

Country Review Report of Brazil

Review by Haiti and Mexico of the implementation by Brazil of articles 15 – 42 of Chapter III. “Criminalization and law enforcement” and articles 44 – 50 of Chapter IV. “International cooperation” of the United Nations Convention against Corruption for the review cycle 2010 - 2015

I. Introduction

The Conference of the States Parties to the United Nations Convention against Corruption was established pursuant to article 63 of the Convention to, inter alia, promote and review the implementation of the Convention.

In accordance with article 63, paragraph 7, of the Convention, the Conference established at its third session, held in Doha from 9 to 13 November 2009, the Mechanism for the Review of Implementation of the Convention. The Mechanism was established also pursuant to article 4, paragraph 1, of the Convention, which states that States parties shall carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and of non-intervention in the domestic affairs of other States.

The Review Mechanism is an intergovernmental process whose overall goal is to assist States parties in implementing the Convention.

The review process is based on the terms of reference of the Review Mechanism.

II. Process

The following review of the implementation by Brazil of the Convention is based on the completed response to the comprehensive self-assessment checklist received from Brazil, and any supplementary information provided in accordance with paragraph 27 of the terms of reference of the Review Mechanism and the outcome of the constructive dialogue between the governmental experts from Haiti and Mexico, by means of telephone conferences, e-mail exchanges and a country visit in accordance with the terms of reference and involving Roberta Solis Ribeiro, Vania Lucia Ribeiro Vieira from Brazil, Amos Durosier, Joseph-Jean Figaro, Ben O'ni Lafortune, Yvlore Pigeot, Marie Antoinette Cayemitte, Mimose Janvier Alexandre, Jean Pierre Salnave, George Henry Pasca and Jean Robert Constant from Haiti and Oswaldo Guillermo Parra Lira, Laura Angelina Borbolla Moreno, José Abel Flores Ramírez, Erasmo Alonso Lara Cabrera, Guillermo Alejandro Hernández Salmerón, and Enrique Camargo and Alfonso Pérez Daza from Mexico.

A country visit, agreed to by Brazil, was conducted from 2 to 4 August 2011, although only experts from Mexico participated.

III. Executive summary

1. Introduction: Overview of the legal and institutional framework of Brazil in the context of implementation of the United Nations Convention against Corruption

The United Nations Convention against Corruption was signed by Brazil on 9 December 2003. The instrument of ratification was enacted through Decree No. 5687 of January 31, 2006. Accordingly, the Convention has become an integral part of domestic law with the status of ordinary law. The Brazilian legal system is based on the civil law tradition; criminal offences of corruption are federal law.

The Brazilian judicial system follows the Roman-Germanic civil law tradition and is characterized by inquisitorial features of this tradition.

The main anti-corruption bodies in Brazil are: the Office of the Comptroller General (Portuguese: Controladoria-Geral da União, CGU); the National Court of Accounts (TCU); the Federal Prosecution Service, the Federal Police Department and the Office of the Attorney General of the Union (Portuguese: Advocacia-Geral da União, AGU).

The National Strategy Against Corruption and Money Laundering (ENCCLA), is the primary policy-co-ordination mechanism in Brazil with respect to money-laundering, financing of terrorism and corruption.

Several measures have been taken to advance the legal and institutional framework against corruption in Brazil since the Convention entered into force in 2006. A general finding of the review process is that Brazil has only fragmented statistical data on how anti-corruption aspects are dealt with within the context of the domestic criminal justice system.

2. Chapter III: Criminalization and law enforcement

2.1. Observations on the implementation of the articles under review

Bribery and trading in influence (arts. 15, 16, 18 and 21)

Article 333 of the Penal Code (PC) establishes as a criminal offence the active bribery of public officials. By virtue of article 29 PC, an individual assisting in the commission of an offence, such as an intermediary in bribery cases, is also subject to criminal liability. Passive bribery of domestic public officials is criminalized through article 317 PC.

Article 327 PC provides for a definition of “public official”. This definition had been interpreted broadly to cover anyone who exercises a public function.

Article 337-B criminalizes active bribery committed in international business transactions. The definition of “foreign

public official” in article 337-D PC was based on the definition of “public official” of article 327 PC and covers the requirements of article 2(b) of the Convention.

The passive bribery of foreign public officials and officials of public international organizations has not been criminalized.

Trading in influence in the domestic sphere is criminalized through article 332 of the Penal Code. Article 337-C PC establishes the offence of “traffic of influence in an international business transaction”. These provisions cover only the passive form of the offence and the last one is only applicable in international business transactions.

Bribery in the private sector has not been criminalized through a specific provision in Brazil. Instead, there are different provisions covering certain elements of the offence such as: article 195 of Law No. 9279/1996; articles 175 and 177 PC; chapter II of Law No. 8137/1990; and Law No. 7492/1986.

Money-laundering, concealment (arts. 23 and 24)

Brazil has criminalized money-laundering through Law No. 9613, of March 3, 1998, as amended by Law No. 12683 of 2012 enacted on July 9, 2012 (article 1).

The Brazilian legislation used to regulate predicate offences using a list approach. However, since the enactment of Law No. 12.683, any crime may be considered a predicate offence for money-laundering (all-crime approach). The Brazilian law also punishes the attempt to commit money-laundering and the “concerted action” or co-delinquency for the same purpose.

The money-laundering offence can be applied in a situation where the predicate offence occurs abroad. The extraterritoriality of the predicate offence under the newly enacted “all crimes approach” is not precluded. Brazil also confirmed that there is no double criminality requirement for the predicate offence and that it does not need to establish jurisdiction over the predicate offence to exercise its competence over the money-laundering offence.

The review team took into account the statistics provided on money-laundering investigations, Suspicious Activity Reports (SARs) and Financial Intelligence Reports (FIRs). However, those statistics did not include information on final sentences and convictions. Therefore they were unable to assess the level of enforcement of the money-laundering legislation in Brazil.

The offence of concealment, as described in article 24 of the Convention, falls within the scope of article 180 PC, which includes all elements required by the Convention.

Embezzlement, abuse of functions and illicit enrichment (arts. 17, 19, 20 and 22)

Article 312 PC criminalizes embezzlement in the public sector. Misappropriation is criminalized through article 315 PC.

The abuse of functions is criminalized in articles 319, 322 and 350 PC. Law No. 4.898/65 governs the right to representation and the administrative, civil and criminal liability process in cases where abuse of functions is committed.

Brazil has an illicit enrichment offence since 2002. It was established through article 9(VII) of the Law of Administrative Improbity. However, the related sanctions are not criminal in nature. Brazil is currently considering adding penal sanctions to the ones already existing.

Brazilian public officials have to submit annual asset declarations. In the event of irregularities, the Office of the Comptroller General conducts the appropriate administrative proceedings.

The Brazilian legislation establishes several offences linked to embezzlement of funds in the private sector (articles 171-179 PC). More specifically, article 177 PC on fraud and abuse when incorporating and managing a company, partially criminalizes the conduct described in article 22 of the Convention.

Obstruction of justice (art. 25)

Article 25(a) of the Convention is implemented through two basic provisions: article 343 PC (“false testimony or auditing”), and article 344 PC (“coercion in the course of proceedings”).

Article 25(b) of the UNCAC is implemented through the above provision, since Brazil does not differentiate between a victim who is an ordinary person, a justice official or law enforcement official.

Liability of legal persons (art. 26)

The attribution of criminal liability to legal persons is only possible in limited circumstances defined in the Constitution. There are different laws regulating the civil and administrative liability of a legal person (Laws Nos. 8884/94; 8666/93; 8429/92).

Law No. 12.846, enacted in August 2013 (“Corporate Liability Law”), sets forth civil and administrative liability of legal persons for performing acts against the national or foreign public administration.

Money-laundering is not included in the list of offences for which a legal person can be held liable. In view of the limited statistics provided, the inability to assess the level of enforcement in money-laundering cases was noted by the reviewing experts.

Law No. 12.846 of 2013 provides for administrative and civil sanctions against legal persons

In December 2007, the Office of the Comptroller General (CGU) created the Commission of Administrative Procedures against Suppliers (CPAF) in an effort to enhance the efficiency of provisions.

Participation and attempt (art. 27)

Article 29 PC is applicable to all forms of participation required by the Convention. In addition, article 14 PC covers the attempt to commit a criminal offence.

The Brazilian PC does not include a specific description for preparation with a view to committing an offence. However, in certain cases the preparation of a criminal offence may be covered by article 286 PC or through Art. 1 paragraph 1 Law No. 12850.

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (arts. 30 and 37)

In general, Brazil's legislation provides for proportionate, dissuasive and effective sanctions for corruption offences. Bill No. 3760/2004 qualified as "heinous crimes" those crimes committed against the Public Administration. The legal consequence is the imposition of a stricter regime for the serving of sentences and the non-use of provisions on bail while in custody.

According to article 86, paragraphs 3 and 4 of the Constitution, the President of the Republic enjoys criminal immunity for acts outside his functions and therefore criminal proceedings cannot be brought against him/her. Members of government, and high level public officials enjoy jurisdictional privileges according to the Federal Constitution and the Criminal Procedural Code. For those categories of public officials, there is a special system of competence, which is known as "privileged forum according to public functions". No more information was provided by the Brazilian authorities to judge how the immunity of the President or the jurisdictional privileges could be lifted and how the balance between those immunities and the effectiveness of investigation, and prosecution of corruption offences is achieved.

In general, the rule of mandatory prosecution is the guiding principle. Nevertheless, Brazil has begun relaxing the rule of compulsory prosecution by introducing reforms inspired by plea-bargaining. Plea-bargaining is provided for in Law No. 12850 of 2013; Law No. 9099/1995; and Law No. 9613/1998 (article 13).

The need to ensure the presence of the defendant in criminal proceedings is dealt with in articles 311, 312, as well as 282,

paragraph 4 of the Criminal Procedure Code (CPC) and on pre-trial detention. Bill No. 3760/2004 foresees the exclusion of bail for some corruption offences (arts. 313, 317, 319, 325 and 333 PC).

The Brazilian legislation provides for early release or parole (*livramento condicional*) of inmates who can show that they satisfy a number of requirements (article 131 of Lei de Execução Penal; article 83 PC (listing requirements)).

According to article 20 of Law No. 8429/92 on Administrative Improbity, the public official, when accused of an offence, can be removed, if it is necessary for the prosecutorial proceedings.

The Brazilian PC states in its article 92 that the loss of the public function or position or elective office can also be a legal consequence of a conviction.

