<sup>7</sup> See the list of goods which are subject to prior authorisation is available at <[http://www.mdic.gov.br/arquivos/dwnl\\_1239892716.pdf](http://www.mdic.gov.br/arquivos/dwnl_1239892716.pdf)>, accessed 2 September 2009.



Secretariat of External Trade can authorize imports of used machines, equipment, devices, instruments, tools, moulds, and containers, if they satisfy the pre-requisites set out under Articles 22 and 23 of Ordinance No. 8 (as amended).<sup>8</sup> In particular, the pre-requisite spelt out in Article 22(a) requires that such products not be produced and have no substitutes in Brazil. Used products listed under Article 25, however, are not subject to Article 22(a). Under Article 25(f), the Secretariat of External Trade can allow imports of used production units and production lines, to the extent that they contribute to the Brazilian economy in terms of quality and cost-efficiency, and create new jobs.

#### 2.4.3 Customs' procedures

Brazilian customs authorities may classify goods under different channels as a matter of customs control. Allocation of imports to the “green” channel means that customs clearance shall be virtually automatic, while allocation to the “yellow” channel results in a deeper scrutiny of import documents. In turn, allocation to the “red” channel also involves the physical examination of goods. Finally, allocation to the “gray” channel means that special (and more stringent) customs controls apply.

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FABIO FERREIRA KUJAWSKI ([kujawski@bkgb.com.br](mailto:kujawski@bkgb.com.br))

LUIZ EDUARDO SALLES ([rsalles@bkgb.com.br](mailto:rsalles@bkgb.com.br))

MAURICIO SILVA ([msilva@bkgb.com.br](mailto:msilva@bkgb.com.br))

ANA GERDAU BORJA ([Borja@bkgb.com.br](mailto:Borja@bkgb.com.br))

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<sup>8</sup> Ordinance No. 8 of 13 May 1991 is available at [http://www.desenvolvimento.gov.br/arquivos/dwnl\\_1197490614.pdf](http://www.desenvolvimento.gov.br/arquivos/dwnl_1197490614.pdf), accessed 2 September 2009.