

BRAZIL

I. INTRODUCTION

The Brazilian legal system is based on Civil Law tradition. The Federal Constitution is the supreme rule of the country and is characterized by its mostly rigid written form. The Constitution organizes the country as a Federative Republic.

The judicial powers are vested upon the Federal Supreme Court, the Superior Court of Justice, the Regional Federal Courts and Federal Judges. There are also specialized courts to deal with electoral, labor and military disputes. The Superior Court of Justice is responsible for upholding federal legislation and treaties. The five Regional Federal Courts have constitutional jurisdiction on cases involving appeals towards the decision ruled by federal judges and are also responsible for cases of national interest and crimes foreseen in international pacts, among other duties. The jurisdiction of the Federal Judges include: being responsible for hearing most disputes in which one of the parties is the Union (State); ruling on lawsuits between a foreign state or international organization and a municipality or a person residing in Brazil; and judging cases based on treaties or international agreements of the Union against a foreign state or international body.

Once the sovereignty, order public and the essential principles of Brazil law are not violated, Brazil can provide mutual legal assistance either based on a treaty (including conventions) or on a non-treaty basis. Brazil allows, on the basis of reciprocity, the execution of incoming requests for legal assistance even on the absence of bilateral or multilateral agreements in force.

As a general rule, the necessary information required for mutual legal assistance is:

- legal basis of the request (if there is a treaty, please specify it or mention 'letter rogatory')
- requesting authority
- summary of the proceeding in the requesting country
- information and identification of the investigated persons, if applicable
- transcription of the legal provisions (articles of the penal and criminal procedure code)
- facts
- description of the requested measures, and
- any special procedure to be observed.

(i) Requests Made Under a Treaty/Convention

In case there is a treaty in place, the competent authority of the requesting country shall prepare a formal written request containing the required information described above and transmit it directly to the Brazilian Central Authority appointed in such treaty.

(ii) Requests Made in the Absence of a Treaty/Convention

In the absence of a treaty/convention, the competent authority of the requesting country shall prepare a formal written request and transmit it via diplomatic channels to the Brazilian authorities. The Brazilian Ministry of Foreign Affairs will transmit such request to the Brazilian Central Authority.

(iii) Dual Criminality is Generally Not Required

In the field of mutual legal assistance, as a general rule, Brazil does not require dual criminality. Assistance shall be provided without regard to whether the conduct that is the subject of the request would be punishable under the legislation of both countries. However, the Brazilian law does require dual criminality in cases of extradition. It is important to highlight that, according to Brazil's case law, dual criminality does not mean the equivalence of the elements defining the criminal offence in the requesting state and in the requested state. It is considered sufficient if the investigated conduct can be sanctioned with a criminal penalty or a regulatory fine.

II. CENTRAL AUTHORITY – CONTACT INFORMATION

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Ministry of Justice and Public Security
National Secretariat of Justice
Department of Assets Recovery and International Legal Assistance
General Coordination for International Legal Assistance in Criminal Matters
Esplanada dos Ministérios, Bloco T, Anexo II, 4º andar, 70.064-900 – Brasília/DF, Brazil
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III. STEPS TO FOLLOW WHEN SEEKING MUTUAL LEGAL ASSISTANCE FROM BRAZIL

Brazil has not adopted a rigid form that must be followed by the competent foreign authorities who submit requests for mutual legal assistance. However, internationally recognized standards for this type of request must be observed.

In general, when seeking mutual legal assistance from Brazil, the steps outlined below should be followed¹:

Step 1: CONSULT WITH THE CENTRAL AUTHORITY BEFORE SUBMITTING THE REQUEST

It is recommended that the requesting authority in your country contact the Central Authority in advance of making a request for mutual legal assistance, particularly in the most serious cases, to ensure the assistance sought is available under the Brazilian laws, and the request will meet national legal requirements.

After that, the request may be sent to the Central Authority. It is up to the Department of Assets Recovery and International Legal Cooperation (DRCI), of the Ministry of Justice, among other tasks, to coordinate the execution of the international legal

¹ Detailed information on Mutual Legal Assistance in Criminal Matters with Brazil can be found in the 2019 Manual on Mutual Legal Assistance in Criminal Matters and Asset Recovery: <https://www.gov.br/mj/pt-br/assuntos/sua-protacao/lavagem-de-dinheiro/drci/publicacoes/manuais/cooperacao-juridica-internacional-em-materia-penal/manual-penal-online-final-2.pdf>

cooperation and instruct, opine, and coordinate the execution of both active and passive international legal cooperation, both in criminal and civil matters.