Based on Decree No. 5.480/2005, the organization of the disciplinary activities was established as a system, in which the Office of the Comptroller General (CGU) is the core body. The disciplinary actions are taken in parallel with civil and/or criminal actions.

A Disciplinary Coordination Commission, collegial body with advisory functions, aims to promote integration and uniform understanding of agencies and units that integrate the Disciplinary System.

Under the above-mentioned plea-bargaining agreements, a judge may grant judicial pardon (article 4 of Law No. 12850/2013) or reduce the sentence or replace it with the penalty of restriction of rights of those who have cooperated with the investigation and prosecution authorities. Brazil confirmed the ability of its authorities to protect collaborators of justice also through bilateral or multilateral treaties, as well as on the basis of reciprocity.

Protection of witnesses and reporting persons (arts. 32 and 33)

Witness protection is coordinated by the Federal Government and implemented at state level. Law No. 9807/1999 provides for the protection of witnesses (and victims insofar as they are witnesses) who contribute to criminal investigations through specially organized programmes.

The National Victims and Threatened Witnesses' Assistance System was established by Decree No. 3518/00, and it is managed by the Human Rights Secretariat.

The victims and threatened witnesses' protection programmes operate through a structure envisaged by Law No. 9807/1999. Brazil has measures to protect whistleblowers in corruption cases. There are several provisions concerning whistleblowers such as article 55 of Law No. 8443 of 16 July 1992 and Law No. 12527/2011 on Access to Information which protects officials from criminal, civil and administrative liability when they report

“irregularities” in accordance with their reporting obligations. Normative Ruling N° 01 CRG/OGU, 24th JUNE 2014 signed by the National Disciplinary Board and the Federal Ombudsman Unit, establishes rules for the reception and handling of anonymous complaints and also establishes the guidelines for whistleblower’s identity protection. Similarly, Article 126-A of Law 8112/1990 states that no public official can be held responsible, in any civil, criminal or administrative proceeding, when he/she reported to the proper authority his/her suspicion that another employee is engaged in unlawful activity.

Freezing, seizing and confiscation; bank secrecy (arts. 31 and 40)

Confiscation exists as a sanction under article 91 PC, which states the effects of a conviction and the coverage of the term “product”. It remains unclear, however, whether an advantage obtained which is not in a monetary or tangible form is covered. The confiscation procedure is set forth in article 122 CPC.

Article 125 CPC provides for interim measures but only for the purposes of securing and preserving evidence. In addition, article 4 of Law No. 9613/98 on money-laundering provides that during investigations or judicial proceedings, the judge may order the seizure or the freezing of assets, rights and valuables that are connected, or are the object or the result of a crime referred to in the Law. By virtue of article 130 CPC, the seizure can be rejected when the defendant demonstrates the lawful origin of the property or goods.

A National Database System of Seized Properties was created by the National Justice Council as an electronic tool that consolidates all information about seized properties and assets in criminal procedures. However, there is no central entity responsible for the administration of seized and confiscated property.

There is no explicit reference in the legislation to proceeds of crime transformed or converted into other property and proceeds of crime intermingled with legitimate property, or to income or other benefits derived from such proceeds of crime. Similarly, it is noted that instrumentalities of legal origin and instrumentalities destined for use are not subject to confiscation. Brazil does not require that an offender demonstrates the lawful origin of the alleged proceeds of crime or other property liable to confiscation.

The rights of bona fide third parties are respected (Art. 91PC). With regard to confiscation of proceeds held by a third party not acting in good faith which is a legal person, civil sanctions are provided in the Corporate Liability Law (article 19.I). A limitation was introduced in the Corporate Liability Law:

confiscation of the profits under article 19.I is excluded in cases of successor companies, and companies held jointly liable and leniency agreements. Although bank secrecy is protected in Brazil (article 5, clauses X and XII of the Federal Constitution), there are exceptions to this rule allowed both by case law and the provisions of Complementary Law No. 105/2001, by court order. The range is broad enough to cover offences established by the Convention.

Statute of limitations; criminal record (arts. 29 and 41)

The statute of limitations period is calculated on the basis of the maximum sentence for the offence, pursuant to articles 109 and 110 PC.

The “interruption” of the limitation period for the prosecution of offences is governed by clauses I to IV of article 117 PC.

Sentences served abroad or within the country for offences committed in the past are taken into account in domestic criminal proceedings (Articles 8, 42 and 63 PC; and article 696 CPC).

Jurisdiction (art. 42)

Article 5 PC provides for jurisdiction on the basis of the principle of territoriality.

Article 7 PC provides for extraterritorial jurisdiction, including based on the active and passive personality principle. The establishment of extraterritorial jurisdiction in clauses II.b and II.3 is subject to the requirement of dual criminality.

Money-laundering is treated in Brazilian law as a “continuous crime” and therefore if acts foreseen in article 23, paragraph 1(b)(ii) of the Convention are committed abroad and only a part of the offence in Brazilian territory, then the offence is considered in its entirety to be subject to the Brazilian legislation.

Where extradition of nationals is denied, the offences may be prosecuted domestically based on the aforementioned provision establishing jurisdiction on the basis of the “active personality principle” (article 7 clause II.b PC).

Consequences of acts of corruption; compensation for damage (arts. 34 and 35)

The Brazilian legislation has provisions on the consequences of illegal acts, including corruption, for the validity of contracts and proceedings based on administrative laws (Articles 49, 77-78,, 89-99 of Law No. 8666/93).

The Brazilian legislation also provides for the possibility of injured parties to have full reparation and restitution of damages suffered as a result of criminal offences, including corruption (article 91.I PC, article 186 of the Civil Code, article 12 of Law 8429/92).

Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)

The federal specialized entities entrusted with anti-corruption tasks and mandates include the Office of the Comptroller General (Portuguese: Controladoria-Geral da União, CGU; the National Court of Accounts (TCU); the Federal Prosecution Service, the Federal Police Department and the Office of the Attorney General of the Union (Portuguese: Advocacia-Geral da União, AGU).

At the strategic level, an “Integrated Management Cabinet for Prevention and Combatting against Corruption and Money Laundering” (GGI) was created for the delineation of public policy and macro-objectives in this area.

The National Strategy Against Corruption and Money Laundering (ENCCLA), which is co-ordinated by the Ministry of Justice, is the primary policy-co-ordination mechanism in Brazil with respect to money-laundering, financing of terrorism and corruption.

The cooperation between the national authorities and the private sector was confirmed mainly in the field of money-laundering. Law No. 9613/1998 specifies the framework for such cooperation. The reviewing experts suggested the expansion of such cooperation between national authorities and entities of the private sector to cover offences other than money laundering.

2.2. Successes and good practices

Overall, the following good practices in implementing chapter III of the Convention are highlighted:

- The creation of the Commission of Administrative Procedures against Suppliers (CPAF) in an effort to enhance the efficiency of provisions establishing administrative penalties for companies that practice illegal acts in order to frustrate the core objectives of bids and contracts (article 26 para. 1);
- The National Register of Convicts for Administrative Improbability, which is a database gathering information on agents convicted of acts of administrative improbity, as a proactive tool for achieving social control of the acts of public administration. (article 30.1);
- The development of the Disciplinary Procedures Management System (CGU-PAD), which is a software aiming at the storage and availability of information on the disciplinary procedures of the Federal Executive Branch. (article 30 para. 8);
- The development of a National Database System of Seized Properties by the National Justice Council as an

electronic tool that consolidates information about seized properties and assets in criminal procedures, for their control and monitoring (article 31 para. 3);

- The National Strategy against Corruption and Money Laundering (ENCCLA) as a group integrated by public institutions and bodies as well as some corporate entities that discusses initiatives to combat corruption and money laundering regarding the implementation of public policies. (art. 36)
- Relative to the administrative liability of legal persons the Federal Government of Brazil created the Registry of Ineligible and Suspended Companies (CEIS), which posts a list on the Internet with data on enterprises punished for irregularities in tenders, tax frauds or non-compliance with contracts with the Public Administration.

2.3. Challenges in implementation

While noting the advanced anti-corruption legal system of Brazil, the reviewers identified some challenges in implementation and/or grounds for further improvement and made the following remarks to be taken into account for action or consideration by the competent national authorities depending on the mandatory or optional nature of the relevant requirements of the Convention:

- Continue developing its crime statistics system with a view to producing in a systematic manner consolidated statistical data in the whole anti-corruption criminal justice spectrum and for all stages of the relevant criminal proceedings;
- Construe the provision on active bribery in the public sector in a way that unambiguously covers instances of “giving” an undue advantage, in addition to those of its “promise” or “offer” (article 15(a));
- Consider the establishment of the offence of passive bribery of foreign public officials and officials of public international organizations (article 16);
- Consider amending the offence of active trading in influence with a view to cover all elements regulated in the Convention, and establishing the offence of passive trading in influence (article 18);
- Continue efforts to complete the process of enacting legislation on the criminalization of illicit enrichment (article 20);
- Consider the establishment of a specific offence of bribery in the private sector (article 21);

- Building on article 177 PC, consider fully criminalizing all forms of embezzlement in the private sector (article 22);
- Continue efforts to ensure effective enforcement of the money-laundering legislation (article 23);
- Enhance the application of the existing administrative/civil liability of legal persons (article 26);
- Ensure that legal persons can be held liable for money laundering offences (article 26);
- Consider criminalizing all forms of preparation of a corruption offence (article 27, paragraph 3);
- Ensure that the statute of limitations period for corruption offences allows adequate time for the investigation, prosecution, sanctioning, and the completion of the full judicial process, including in cases where the final sentence is at the lower end of the scale (article 29);
- Make efforts to ensure an appropriate balance between the jurisdictional privileges of certain categories of public officials and the possibility of effectively investigating, prosecuting and adjudicating corruption offences (article 30, paragraph 2);
- Amend domestic legislation to allow for the confiscation of instrumentalities of crime that are themselves of legal origin, and for instrumentalities destined for use (article 31 para. 1 b));
- Continue working towards ensuring the full and effective implementation of article 31, paragraph 3, of the Convention, possibly through the establishment of an asset management office or other alternatives which might fit better in the Brazilian system (article 31, para. 3);
- Amend domestic legislation to explicitly provide that proceeds of crime transformed or converted into other property and proceeds of crime intermingled with legitimate property, as well as income and other benefits derived from proceeds of corruption, are subject to the measures set forth in article 31 of the Convention (article 31 para. 4-6);
- Brazil could consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or another property liable to confiscation (article 31 para. 8);
- Continue to develop and strengthen the application of specific legislation on the protection of reporting persons (article 33), while considering:
 - ✓ Retaliation against whistleblowers should be expressis verbis forbidden and retributive actions

should also be referred to as a form of discrimination in the legislative text;

- ✓ In terms of implementation, the burden of proof in whistleblowing cases should be expressis verbis placed on the employer.
- Establish specialized anti-corruption departments/units within the prosecution service (article 36).
- Expand the existing cooperation between national investigative and prosecuting authorities and the private sector on matters involving corruption offences other than money laundering.

