

LEGAL CERTAINTY



National Confederation of Industry
Brazil
CNI. THE STRENGTH OF THE BRAZILIAN INDUSTRY

LEGAL CERTAINTY AND GOVERNANCE: THE PROBLEM AND THE AGENDA

- *Legal uncertainty increases costs, raises uncertainties and stalls investment. Companies incur more litigation costs and are forced to make provisions to defend themselves against the lack of clear standards.*
- *Uncertainty stems from actions of the executive, legislative and judicial branches and control agencies. It is a product of the process of drafting, enforcing, controlling and interpreting laws. The bad relationship among the branches have increased legal uncertainty and have become a serious governance problem.*

Companies are becoming increasingly aware of the importance and deterioration of both legal certainty and the quality of governance in Brazil. Legal uncertainty affects certainty about the consolidated past, confidence in the present and legitimate expectations about the future, and, more seriously, it destroys values that are indispensable to the existence and stability of society.

Actions to reduce legal uncertainty should stem from recognizing the costs it represents for Brazil and for society. This increasing uncertainty ultimately leads the State itself and companies to a decision-making paralysis.

In playing the classical roles of its three branches with increasing participation of control agencies – in particular of the Public Prosecutor's Office and of Audit Courts, notably at federal level – the State should be the primary source of legal certainty. This is due to its responsibility for drafting, amending, implementing, controlling, interpreting, and enforcing laws and for settling, prescriptive and swiftly, conflicts between public and private persons.

Factors leading to uncertainty are diverse, intertwined and cumulative. Legal uncertainty is associated with laws that do not have the desired clarity and sometimes lack constitutional basis; amendments to laws without both a transition regime and an assessment of their economic impact; excessive laws, provisional executive orders and regulations; overlapping standards; delays in court decisions; constant variations in interpretations.

Special mention should also be made of a growing imbalance in implementing the principle of independence and harmony among branches and of the disharmony in governance that can also be felt in the relationship between control agencies.

The omnipresence of the State, its political and administrative inefficiency and its constant fiscal deficit also contribute to uncertainty. **Society can also contribute to legal uncertainty** when it spontaneously refrains from acting within the dictates of the law.

LEGAL UNCERTAINTY IN BRAZIL



Source: CNI.

Main recommendations

1 Clear and widely disseminated standards should be ensured, with emphasis on raising the quality of legislation; improving legislative procedures; increasing transparency and reducing uncertainties in issuing standards; improving consultation mechanisms; reducing discretionary actions that may increase the risk of corruption; issuing court decisions based on clear grounds and on established law; improving the participation in lawsuits (e.g. *amici curiae*); and preventing the inspection of control agencies from being a source of instability itself.

2 The stability of law should be strengthened through improved legislative procedures; respect for established procedures and rites for drafting laws; inclusion of formal impact assessment stages in legislative production; avoid discontinuing policies and services; establishment of deadlines for executive's action, inclusion of formal steps for assessing impacts on standards; minimization of

variation of judicial interpretations; consideration of the economic repercussion of judicial decisions and elimination of control overlapping, varied accountability and different guiding approaches.

3 Varying interpretations should be minimized by producing clear and stable standards; refraining from postponing compliance with court decisions; drafting standards based on clear criteria and within the limits of the law; ensuring respect for jurisprudence and legal culture; acting judiciously with restraint in legal matters of high technical profile and/or involving political choices; respecting the past (transition rules) when there is a change in jurisprudence; and avoiding interference by control agencies and interference in public policies.

4 The actions of the Branches should be restricted to their constitutional competencies.

The full version of the document can be accessed through the QR code on the side or at: <http://www.cni.com.br/eleicoes2018/downloads/> This summary is part of the series Proposals of Industry for the 2018 Elections comprising 43 documents. The series, which is based on the *2018-2022 Strategy Map for Industry* is a CNI contribution to the new federal administration and presents analyses and proposals of priorities to increase Brazil's competitiveness. Any part of this publication may be copied, provided that the source is acknowledged. Brasília-DF, July 2018.