Requests from foreign jurisdictions may be sent to the DRCI. After the formal analysis of the required information contained in such requests, which will vary depending on the requested measure, DRCI will submit such a document to the Superior Court of Justice (STJ), for the granting of the exequatur by a decision of the President of such Court, i.e. the authorization that allows for the enforcement in Brazil of a foreign judicial proceeding. The exequatur does not assess the merit of the foreign request, it only verifies if the procedure contained in the request does not offend Brazilian constitutional principles.

Thus, the passive requests for mutual legal assistance in criminal matters that fall under the competence of the Brazilian Federal Justice and do not require advisory opinion from the STJ are forwarded by DRCI to the Center for International Legal Cooperation (CCJI) of the Attorney General's Office. The CCJI then distributes the requests to the Federal Prosecution Service's Offices designated to judicially promote the acts needed for cooperation.

Depending on its nature, the request shall alternatively or concomitantly be transmitted by DRCI to the Federal Police Department for execution, owing to the likely need to take measures related to police work. Finally, the requests for assistance for acts that, under the Brazilian legislation, do not need intervention of the Judiciary Branch may be transmitted directly by the Central Authority to the competent administrative authority for execution.

Step 2: ENSURE THE REQUEST IS PROPORTIONATE TO THE ALLEGED CRIME

Please ensure that the request for assistance is proportionate to the level of crime being investigated. Given the limited resources available to law enforcement and prosecuting authorities in Brazil, a requesting state is urged to consider the need for the evidence in question. If significant resources will be required to execute a request and the offence being investigated is very minor, the request may be given low priority.

Step 3: INDICATE THE MECHANISM USED TO SEEK ASSISTANCE

In drafting your request, begin by clearly identifying the treaty, convention (UNCAC, UNTOC, OECD Anti-Bribery Convention, other) or other avenue of cooperation being referred to in seeking the assistance from Brazil. If no treaty is in force, assistance may be granted on the basis of reciprocity.

Step 4: IDENTIFY THE AUTHORITY CONDUCTING THE INVESTIGATION / PROSECUTION

Clearly indicate which authority in your country is conducting the investigation and/or prosecution.

Step 5: SUMMARIZE THE CASE

Provide a detailed outline of the case under investigation or prosecution, including a summary of the evidence that supports the investigation/prosecution. This outline should also include the following:

- a. If **witness statement/testimony** is being sought, please include all available identification information, including complete name, parent's name and identification document number or passport number, complete address and the questions to be posed to such person. The interrogatory is conducted by the Brazilian authority and the participation of foreign authorities is normally allowed in the condition of observers. In addition, it is very important to indicate the relation of such person with the investigated crime and why such testimony will be useful in the foreign procedure.
- b. If **documentary evidence** is needed, please detail in a clean and succinct way the required documents and required measures to obtain such documents.
- c. If the **execution of a search warrant** is sought, please provide copy of the judicial decision or ancillary documentation ordering such search warrant in the requesting country, detailed information regarding the assets, documents or values involved, location of the assets, documents and values and explanation about the necessity to proceed with this urgency measure.
- d. If **seizure/confiscation of criminal proceeds** is requested, please provide copy of the confiscation order or similar documentation ordering such seizure/confiscation in the requesting country, detailed information regarding the criminal proceeds, as well as location and any helpful information regarding such criminal proceeds.

Step 6: SET OUT THE APPLICABLE LEGAL PROVISIONS

Identify and set out the verbatim text of all relevant legal provisions under investigation and/or prosecution, including applicable penalties.

Step 7: IDENTIFY THE ASSISTANCE BEING SOUGHT

Brazil provides mutual legal assistance for the purpose of proceedings related to criminal matters, including measures taken in connection with the investigation or prosecution of criminal offenses, and provisional measures referring to proceeds or instrumentalities of crime, such as the restraint, seizure, or confiscation, and the disposal and return of assets. As such, it is necessary to outline, in specific terms, exactly what you are seeking to obtain from Brazil, and any particular requirements that must be met (for example, certification/authentication needs). In the matter of certification and authentication needs, Brazil usually assumes that any documents transmitted by means of the Central Authorities shall not require any form of certification or authentication.