3. Chapter IV: International cooperation

3.1. Observations on the implementation of the articles under review

Extradition; transfer of sentenced persons; transfer of criminal proceedings
(arts. 44, 45 and 47)

Extradition is regulated in Article 102 (I) (g) of the Federal Constitution, Article 76 et seq. of Law No. 6815/1981 (the Foreigners Statute) and by Decree 6061/2007 (which provides for the structure of the Ministry of Justice).

Article 76 of Law No. 6815/1981 stipulates that extradition can be provided on the basis of a convention/treaty or reciprocity. With regard to treaty-based extradition relations, Brazil considers the Convention as a legal basis for extradition. Brazil generally requires dual criminality for extradition, but also adopts a flexible approach by focusing on the underlying conduct and not on the denomination of the offence.

Brazil's legislation provides for a one-year period of imprisonment as a minimum penalty for extradition. Corruption offences generally comply with this minimum penalty.

The grounds for refusal of extradition requests are enumerated in article 77 of Law No. 6815/1981. Extradition cannot be refused on the ground that the offence involves fiscal matters.

In accordance with article 77 of Law No. 6815/1981, extradition is not granted if the offence for which it is requested is a political crime. There is no definition of the "political offence", nor is a list of "political crimes" contained in the domestic legislation. The reviewing experts were not in a position to judge whether considerations of "political nature" could hinder extradition for offences covered by the Convention.

Brazil does not extradite its nationals. In practice, where a request for extradition is refused on the ground of nationality,

the Brazilian authorities forward the case to the prosecution authorities without delay, in application of the principle “*aut dedere aut judicare*”.

Brazil does not enforce foreign sentences in lieu of extradition of nationals to partially or totally serve foreign sentences. If the extraditable person is a Brazilian national, foreign sentences may only be considered as proof of recidivism, provided that the person sought has committed an offence after the extradition request. However, a bilateral treaty signed with the Netherlands provides for foreign sentences to be enforced in Brazil where the extradition of a Brazilian national is refused

Simplified extradition procedures are foreseen in some bilateral treaties to which Brazil is a party to address cases in which the person sought agrees to be extradited. No information has been provided regarding the average duration of the extradition process. The need for a more systematic approach in compiling statistical data on extradition cases was highlighted.

Brazil is bound by regional and multilateral extradition treaties, including bilateral extradition treaties in force with 28 countries and territories.

Article 9(III) of Decree No. 6061/2007 governs the transfer of prisoners into and out of Brazil. Brazil has concluded 11 bilateral treaties on transfer of prisoners and is a party to relevant regional instruments.

Regarding the transfer of criminal proceedings, there is no specific legal framework in Brazil which allows for such transfer.

Mutual legal assistance (art. 46)

Brazil does not have in place specific legislation for the provision of mutual legal assistance. It can afford mutual legal assistance on the basis of a relevant treaty (including the Convention), or on the principle of reciprocity.

The requirements and grounds for refusal set forth in the Convention (article 46, paragraph 21) are applied directly domestically. Brazil does not refuse MLA requests when they involve fiscal matters. Brazil has ratified bilateral Mutual Legal Assistance Treaties with 19 countries. Bank secrecy is not a ground for refusal of mutual legal assistance requests.

The central authority for mutual legal assistance is the DRCI - Departamento de Recuperação de Ativos e Cooperação Internacional (Department of Asset Recovery and International Cooperation, of the Ministry of Justice). For some countries, the central authority for Mutual Legal Assistance is the Federal Prosecution Service.

Similar to extradition, the reviewing experts were not provided with analytical statistical data on the effectiveness of MLA proceedings.

Brazil is bound by multilateral instruments on mutual legal assistance (or with provisions on MLA) and 19 bilateral treaties.

Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49 and 50)

The Federal Prosecution Service (MPF) exchanges information with agencies in other countries for the rapid identification of crimes, both those covered by the Convention and other offences.

Decree No. 2799/1998 establishes that the Council for the Control of Financial Activities (COAF, the Brazilian Financial Intelligence Unit), may share information with relevant authorities of foreign countries and international organizations based on reciprocity or on agreements. As member of the Egmont Group, COAF is also entitled to exchange information with other financial intelligence units.

Moreover, Brazil is a member of the International Criminal Police Organization (INTERPOL).

Brazil participates in three networks of international legal cooperation: the Ibero-American Judicial Cooperation Network (IberRED); the Network of International Legal and Judicial Cooperation of Portuguese Language Countries (CPLP Judicial Network); and the Hemispheric Network for Exchange of Information for Legal Assistance in Criminal Matters and Extradition, the Asset Recovery Network of the Financial Action Task Force of South America against Money-Laundering (RRAG)

Investigating authorities in Brazil make use of joint investigation teams on the basis of the Convention and the United Nations Convention against Transnational Organized Crime.

A large number of special investigative techniques have been regulated domestically. However, law No. 9296/1996 and law No. 12850/2013 do only apply to corruption offences when committed by criminal organisations or are transnational in nature.

3.2. Successes and good practices

Overall, the following points are regarded as successes in the framework of implementing Chapter IV of the Convention:

- The flexible interpretation of the dual criminality requirement in both extradition and MLA proceedings (articles 44 para. 2, 46 para. 9);
- The participation of Brazil in three networks of international legal cooperation (article 48 para. 1).

3.3. Challenges in implementation

While noting the advanced anti-corruption legal system of Brazil, the reviewers identified some challenges in implementation and/or grounds for further improvement and made the following remarks to be taken into account for action or consideration by the competent national authorities (depending on the mandatory or optional nature of the relevant Convention against Corruption requirements):

- Continue efforts to put in place – or improve - and render fully operational an information system, compiling in a systematic manner information on extradition and mutual legal assistance cases, with a view to facilitating the monitoring of such cases;
- Ensure that consistent jurisprudence of the Supreme Federal Court guarantees that any crime established in accordance with the Convention is not considered or identified as a political offence that may hinder extradition (article 44, paragraph 4);
- With due regard to the rights of the person sought, ensure that extradition proceedings are conducted in an expeditious manner, also in those cases where the simplified extradition process does not apply (article 44, paragraph 9);
- Continue to ensure that domestic criminal proceedings are initiated when extradition is denied on the ground of nationality or other grounds, in application of the principle “*aut dedere aut judicare*” (article 44, paragraph 11);
- Consider taking legislative measures to allow the enforcement of foreign criminal judgments, including in cases where such enforcement is an alternative to extradition when the latter is denied on the grounds of nationality (article 44, paragraph 13);
- Expand the scope of application of existing legislation on special investigative techniques to cover not only offences committed by criminal organisations or transnational in nature, but also corruption offences without the involvement of criminal organisations.

IV. Implementation of the Convention

A. Ratification of the Convention

The Convention was signed by Brazil on December 9, 2003. The instrument of ratification was enacted through Decree No. 5687 of January 31, 2006. Accordingly, the Convention has become an integral part of domestic law with the status of ordinary law.

B. Legal system of Brazil

The Brazilian legal system is based on Civil Law tradition. The Federal Constitution, in force since October 5th, 1988, is the supreme rule of the country and is characterized by its rigid written form. The Constitution organizes the country as a Federative Republic, formed by the indissoluble union of the states and municipalities and of the Federal District. The 26 federate states have powers to adopt their own Constitutions and laws in the framework of the Federal Constitution; criminal offences of corruption are federal law

Municipalities also enjoy restricted autonomy as their legislation must follow the dictates of the Constitution of the state to which they belong, and consequently those of the Federal Constitution itself. As for the Federal District, it blends functions of federate states and of municipalities, and its equivalent to a constitution, named Organic Law, must also obey the terms of the Federal Constitution.

The branches of the Union, as defined within the Constitution, are the Executive, the Legislative and the Judiciary, which are independent and harmonious amongst themselves. The head of the Executive is the President of the Republic, which is both the Chief of State and the Head of Government and is directly elected by the citizens. The Legislative, embedded in the form of National Congress, consists of two houses: The Chamber of Deputies (lower house) and the Federal Senate (upper house), both constituted by representatives who are elected by the citizens. 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 Judiciary is organized into federal and state branches. Municipalities do not have their own justice systems, and must, therefore, resort to state or federal justice systems, depending on the nature of the case. The judicial system consists of several courts. The apex is the Federal Supreme Court, which is the guardian of the Constitution. Among other duties, it has exclusive jurisdiction to: (i) declare the unconstitutionality of federal or state laws; (ii) grant passive extradition; and (iii) rule over appeals for constitutional reasons.

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.

State-level justice in Brazil consists of state courts and judges. The 27 states of Brazil (26 states plus the Federal District) organize their own judicial systems, with court jurisdiction defined in each state constitution, observing that their legal scope is limited by those that do not concern the federal judicial ordainment. Corruption cases can be judged by state courts when there is no federal jurisdiction.

The legislative process begins, in broad terms, with a bill in one of the Congress Houses – either the Chamber of Deputies or the Federal Senate, thus called the Originating House. Once the bill is voted, it can either be rejected or forwarded to the other house, which is then called the Reviewing House. There the bill can be rejected, approved or amended to be then returned to the Originating House. Depending on the object of the bill, it is forwarded for the presidential sanction or veto, which can be of the bill as a whole or in part. If the bill is vetoed, the members of the National Congress can override such veto.

The Federal Constitution lists the forms of legal provisions, the most important of which are: (i) Amendments to the Constitution, that consists of changes to the constitutional text; (ii) Complementary Laws, which supplement the Constitution, by detailing a matter, without interfering with the constitutional text, and are admissible only in cases expressly authorized by the Constitution; (iii) Ordinary Laws, which deal with all subjects, except those reserved to complementary laws; and (iv) Provisional Measures, which are issued by the President of the Republic in important and urgent situations, with a temporary nature, with the force of law, and must be submitted to the National Congress in order to go through the legislative process. After being examined by the National Congress, they shall be converted into an ordinary law if approved. If rejected, either tacitly or expressly, they lose effectiveness *ex tunc*, and the National Congress shall regulate the legal relations arisen therefrom.

In Brazil, treaties have the status as ordinary laws. Thus, UNCAC provisions have law standard since Decree N° 5.687, from January 31st, 2006 promulgated the UNCAC. Human rights treaties are an exception though and may have a higher status, when ratified under a special quorum and procedure specified in the Constitution.

The main anti-corruption bodies in Brazil are the following: the Office of the Comptroller General (Portuguese: Controladoria-Geral da União, CGU); the National Court of Accounts (TCU) (independent under article 73 of the Federal Constitution); the Federal Prosecution Service (independent under article 127 of the Federal Constitution), the Federal Police Department and the Office of the Attorney General of the Union (Portuguese: Advocacia-Geral da União, AGU). At the State level, there are State Courts of Accounts (TCE); the Prosecution Service of each State and the State Police Department of each State.

The National Strategy Against Corruption and Money Laundering (ENCCLA), which is co-ordinated by the Ministry of Justice, is the primary policy-co-ordination mechanism in Brazil with respect to money-laundering, financing of terrorism and corruption.

C. Implementation of selected articles

Chapter III. Criminalization and law enforcement

Article 15 Bribery of national public officials

Subparagraph (a)

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(a) Summary of information relevant to reviewing the implementation of the article

The active bribery provisions which correspond to subparagraph (a) of article 15 are regulated in the Brazilian Penal Code, Decree-Law n. 2.848, of December 7th, 1940, Article 333, which establishes as **active corruption** the offer or promise of undue advantage to an official in order to convince him/her to act, fail to act or hold back an official act. That is submitted to a sentence of incarceration from 2 (two) to 12 (twelve) years and a fine.

As for the aspect of the promise, offering or giving being done **directly or indirectly**, Article 29 of the BPC provides that whoever contributes to the commission of a crime is subject to its sanctions. Therefore, an intermediary in the bribery of public officials, both national and international, may be punished for the offense.

Art. 333 of the Brazilian Penal Code (BPC)

- Offer or promise of an undue advantage to an official in order to convince him to act, fail to act or hold back an official act:

Sentence - incarceration from 2 (two) to 12 (twelve) years and a fine. (Provision included by the Law No. 10.163, of 12.11.2003)

Sole Paragraph - the sentence shall be increased in one third if, due to an advantage or a promise, the official holds back or omits an official act or does it by breaking his official duty.

In addition, the Court of Justice of the State of Sao Paulo, on the RT 542/323, corroborates that decision when it says that it does not matter that the offer or promise be made by the corruptor, directly or *per interpositam personam*. Also, the Federal Regional Court of the 3rd Region, on the *Habeas Corpus* 11011, decided that "it is clear that the crime described on Article 333 of the Penal Code is constituted by a simple offer or promise of an undue advantage, and can be committed with the participation of an intermediary, who is in charge of dealing with a public official, answering to a request of the agent".

Furthermore, the Superior Court of Justice, on the judgement of the *Habeas Corpus* 33535/SC, declared that the offense of active corruption can be committed by an interposed party, not requiring necessarily that this third party, through whom an agent offers or promises an undue advantage to a public official, acts in his/her will.

The Brazilian Judiciary power does not apply the *stare decisis* system as a general rule. Therefore, precedents are not usually binding to lower courts, nor are precedents from federal courts binding to state courts. Precedents are binding, however, when the Federal Supreme Court tries abstract constitutionality cases. These judgments are binding for all citizens, public bodies and other courts. Nonetheless, there is a trend among lower courts to follow precedents – although not binding – from the main superior courts, which are the Federal Supreme Court and the Superior Court of Justice.

Bill 3760/2004 aims at qualifying as **heinous crimes** those committed against the Public Administration, thus inserting those crimes in the list of Law n. 8.072, of July 25th 1990. The crimes against the Public Administration for this Bill that relate to the provisions of UNCAC set forth in its Chapter III will be those comprised by: Arts. 312 and 313 (embezzlement); Art. 317 (passive bribery); Art. 319 (prevarication); Art. 325 (breach of secrecy); Art. 332 (trafficking of influence); and Art. 333 (active bribery), all of the Brazilian Penal Code. These crimes will be referred in subsequent items of the checklist. According to the provisions of Law n. 8.072/1990, heinous crimes have a stricter regimen for the serving of sentences and do not contemplate the possibility of bail.

Article 327 PC provides for a definition of “public official”. The Brazilian authorities clarified that this definition had been interpreted very broadly by Brazilian courts and doctrine to cover anyone who exercises, in any way, a public function. They further stated that the definition in article 327 covers all spheres of State activities, including the executive, legislative and judicial functions.

Statistics:

Up to date, 46.376.581 (forty-six million, three hundred seventy six thousand, five hundred eighty-one) goods have been seized because of criminal acts, which adds up to R\$ 1.185.502.706,72 (one billion, one hundred eighty-five million, five hundred and two thousand, seven hundred and six reais and seventy-two cents).

Based on the actions carried out by the Federal Police, the number of cases brought on bribery of national public officials, are:

| Year | Art. 333 |
|------|----------|
| 2005 | 293 |
| 2006 | 275 |
| 2007 | 474 |
| 2008 | 509 |
| 2009 | 929 |
| 2010 | 286 |
| 2011 | 382 |
| 2012 | 488 |
| 2013 | 323 |

The Brazilian Judiciary Branch comprises 27 State Courts of Justice and 5 Federal Regional Courts, which are competent to process and judge criminal matters. Each Court has its own

information system and in most cases there is no integration between those systems and the Superior Courts' information system. Thus, in order to decrease the problem concerning statistical data collection, the National Justice Council (CNJ) issued the Resolution n. 46, as of December 19 2007 (amended in April 2010 so as to include military and electoral courts), through which the Table of Issues, Classes and Proceedings Movements aims at standardizing the language used in all Courts in a first moment. Most of Brazilian Courts have implemented the Table; however, as an attempt to collect data from a single source, the CNJ is working on the implementation of the national electronic process.

Concerning statistics, the CNJ has created databases to monitor the management of goods which were seized in criminal proceedings, as well as an action control of convicted people for administrative improbity.

The Federal Police Department collects its information from a database developed to gather all information on investigations and other actions carried out by the Department.

As for the Prosecutor General's Office, A system to collect data and statistics of the Office's effectiveness was put in place in 2012 by the National Council of the Prosecutors' Offices, a body created to oversee administrative matters relating to the work of the different Prosecutor's Offices in the state levels and in the federal level. This system follows up the status of criminal cases, from the investigative phase to the judicial phase.

An empirical assessment though can show that the total effectiveness of this criminalization is impaired by some factors inherent to the Brazilian penal system, such as:

- a. the possibility of criminal appeal in up to four different levels in the judiciary structure, which allows for some acts to reach the Federal Supreme Court (STF).
- b. the possibility of multiple appeals in each level of the judiciary structure;
- c. the understanding of the STF that it is not possible to initiate the enforcement of a criminal conviction before all possible appeals have not been depleted.
- d. the diversity of statute of limitations brought by the Brazilian Penal Code.

However, Brazil has had this provision assessed by the MESICIC - Mechanism for Follow-up on the Implementation of the Inter-American Convention against Corruption on its third round of review

The definition of public official appears on article 327 of the Penal Code

Art. 327 - Considera-se funcionário público, para os efeitos penais, quem, embora transitoriamente ou sem remuneração, exerce cargo, emprego ou função pública. § 1º - Equipara-se a funcionário público quem exerce cargo, emprego ou função em entidade paraestatal, e quem trabalha para empresa prestadora de serviço contratada ou conveniada para a execução de atividade típica da Administração Pública. (Incluído pela Lei nº 9.983, de 2000) § 2º - A pena será aumentada da terça parte quando os autores dos crimes previstos neste Capítulo forem ocupantes de cargos em comissão ou de função de direção ou assessoramento de órgão da administração direta, sociedade de economia mista, empresa pública ou fundação instituída pelo poder público. (Incluído pela Lei nº 6.799, de 1980)

(b) Observations on the implementation of the article

Article 333 of the Penal Code (PC) establishes as a criminal offence the active bribery of public officials. By virtue of article 29 PC, an individual assisting in the commission of an offence, such as the intermediary in bribery cases, is also subject to criminal liability

(d) Challenges, where applicable

Construe the provision on active bribery in the public sector in a way that unambiguously covers instances of “giving” an undue advantage, in addition to those of its “promise” or “offer”. **Article 15 Bribery of national public officials**

Subparagraph (b)

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

(a) Summary of information relevant to reviewing the implementation of the article

The passive bribery provisions which correspond to subparagraph (b) of article 15 are regulated in article 317 of the Brazilian Penal Code, Decree-Law n. 2.848, of December 7th, 1940, which states that any public official that solicits or receives an undue advantage, for himself or other persons, either directly or indirectly, or accepts the promise of it commits the crime of passive corruption.

Article 317 - Requesting or receiving on his or her own account, directly or indirectly, even where outside the function or before taking it on, but on account of it, any improper advantage, or accepting the promise of such advantage:

Sentence -incarceration from 2(two) to 12(twelve) years and a fine. (Provision included by the Law No. 10.763, of 12.11.2003)

§ 1º - the sentence shall be increased in one third if in consequence of the advantage or the promise, the official holds back or fails to execute any official action or practice and by doing so he/she breaks his official duty.

§ 2º - If the official acts, fails to act or holds back an official action when he gives in the request or influence of a third party, thus breaking his official duty,

Sentence - detention from 3 (three) months to 1 (one) year or a fine.

Statistics:

Based on the actions carried out by the Federal Police, considering the cases brought in relation to Article 317 of the Brazilian Penal Code, the figures are:

| Year | Art. 317 |
|-------------|-----------------|
| 2005 | 348 |
| 2006 | 495 |
| 2007 | 656 |
| 2008 | 596 |
| 2009 | 851 |
| 2010 | 409 |

| | |
|------|-----|
| 2011 | 581 |
| 2012 | 649 |
| 2013 | 441 |

In relation to extortion,¹ established under Article 316 of the Brazilian Penal Code, the cases brought present the following figures:

| Year | Art. 316 |
|-------------|-----------------|
| 2005 | 119 |
| 2006 | 107 |
| 2007 | 160 |
| 2008 | 123 |
| 2008 | 123 |
| 2009 | 135 |
| 2010 | 116 |
| 2011 | 119 |
| 2012 | 107 |
| 2013 | 76 |

(b) Observations on the implementation of the article

Passive bribery of domestic public officials is criminalized through article 317 PC.