In addition, considering the nature of the assistance sought, the following information must be included:

a. Witness statements/testimony:

- If a person from whom evidence is requested in the Brazilian territory may be compelled to appear in order to testify or produce documents, records, or articles of evidence by summons or such other method as may be permitted under the Brazilian law.
- If the person summoned asserts a claim of immunity, incapacity or privilege under the laws of the requesting country, if the evidence shall nonetheless be taken and the claim be made known to the requesting country for resolution by the authorities of that Party.
- If the Brazilian Central Authority shall furnish information in advance about the date and place of the taking of the evidence.
- If Brazil may permit the presence of such persons as specified in the request during the execution of the request, and may, pursuant to its legislation, allow such persons to present questions.

b. Documentary evidence: If banking documentation is requested, we suggest the indication of the name and address of the bank, account number, account holder name, time period for the production of the bank statements, types of banking documents requested (account opening documents, statements, wires, loan agreements, among others), relation of the bank account with the crimes committed. According to Brazilian legislation, to obtain the lifting of the banking secrecy, an internal judicial decision must be rendered by the competent Brazilian judicial authorities, as a guarantee of the fundamental rights contained in our Federal Constitution.

c. Search and seizure:

- The Brazilian Code of Criminal Procedure foresees the seizure of assets held by the accused person. The assets originating from crime are kept unavailable. Generally, these measures are not necessarily linked to the assets which were object of a crime. Brazil counts, for example, with the seizure, arrest, and real estate legal mortgage. These measures guarantee remedies for the affected party and the payment of legal and general costs.
- The seizure can be ordered if there is a clue indicating that such assets were originated from crime. All the assets which derive from criminal activities can be seized. The seizure can be ordered during the police investigation or during the criminal procedure. In case the sentence acquits the defendant, the seizure is released. If the sentence condemns the defendant, the judge can determine the evaluation of the assets and the disposal by public auction.
- The arrest is a wider measure and can be ordered considering all the property of the defendant to secure payment of damages for victims and/or legal costs. Also, a real estate legal mortgage can be ordered in relation to real estate belonging to the accused person.

- These measures do not have any reserve regarding the type of crime. They are applied to all types of offenses foresaw in the Penal Code.

d. Enforcing an order to seize criminal proceeds: As a general rule, Brazil does not enforce foreign forfeiture judgements. An internal decision must be rendered by a competent judge to seize and forfeit assets, as a guarantee to fundamental rights contained in our Federal Constitution.

e. Enforcing order to confiscate criminal proceeds: It is possible to provide assistance in proceedings involving the identification, tracing, provisional measures, such as restraint, seizure and confiscation of the proceeds and instrumentalities of crime in accordance with the domestic law.

If the Brazilian Central Authority becomes aware that proceeds or instrumentalities of crime are located in the territory of another country and may be liable to provisional measures, such as restraint, seizure or confiscation under the laws of that country, it may so inform the authorities of the other country.

Step 8: HIGHLIGHT ANY SPECIFIC CONFIDENTIALITY REQUIREMENTS

Brazil shall, upon request, keep confidential any information which might indicate that a request has been made or responded to. In the same way, the requesting country shall request prior consent from Brazil to use or disclose information or evidence obtained by means of assistance for purposes other than those stated in the request.

Step 9: IDENTIFY ANY URGENCY IN THE EXECUTION OF THE REQUEST

The Brazilian Central Authority shall promptly execute the request itself or, when appropriate, shall transmit it to the officials having authority to do so. The competent officials shall do everything in their power to execute the request.

Upon request, the competent authority of Brazil shall implement provisional measures to preserve an existing situation, to safeguard threatened legal interests or to preserve evidence.

Step 10: PROVIDE A LIST OF RELEVANT CONTACT POINTS IN YOUR COUNTRY

Include a list of the names and contact numbers for key law enforcement/prosecution authorities familiar with the case. You should include the name and, where applicable, the contact information of your Central Authority, in the event the Brazilian Central Authority wishes to contact you for the purpose of clarification or obtaining additional information.

Step 11: TRANSLATE THE REQUEST

Requests shall be submitted in the language of the requesting country, accompanied by a translation into Portuguese.

Step 12: LIMITATIONS ON USE OF EVIDENCE PROVIDED

Note that any evidence which Brazil provides in response to a mutual legal assistance request may only be used for the specific purpose stated in the request. If further use of the evidence is required, your country must first seek Brazil's consent to the further use.

IV. OTHER USEFUL REFERENCES

For additional guidance on how to elaborate requests for Mutual Legal Assistance in criminal matters, please refer to the following document:

https://www.gov.br/mj/pt-br/assuntos/sua-protecao/cooperacao-internacional/formula_rio_modelo__ingla_s_passivo_.pdf