Article 16 Bribery of foreign public officials and officials of public international organizations

Paragraph 1

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil stated that it has implemented the provision under review.

¹ It is a crime in which a public servant or employee requires an undue tax or, when it is due, s/he uses a vexatious or heavy way of collection, not authorised by law. In Brazilian Portuguese, it reads “*excesso de exação*”.

The active bribery provisions which correspond to paragraph 1 of article 16 are regulated in articles 337-B to 337-D of the PC, which appear as Chapter II-A (“Crimes committed by individuals against a foreign public administration”).

The Article 337-B complies with the provision of Paragraph 1 of Article 16 by establishing as a crime the active bribery in an international business transaction, meaning the direct or indirect promising, offering or giving of any undue advantage to a foreign public official or to a third person, aimed at having him or her put into practice, omit, or delay any official act relating to an international business transaction.

Thus, the foreign public official, according to Article 337-D of the Brazilian Penal Code (Decree-Law n. 2848/40) is defined as, for penal matters, any person that has any public labour bond with foreign state entities of diplomatic representations, even if he/she is not paid for that or his/her job is temporary. It is also understood as a foreign public official, any person that works for an enterprise controlled by a foreign country's public power or for any international public organization.

Concerning the term "intentionally", “felonious intent” is presumed to be required in criminal offences where no other form of *mens rea* is specified. By law, intention is present by implication and does not need to be made explicit. In the Brazilian Penal Code, the intent is present when the individual wants the result, or when he or she assumes the risk of producing it, which clearly gives similar treatment both to intent (*dolus*) and to recklessness/negligence.

As for an undue advantage, any of material nature such as money or goods, and other advantages such as moral or sexual advantages, can be taken as undue advantage. Brazilian jurisprudence and doctrine deem “improper advantage” to be any advantage at all. In this sense, it shall be considered as the essential idea the reward that the official receives or accepts as the price of his or her corruption. Also, if the advantage is not laid down in law, in other words, if the public official has no right to it, the advantage will be deemed to be improper. In a case where the advantage is not expressly permitted or required by the law (of the foreign public official), but is not prohibited thereby, in case the other elements characterising it as criminal were present, the courts shall consider this to be an undue advantage.

In addition, for the offence to be committed, it is sufficient that the core act of an offer, promise or giving is made regardless of whether the foreign public official acted in return for the bribe. Under the sole paragraph of Article 337-B, it is an aggravated offence if the foreign public official acts in breach of his or her functional duty, as a result of the bribe. The offence will also be committed if the act bears any relationship, even indirectly, with the functions of the public official and it will be no defence that the act was outside the scope of the official’s authority. For instance, in the case of a bribe given to a senior government official in order that he or she use his or her office - though acting outside his or her competence - to make another official award a contract to the briber, the briber and the “influencing” official would probably be held to be joint offenders.

In the case of legal persons, Law n. 12.846 of August 1st 2013, which entered into force in January 2014, provides now for the administrative and civil liability of legal persons for acts of corruption. Filling a gap in the Brazilian legal framework, the Law also provides for the liability of legal persons for the bribery of foreign public officials and officials of international organizations.

Although Law n. 12.846/2013 does not establish the criminal liability of legal persons (for more information on the Law, please refer to observations about Article 26 of the UNCAC), it complements the Brazilian legal framework to persecute cases of bribery of foreign public officials and officials of international organizations, allowing for a comprehensive approach to fight these acts of corruption.

(b) Observations on the implementation of the article

Article 337-B criminalizes active bribery committed in international business transactions. According to article 337-D PC, the foreign public official is defined as any officer or employee of a foreign government or any department, agency or institution thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency or institution thereof, or for or on behalf of any such public international organization, including judges, members of the Public Prosecution Service, elected representatives, senators and civil servants. The definition in article 337-D was based on the definition of “public official” of article 327 PC and was of sufficient scope to cover the requirements of article 2(b) of the Convention.

Article 16 Bribery of foreign public officials and officials of public international organizations

Paragraph 2

2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil adopted the offence of "active corruption in international business transactions"(article 337-B PC,), without creating a corresponding passive type of transnational corruption. Given exactly the non-mandatory nature of Article 16 par. 2, Brazil has considered and *opted* not to introduce the offence in question, considering that if a foreign public official carries out the conduct described in Article 317 of the Criminal Code (bribery) in Brazilian territory, he may be punished by the Brazilian jurisdiction since the concept of a public official adopted in Article 327

makes reference only to the exercise of public function, without reference of the “public” adjective relating to a national administration, foreign, or even supranational administration.

(b) Observations on the implementation of the article

The passive bribery of foreign public officials and officials of public international organizations has not been criminalized.

(d) Challenges, where applicable

Consider the establishment of the offence of passive bribery of foreign public officials and officials of public international organizations.

Article 17 Embezzlement, misappropriation or other diversion of property by a public official

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil stated that it has implemented the provision under review both criminally and administratively.

The Brazilian Penal Code, Decree-Law n. 2.848/40, through its article 312, provides for the crime of Embezzlement, referring to the appropriation by a public official of money, chattel or valuables, no matter whether public or private, when he or she holds possession of them by using his or her office, for his or her benefit or for the benefit of a third party. Administratively, Brazil relies on articles 9 and 10 of the Law on Administrative Improbity, Law n. 8.429/92, which point out several conducts which constitute improbity acts.

Misappropriation is provided in article 315 of the Brazilian Penal Code which defines as a criminal offense the misuse of public monies or incomes.

Related offences to **embezzlement, misappropriation or other diversion of property by a public official could be found in the following provisions of the PC:**

- a. Article 313 - defines embezzlement resulting from another party's mistake;
- b. Article 313-A - establishes as a criminal offence the insertion of false data in information systems;
- c. Article 313-B - provides for the crime of non-authorized modification or alteration in information systems;
- d. Article 314 - states that it is a crime the loss, evasion or destruction of books or documents;
- e. Article 318 - punishes the facilitation of smuggling or embezzlement;

- f. Article 319 - provides for the crime of prevarication, when a public official delays or does not do an act which he or she is in charge of, or when this act goes against the law, to satisfy personal interest of feeling;
- g. Article 320 - typifies as a criminal offence the criminal condescension, when a public official does not blame a subordinate who has committed an infraction by virtue of his or her position;
- h. Article 321 - defines as crime the administrative advocacy, which refers to the action conducted by a public official before the public administration, in private interest, using his or her public position;
- i. Article 325 - punishes the breach of official secrecy by a public official by virtue of his or her position, also included the facilitation of it;
- j. Article 326 - establishes as a criminal offence the breach of secrecy of a bidding proposal.

Statistics:

Based on the actions carried out by the Federal Police, the cases brought show the following figures concerning Article 312 of the Brazilian Penal Code.

| Year | Art. 312 |
|-------------|-----------------|
| 2005 | 1.247 |
| 2006 | 1.291 |
| 2007 | 1.294 |
| 2008 | 1.749 |
| 2009 | 1.373 |
| 2010 | 1.114 |
| 2011 | 1.556 |
| 2012 | 1.677 |
| 2013 | 1.366 |

(b) Observations on the implementation of the article

Misappropriation is criminalized through article 315 PC, which defines as a criminal offence the misuse of public monies or incomes.

Article 312 PC criminalizes embezzlement in the public sector. Other provisions of the PC (articles 312, 313-A, 313-B, 314, 318, 319, 320, 321, 325 and 326) establish related offences.

Article 18 Trading in influence

Subparagraphs (a) and (b)

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;

(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil considers that the provision under review has been implemented through Article 332, of the Brazilian Penal Code, Decree-Law n. 2.484/40, which establishes the crime of trafficking of influence. For this crime, what is considered as basis for the punishment is a simple solicitation, exaction, charge or obtaining of advantages or promise of it, without a need of another result.

Besides establishing as a criminal offense the trafficking of influence by a public official, Brazil also counts on the establishment of the trafficking of influence in international business transactions, through Article 337-C, cited below:

Statistics.

Based on the actions carried out by the Federal Police, concerning the cases brought under Article 332 of the Brazilian Penal Code, the figures are:

| Year | Art. 332 |
|-------------|-----------------|
| 2005 | 67 |
| 2006 | 79 |
| 2007 | 71 |
| 2008 | 178 |
| 2009 | 94 |
| 2010 | 57 |
| 2011 | 48 |
| 2012 | 47 |
| 2013 | 43 |

(b) Observations on the implementation of the article

Trading in influence in the domestic sphere is criminalized through article 332 of the Penal Code. Article 337-C PC establishes the offence of “traffic of influence in an international business transactions”. These provisions cover only the passive form of the offence (“requesting, requiring, charging or obtaining any advantage or promise of advantage in exchange of influencing an act...”) and the last one is only applicable in international business transactions.

(d) Challenges, where applicable

Consider amending the offence of active trading in influence with a view to covering all elements regulated in the Convention, and establishing the offence of passive trading in influence.

Article 19 Abuse of Functions

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

(a) Summary of information relevant to reviewing the implementation of the article

Acts related to abuse of functions are criminalized through articles 319, 322 and 350 PC. Article 319 of the Brazilian Penal Code is used to support the criminalization of a public official for the delaying or not performing, unduly, of any official act, or even the performing an act against the law, in order to satisfy his or her personal interest or feeling. Article 319 of the BPC is applicable to acts intending to favor the perpetrator or someone else, since the interest or personal feeling mentioned therein can be directed towards favoring a third party.

Also on the Brazilian Penal Code, Article 322 establishes as a criminal offence the act of performing violence, in the exercise of or as an excuse to exercise a public position. Article 350 provides for the arbitrary exercise or abuse of power, comprising, among others, the irregular conduct of a public official when he or she exercises diligences abusively.

Law No. 4.898/65 regulates issues pertinent to the abuse of authority (nature of authority, what constitutes abuse of such authority, as well as the right of representation and the process of administrative, civil and criminal liability in cases of abuse of authority)

Through its Article 5, this law provides for who is considered to be an authority, i.e. whoever exercises any public function, whether in the civil or military area, even if this function is temporary or non-paid. Articles 3 and 4 list what may constitute abuse of authority, which includes, among others, any attempt against:

- a. the freedom of locomotion;
- b. the inviolability of the home;
- c. the secrecy of correspondence;
- d. the freedom of thought and creed;
- e. the free exercise of religious service;
- f. the freedom to associating;
- g. the legal rights and guarantees assured for the exercise of voting;
- h. the legal rights and guarantees assured for the professional exercise;
- i. the individual freedom, without legal proceedings or with abuse of power;
- j. the humiliation or constraint which anyone can be submitted to, without legal support;
- k. the honor or property of a natural or legal person, when performed with power abuse or deviation, or without legal competence.

(b) Observations on the implementation of the article

The abuse of functions is criminalized in articles 319, 322 and 350 PC. Law No. 4.898/65 governs the representation right and the administrative, civil and criminal liability process in cases where abuse of functions is committed.

Article 20 Illicit Enrichment

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

(a) Summary of information relevant to reviewing the implementation of the article

Law n. 8.429, of June 2, 1992, also called Law of Administrative Improbability, addresses the sanctions applicable to the public officials in cases of illicit enrichment in the exercise of one's mandate, office, job or position in the direct, indirect or foundational public administration and other matters. Among the acts resulting in illicit enrichment, brought by the Article 9, are the ones below, more specifically VII:

I - to receive, for oneself or someone else, money, movables or immovables, or any other direct or indirect economic advantage, as commission, percentage, gratification or present from whoever has direct or indirect interest and may be reached or benefited by acts or omissions resulting from the public official's duties;

II - to receive direct or indirect economic advantage to facilitate the acquisition, exchange or rent of a movable or immovable asset or the hiring of services by the entities referred to in the article 1 at a price higher than the market's;

III - to receive direct or indirect economic advantage to facilitate the alienation, exchange or rent of a public asset or the providing of service by a public body at a price which is lower than the market's;

VII - to acquire for themselves or others, in the exercise of office, position, employment or public office, assets of any type whose value is disproportionate to the evolution of wealth or income of the public official;

VIII - to take a job, commission or perform a consulting activity for individuals or legal entities whose interests may be prejudiced or benefited by acts or omissions resulting from the attributions of the public agent during the activity;

IX - to receive an economic advantage to intermediate the clearance or the investment of public money of any nature;

X - to receive direct or indirect economic advantage to omit an official act, an arrangement or a declaration which he is obliged to.

This law, through its Article 12, establishes that apart from the civil, administrative and criminal penalties, the public official shall also have as sanctions the forfeiture of the assets and funds illicitly added to his or her estate, integral compensation for damages, if any, loss of the public office, suspension of the political rights from eight to ten years, payment of civil fine of up to three times the amount of the increase of estate and the prohibition to have contracts with the Government or receive benefits or tax incentives or credits, directly or indirectly, even if by

means of a legal entity of which it is a major partner for the deadline of ten years. In addition to that, Brazil also counts on the Decree n. 5.483, of June 30, 2005, which states the property and assets investigations, started by any authority that has any knowledge of well-based news or traces of occurrence of any illicit enrichment hypothesis listed by Law n. 8.429/92.

Also, the Federal Executive Branch, through the Office of the Comptroller General (CGU), sent the Bill n. 5.586/2005 to the National Congress; this bill provides for the inclusion, in the Brazilian Penal Code, of an article that typifies the offense of illicit enrichment, referring to when a public official possesses goods and valuables incompatible with his or her incomes, or even when he or she makes use of goods and valuables in a way it becomes clear that they are his or her own.

In addition, by the Article 7 of Decree n. 5.483, of June 30th 2005, the CGU is empowered to analyze, whenever judged necessary, public agents' property and assets evolution, for checking whether it is compatible with the agents' incomes. Once incompatibility is verified, the CGU shall start or demand other authorities to initiate a property and assets investigation, which will constitute a confidential and investigative procedure, having no punitive aspect. This procedure will be led by a commission composed by two or more career officials, who will conduct it for a period of thirty days (renewable for more 30 days) and whose report will determine the procedure filing or its conversion into a Disciplinary Administrative Procedure (PAD). After the property and assets investigations are concluded, there is immediate information sharing with the Prosecutor General, the Court of Accounts, the CGU, the Federal Revenue and the COAF, for further provisions.

(b) Observations on the implementation of the article

Brazil has had an illicit enrichment offence since 2002. It was established through article 9(VII) of the Law of Administrative Improbity. However, the related sanctions are not criminal in nature. If the enrichment results from an act of bribery, it will be considered as a crime and punished accordingly. Brazil is currently considering to criminalize illicit enrichment by adding penal sanctions to the ones already existing. A draft law has been pending since 2005, was presented again for adoption in May 2011 and at the time of the review process it was ready for consideration by the Plenary of the Chamber of Deputies. The reviewing experts encouraged the national authorities to complete the process of enacting the relevant legislation.

On a related topic, Brazilian public officials have to submit annual asset declarations. In the event of irregularities, the Office of the Comptroller General conducts the appropriate administrative proceedings.

(d) Challenges, where applicable

Continue efforts to complete the process of enacting legislation on the criminalization of illicit enrichment

Article 21 Bribery in the private sector

Subparagraph (a)

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

(a) Summary of information relevant to reviewing the implementation of the article

In Brazil, there is specific legislation that criminalizes active and passive bribery in the public sector. Although bribery in the private sector is not specifically criminalised, norms from different laws, whether from private, commercial or penal law, may be used to address the corruption in the private sector. First, it is worth mentioning that Brazil counts on a special type of legal person, whose creation and functioning is provided for in Articles 37 (item XIX) and 173 (Paragraphs 1 and 2) of the Federal Constitution. That legal person is known as a private and public joint stock company, or mixed-economy company, which is composed by private and state capital, with the majority of stocks with right to vote belonging to the State. They can be either of public service delivery or economic activity exploitation, being ruled by what is stated by Private Law, but being organized, hiring, among other actions, according to Public Law. An example of that is the Bank of Brazil. In this case, the occurrence of active and passive bribery, as well as bribery of foreign public officials, shall be addressed equally to what was informed in questions 69 through 72 of this questionnaire.

Concerning bribery in the private sector, specifically the following should be mentioned:

Law n. 9.279, of May 14 1996, known as Law on Industrial Property, through its Article 195, items IX, similarly to active bribery, provides for the offense of disloyal competition, stating that any agent will commit this crime when he or she gives or promises money or any other utility to a competitor's employee, in order that he or she, in breach of his or her duties, provides the agent with advantage.

The Brazilian Penal Code, Law n. 2848/40, through its Articles 175 and 177, provides for, respectively, business fraud and fraud and abuse in the creation and administration of joint stock companies. The first states that it is an offence to deceive the purchaser or consumer while selling fake or damaged goods as true or in perfect condition, or even when some goods are delivered in the place of other goods. As for Article 177, it comprises offences referring to, among others, the business constitution, fake information on economic status, unauthorized use of social goods and assets, stock selling and buying, false information offered to the Government.

Law n. 8137, of December 27 1990, in its Chapter II - Crimes against Economy and Consume Relations, criminalizes the following conducts, among others: a) abuse of economic power for dominating the market or eliminating competition; b) agreements, adjustments or alliances among

bidders; c) monopoly establishment; d) hiding of information concerning produce cost or selling price; e) favouring to a consumer, without a just cause.

Law n. 7492, of June 16 1986, known as the White Collar Law, defines the offences against the national finance system, ruling over finance institutions which exercise third parties' fund raising, negotiation or application, as well as the securities custody, issuance, distribution, negotiation or administration.

(b) Observations on the implementation of the article

Bribery in the private sector has not been criminalized through a specific provision in Brazil. Instead, there are different provisions covering certain elements of the offence such as: article 195 of Law No. 9279/1996 establishing the offence of disloyal competition; articles 175 and 177 PC (business fraud and abuse in the creation and administration of joint stock companies respectively); chapter II of Law No. 8137/1990 (crimes against economy and consumer relations); and Law No. 7492/1986, which defines the offences against the national finance system.

It should be noted that in Brazil there is a special type of legal person which is known as private and public joint stock company, or mixed-economy company (articles 37, item XIX; and 173, paragraphs 1 and 2, of the Federal Constitution). It is composed by private and state capital, with the majority of stocks with right to vote belonging to the State. This legal person can be either of public service delivery or economic activity exploitation, ruled by private law but organized according to public law. An example of that is the Bank of Brazil. In this case, active and passive bribery, as well as bribery of foreign public officials are dealt with through the aforementioned provisions on bribery in the public sector.

(d) Challenges, where applicable

Consider the establishment of a specific offence of bribery in the private sector

Article 22 Embezzlement of property in the private sector

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position

(a) Summary of information relevant to reviewing the implementation of the article

The provision under review has been implemented by the Brazilian Penal Code, in Chapters V - Embezzlement and VI - Larceny and other Frauds, of Title II - Crimes against Public Property.

Chapter V of Title II provides a general provision for the criminalization of embezzlement, which is applicable to cases that happened in the private sector, as well as in a person's private life. This Chapter comprises Articles 168 to 170 which include as a criminal offence, amongst other offences, the embezzlement of social security contributions.

Chapter VI comprises Articles 171 through to 179, with a special mention of Article 177 which provides for the criminalization of types of fraud and abuse in the management of joint stock companies.

Embezzlement

Article 168 - ownership of movable things belonging to others with possession or ownership: Penalty - imprisonment from one to four years and a fine.

Increased penalty

§ 1 - The penalty is increased by one third, when the agent received the goods:

I - on deposit as required;

II - as a guardian, trustee, receiver, liquidator, administrator, executor or judicial trustee;

III - by virtue of occupation, employment or occupation.

Embezzlement of social security (including Law No. 9983, 2000)

https://www.planalto.gov.br/ccivil_03/LEIS/L9983.htm

Article 168-A. Failure to forward the social security contributions collected from taxpayers, and within a legal or conventional framework (Included by Law No. 9983, 2000) <https://www.planalto.gov.br/ccivil_03/LEIS/L9983.htm>

Penalty - 2 (two) to 5 (five) years and a fine. (Included by Law No. 9983, 2000)

https://www.planalto.gov.br/ccivil_03/LEIS/L9983.htm

§ 1 In the same penalties which fail to: (Included by Law No. 9983, 2000)

https://www.planalto.gov.br/ccivil_03/LEIS/L9983.htm

I - collect, within the legal period, contribution or other amount allocated to social security has been deducted from payment for the insured to third parties or collected from the public (including by Law No. 9983, 2000) <https://www.planalto.gov.br/ccivil_03/LEIS/L9983.htm>

II - collect to social security contributions that have involved non-cash expenses or costs relating to the sale of products or services; (Included by Law No. 9983, 2000)

<https://www.planalto.gov.br/ccivil_03/LEIS/L9983.htm>

III - pay the insured a benefit when their assessments or values have already been reimbursed by social security to the company. (Included by Law No. 9983, 2000)

https://www.planalto.gov.br/ccivil_03/LEIS/L9983.htm

§ 2 The punishment is extinguished if the perpetrator has spontaneously declared, confessed and paid the contributions, amounts or values and provided the information due to social security, as defined by law or regulation before the start of inspections.

(Included by Law No. 9983, 2000)
https://www.planalto.gov.br/ccivil_03/LEIS/L9983.htm

§ 3 It is optional to the judge not to apply the penalty or to impose only a fine if the agent is a first-time offender and has good reputation, provided that: (Included by Law No. 9983, 2000) https://www.planalto.gov.br/ccivil_03/LEIS/L9983.htm

I – he/she has promoted, after the start of tax proceedings and before the lodgment of an accusation, the payment of social welfare contributions, including attachments, or (Included by Law No. 9983, 2000)
https://www.planalto.gov.br/ccivil_03/LEIS/L9983.htm

II - the value of contributions due, including extras, is equal to or less than those provided by social security, administratively, as the minimum for the filing of their executions. (Included by Law No. 9983, 2000)
https://www.planalto.gov.br/ccivil_03/LEIS/L9983.htm

Embezzlement of something regarded by error, fortuitous event or force of nature

Article 169 - Appropriating someone of something strange coming to power by his error, further to a fortuitous event or by force of nature:

Penalty - detention of one month to one year or a fine.

Sole paragraph - The same penalty:

Embezzlement of treasure

I - he who finds a treasure in a building to others and appropriates it, in whole or in part, is entitled to share it with the building owner;

Embezzlement of thing found

II – he who thinks something is strange and lost and appropriates it, in whole or in part, failing to restore to the rightful owner or possessor or handing it to the competent authority within the period of 15 (fifteen) days.

Article 170 - The provisions of art. 155, § 2 shall apply to the crimes described in this chapter.

FRAUD AND OTHERS

Larceny

Article 171 - Obtaining for himself or for others an illegal advantage to the detriment of others, inducing or keeping someone in error, by artifice, trick, or any other fraudulent means:

Penalty - imprisonment from one to five years and a fine.

§ 1 - If the criminal is primary, and the injury is of little value, the judge may impose a penalty pursuant to art.155, § 2.

§ 2 - The same penalties apply to those who:

Disposition of things of others as their own

I - sell, barter, give in payment, hire or guarantee things belonging to others as their own;

Fraudulent sale or encumbrance of its own thing

II - sell, barter, or give in payment a guarantee which is inalienable on his own thing, record liens or litigate, or promise to sell the property to a third party through payments in instalments, silencing about any of these circumstances;

Spoofing pledge

III - defraud through the sale by the creditor without consent or otherwise guarantee the pawn, when he has committed the possession of the object;

Fraud in the delivery of a thing

IV – defraud the substance, quality or quantity of something that must be handed to someone ;

Fraud to receive compensation or insurance value

V - destroy, in whole or in part, or hides its own thing, or injures the body or health, or exacerbates the consequences of injury or illness, in order to receive compensation or the insurance value;

Fraud in the payment by check

VI - issue checks without sufficient provisions of funds held by the drawee, or frustrates the payment.

§ 3 - The penalty is increased by one third if the crime is committed at the expense of public-law or the institute of popular economy, welfare or charity.

Duplicate simulated

Article 172 - Issue invoices, duplicates or bills of sale that do not correspond to the merchandise sold in quantity or quality, or the service provided. (Writing amended by Law No. 8137 of 12.27.1990)

<https://www.planalto.gov.br/ccivil_03/LEIS/L8137.htm>

Penalty - detention of 2 (two) to 4 (four) years and a fine. (Writing amended by Law No. 8137 of 12.27.1990)

<https://www.planalto.gov.br/ccivil_03/LEIS/L8137.htm>

Sole Paragraph. The same penalties incurred by those who falsify or tamper with the books of the Registry of Duplicates. (Included by Law No. 5474., 1968)

<https://www.planalto.gov.br/ccivil_03/LEIS/L5474.htm>

Abuse of the unable

Article 173 - Abuse, for your benefit or the interest, need, passion of others or the inexperience of a minor, or the sale or unsoundness of mind of others, inducing them to practice any act likely to have legal consequences against himself or a third party:

Penalty - imprisonment from two to six years and a fine.

Inducement to speculation

Article 174 – Misuse for yourself or others or use the inexperience of simplicity or mental inferiority of others, inducing others to play or practice betting or speculate in securities or commodities, knowing or having reasons to know that the transaction is ruinous:

Penalty - imprisonment from one to three years and fine.

Fraud in Trade

Article 175 - Cheating, in the exercise of commercial activity, on the purchaser or consumer;

I - selling, as true or perfect counterfeit or damaged merchandise;

II - delivering a commodity for another:

Penalty - detention from six months to two years or a fine.

§ 1 - Change in the work commissioned regarding the quality or weight of metal or replace in the same case real stone by false or other stone of a lesser value, sell fake rock for real, sell as precious metal some other quality:

Penalty - imprisonment from one to five years and a fine.

§ 2 - The provisions of art. 155, § 2.

Other fraud

Article 176 - Taking meals in restaurants, stay at a hotel or make use of means of transport without being able to afford payment:

Penalty - imprisonment of fifteen days to two months or a fine.

Sole paragraph - only take place through representation, and the judge may, under the circumstances no longer apply the penalty.

Fraud and abuse in the founding or management of a corporation

Article 177 - Promote the establishment of a corporation, making a false statement about the economic conditions of the corporation in the prospectus or in a communication to the public or to the assembly, or fraudulently conceal the fact relating thereto: Penalty - imprisonment from one to four years and a fine, if the fact no crime against the popular economy.

§ 1 - the same penalty if the fact does not constitute a crime against the public economy: (See Law No. 1521 of 1951)

<https://www.planalto.gov.br/ccivil_03/LEIS/L1521.htm>

I - the director, manager or supervisor of a corporation which, in the prospectus, report, opinion, review or disclosure to the public or to the assembly, make false statement about the economic conditions of a company, or fraudulently conceals, in whole or in part, a fact against them;

II - the director, manager or supervisor who promotes, by any deceptive means, false valuation of shares or other securities of the company;

III - the director or manager who takes loan from the company or uses, for himself or a third party, property or company assets without prior approval of the General Assembly;

IV - the director or manager who buys or sells on behalf of the company, shares issued by it, except when the law allows it;

V - the director or manager who, as a guarantee of social credit, accepts company shares as security or collateral;

VI - the director or manager who, in the absence of a balance sheet, in disagreement with this, distributes false or fictitious profits or dividends;

VII - the director, manager or supervisor who, through an intermediary, or colluded with a shareholder, obtains the approval of the account or legal opinion;

VIII - the liquidator, in the case of paragraphs I, II, III, IV, V and VII;

IX - the representative of the foreign corporation, authorized to operate in the country, who practices the acts mentioned in paragraphs I and II, or gives false information to the Government.

§ 2 - The penalty of imprisonment of six months to two years and a fine, a stockholder in order to gain advantage for themselves or others, negotiates the vote in the general assembly.

Irregular issue of the warehouse receipt or "warrant"

Article 178 – to issue the warehouse receipt or warrant in violation of legal provisions:
Penalty - imprisonment from one to four years and a fine.

Fraud to execution

Article 179 - Cheating execution, alienating, dodging, destroying or damaging property, or simulating debts: Penalty - detention from six months to two years or a fine.
Sole paragraph - only takes place upon complaint.

(b) Observations on the implementation of the article

The Brazilian legislation establishes several offences linked to embezzlement of funds in the private sector (articles 171-179 PC). More specifically, article 177 PC on fraud and abuse when incorporating and managing a company, partially criminalizes the conduct described in article 22 of the Convention.

(d) Challenges, where applicable

Building on article 177 PC, Brazil should consider fully criminalizing all forms of embezzlement in the private sector

Article 23 Laundering of proceeds of crime

Subparagraph 1 (a) (i)

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- (a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;*

(a) Summary of information relevant to reviewing the implementation of the article

To comply with this provision, Brazil fulfils the measures described in article 23 (1) (a) (i) through a specific law devoted to criminalizing money laundering, which is the Law N. 9.613, of March 3, 1998.

Article 1 of this Law gives a definition of money laundering crimes and lists the proceeding crimes, including those against Federal and Foreign Public Administration.

In 2012, Law N 12683 was published, altering Law N 9613 to render more effective the criminal prosecution of money laundering offences, including by deleting the list of

predicate offences. As such, under the new legislation, any crime can be a predicate offence in money laundering cases.

Concerning the provision for Subparagraph 1 (a) (i) of Article 23, this law states through Paragraph 1 of Article 1 that anyone who converts assets, rights or valuables into licit assets shall be sentenced to incarceration; also if he/she acquires, receives, exchanges, trades, gives or receives as guarantee, keeps, stores, moves, or transfers any such assets, rights and valuables; or imports or exports goods at prices that do not correspond to their true value, in an attempt of concealing or disguising the true nature, origin, location, disposition, movement, or ownership of those assets, rights and valuables that result directly or indirectly from the crimes described in the same article.

This shall also apply to anyone who, through economic or financial activity, makes use of any assets, rights and valuables that he/she knows are derived from the crimes referred to in this article; knowingly takes part in any group, association, or office set up for the principal or secondary purpose of committing crimes referred to in this Law. It is worth mentioning that the attempts at committing any of the crimes referred to in this Law are also punishable.

Brazil has ratified the 1988 Vienna Convention (1991) and the Palermo Convention (2004). Money laundering is criminalized on the basis of the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention) and the 2000 UN Convention against Transnational Organized Crime (the Palermo Convention). Federal law 11.343/06 criminalizes narcotic and drug trafficking.

One should note that, under article 18 of the Brazilian Penal Code, any person shall be punished for the commission of a crime if she or he wanted to produce the result (direct dolus) or if she or he took the risk to produce it (eventual dolus). This provision of the Penal Code also applies to the conduct of ML. Also, article 29 of Brazilian Penal Code establishes that anyone who acts in the commission or omission of a crime should respond for the corresponding penalties to the extent of its own culpability. This provision covers the ancillary offences of money laundering.

Article 91 of the Penal Code establishes as an effect of conviction the loss in favor of the Union, except the right of the victim or a third party in good faith, of: a) the instrumentalities of crime, consisting of things from the manufacture, sale, use, transport or possession which is actually illegal and; b) the proceeds of crime or any property or value that is received from the agent as a result of the criminal activity.

In addition to the provisions set forth in the Criminal Code, the Brazilian AML Law also establishes that a guilty sentence entails the forfeiture, in favour of the Union, of any assets, rights and valuables resulting from any of the crimes referred to in this Law, due to provisions being made for safeguarding the rights of a victim or a third party in good faith.

Moreover, Law No. 9.613/98 brought forth specific regulations on the penalty of confiscation. The expression “assets, rights and valuables objects of crime”, used in the subsection I of article 7 of this law provides a comprehensive characteristic to the legal provision. Hence, the word “object” means in its legal definition “anything on which a right, an action or an obligation falls”. Moreover, the reference to the word in its ordinary meaning means both “reason, cause” and “intention, design, aim”. It is noted that for the purposes of the Money Laundering Law, the assets, rights and valuables related to the illicit act by any means - either by the action of the agents or by motivation, or else by the objectives to be achieved - must be the aim of the penalty of confiscation. Thus in Brazil the confiscation penalty related to the crime of money laundering includes: i) products or proceeds of crime; ii) instruments effectively or presumably used for the perpetration of the crime, and iii) products, proceeds or instrumentalities which have ultimately been transferred to third parties.

Article 1 of the Act 9.613 refers to the laundered property in a broad manner extending it to “assets, rights and valuables resulting from” the predicate crimes, with no limits with regards to their value. This provision is broad enough to cover property of any kind that directly or indirectly represents the proceeds of crime.

In addition to the statutes described above, one more can refer to an offense that may be related to money laundering: fencing. Fencing is present in Article 180 of the Brazilian Penal Code and described, in general, as the act of acquiring, receiving, transporting, carrying or hiding in one's or other's home, something you know to be proceeds of crime, or to influence third parties in good faith, to acquire, receive or hide them.

Statistics:

The Council for the Control of Financial Activities (Conselho de Controle de Atividades Financeiras - COAF), created by Law 9.613/1998 is the Brazilian Financial Intelligence Unit (FIU). Pursuant to articles 9, 10 and 11 of the aforementioned law, Companies that trade in specific activities that pose a greater risk of being used to launder proceeds of crime are obliged to report to COAF for the occurrence of “Suspicious Activities” (the COAF also has the power to define, in bylaws, what those consist in). Based on the financial intelligence analysis of those “Suspicious Activity Reports” – SARs, COAF may produce Financial Intelligence Reports, that are sent to authorities with investigation and prosecution powers. From 2004 to 2013, here are the statistics related to the Brazilian financial intelligence activity:

| Financial Intelligence Statistics by COAF | | |
|--|---|--|
| Year | SARs Received from Obligated Companies | FIRs delivered to investigation and prosecution authorities |
| 2004 | 9,050 | 843 |
| 2005 | 29,124 | 1,324 |
| 2006 | 22,893 | 1,169 |
| 2007 | 29,848 | 1,221 |

| | | |
|------|---------|-------|
| 2008 | 58,856 | 1,258 |
| 2009 | 64,966 | 1,501 |
| 2010 | 207,233 | 1,149 |
| 2011 | 230,412 | 1,471 |
| 2012 | 312,697 | 2,104 |
| 2013 | 426,232 | 2,450 |
| 2014 | 102,481 | 1,787 |

The Federal Prosecution Service provides the following statistics regarding Financial Intelligence Reports (FIR or RIF in Portuguese) received from the Brazilian UIF (COAF), as well as other documents qualified as *notitia criminis* received from different sources (Customs, Central Bank, etc.), and the consequent preliminary investigations. These statistics are published in GTLD’s website (Federal Prosecution Service’s Working Group on Money Laundering and Financial Crimes), <<http://gtld.pgr.mpf.gov.br>>, under the link “Estatísticas”.

Money laundering investigations (including but not limited to domestic bribery as a predicate crime), as it was reported for the OECD during the third phase of the peer evaluation (Phase 3) of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions are as follows:

| | 2010 | 2011 | 2012 |
|--|------|------|------|
| Investigations by Public Prosecutor | 131 | 225 | 280 |
| Investigations by Federal Police officers | 504 | 329 | 358 |

When the Prosecutor receives a report from the UIF, he may open a preliminary investigation in order to gather more information or evidence. After the preliminary investigation, the Prosecutor may send the case to the Federal Police, to open a criminal investigation, or he may go directly to prosecution. Another possibility, when a Prosecutor receives a SAR or a *notitia criminis*, is to dismiss it, when it has absolutely no evidence supporting the beginning of an investigation. Therefore, the numbers provided above do not represent the absence of action, when the number of preliminary inquiries is lower than the number of UIF Reports and other *notitia criminis* received. In the Brazilian system, the Prosecutor must always act: after analyzing the case, he/she may either dismiss it, with a formal act (administrative or judicial) or open a preliminary investigation (administrative), or send it to the Federal Police for a criminal investigation (*inquérito policial*), and prosecute the case (ação penal).

The Federal Prosecution Service has a Working Group specialized in money laundering and financial crimes. The Group is formed by experienced Federal Prosecutors, all over the country, who give information and support to every Prosecutor which has an investigation or a prosecution about money laundering.

The Group represents the Federal Public Prosecution Services in national and international events about money laundering, such as the National Strategy on Money Laundering (ENCCLA - *Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro*) and the FATF/GAFI Plenary Meetings.

To increase the support to the Prosecutors, as well as to give general information for the public, the GTLD Working Group maintains a website under the address <<http://gtld.pgr.mpf.gov.br>>, where relevant information and exchange of data and help are provided.

(b) Observations on the implementation of the article

Brazil has criminalized money-laundering through Law No. 9613, of March 3, 1998, as amended by Law No. 12683 of 2012 enacted on July 9, 2012 (article 1). The money laundering offences address all constituent elements as defined in article 23 of the Convention.

The Brazilian legislation used to regulate predicate offences using a list approach. However, since the enactment of Law No. 12.683, any crime may be considered as predicate offence for money-laundering purposes (all-crime approach). The Brazilian law also punishes the attempt to commit a money laundering offence and the “concerted action” or co-delinquency for the same purpose.

The review team took into account the statistics provided by the Federal Prosecution Service on money laundering investigations, as well as the statistics on the Suspicious Activities Reports (SARs) and Financial Intelligence Reports (FIRs) produced by the Council for Financial Activities Control – the Brazilian FIU – and sent to authorities with investigation and prosecution powers. However, the reviewing experts noted that those statistics were piecemeal, did not include information on final sentences and convictions and, as such, did not provide a comprehensive picture, also bearing in mind the size of the country. Therefore the reviewing experts were unable to assess the level of enforcement of the money-laundering legislation in Brazil.

(d) Challenges, where applicable

Brazil should continue its efforts to ensure effective enforcement of the money laundering legislation.

Article 23 Laundering of proceeds of crime

Subparagraph 1 (a) (ii)

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(a) Summary of information relevant to reviewing the implementation of the article

The provision under review has been implemented through Article 1 of Law n. 9.613/98 (now modified by Law 12.863 in order to exclude the list of proceeding crimes), which states that concealing or disguising the true nature, origin, location, disposition, movement, or ownership of assets, rights and valuables that result directly or indirectly from crimes.

According to Paragraph 2 of the same article, anyone can be punished if, through economic or financial activity, such person makes use of any assets, rights and valuables that he/she knows are derived from a criminal offence. The Law n. 12683, of July 9, 2012, establishes that anyone participating in group, association or business knowing that the primary or secondary purpose of its functioning is the commission of a crime covered by this law can also be punished.

(b) Observations on the implementation of the article

The money laundering offences address all constituent elements as defined in article 23 of the Convention through Law No. 9613, of March 3, 1998, as amended by Law No. 12683 of 2012 enacted on July 9, 2012.

Article 23 Laundering of proceeds of crime

Subparagraph 1 (b) (i)

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(a) Summary of information relevant to reviewing the implementation of the article

For this provision, Article 1 and its Paragraphs 1 and 2 comply with what is required for criminalizing the acquisition, possession or use of property known to be proceeds of crime, with better detail being item II of Paragraph 1, which refers to the acquisition, concealment, negotiation, giving or receiving as guarantee, keeping, storage, moving or transfer of illicit assets, rights or valuables; and item I of Paragraph 2, which refers to the use of assets, rights and valuables known as being proceeds of crime.

LAW No. 9613, OF MARCH 3, 1998

This law addresses the crimes of money laundering or concealment of assets, rights, and valuables; the measures designed to prevent the misuse of the financial system for illicit actions as described in this law; it creates the Council for Financial Activities Control (COAF) and addresses other matters.

LAW No. 12683, OF JULY 9, 2012

This Law amends Law n. 9613, of March 3, 1998, to render more effective the criminal prosecution of money laundering offences.

Statistics: Please see answer to Subparagraph 1 (a) (i) of Article 23 (question 81), above.

(b) Observations on the implementation of the article

The money laundering offences address all constitutive elements as defined in article 23 of the Convention through Law No. 9613, of March 3, 1998, as amended by Law No. 12683 of 2012 enacted on July 9, 2012

Article 23 Laundering of proceeds of crime

Subparagraph 1 (b) (ii)

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) Subject to the basic concepts of its legal system:

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

(a) Summary of information relevant to reviewing the implementation of the article

The provision under review has been implemented through items I and II of Paragraph 2, Article 1, of Law No. 9.613/98, which states that anyone can be punished when using, in economic or financial activities, assets, rights or valuables known as being proceeds of crime and participating in a group, association or business knowing that the primary or secondary purpose of its functioning is the commission of crime covered by this law. The attempt is also punishable, considering what is set forth in the Sole Paragraph of Article 14 of the Brazilian Penal Code, Decree-Law No. 2848/40, which punishes the attempt with the corresponding penalty of the consumed crime, decreasing one to two thirds of it. The Penal Code also provides, in its Articles 29 to 31, the figure of the "concerted action". The concerted action, also called concurrence for delinquents (*concurso delinquentium*) or co-delinquency, is defined as the concurrence of two or more persons, knowingly and voluntarily, competing or collaborating in the commission of some criminal offense.

Statistics: Please see answer to Subparagraph 1 (a) (i) of Article 23 above.

(b) Observations on the implementation of the article

The Brazilian law punishes the attempt to commit the money laundering offence and the “concerted action” or co-delinquency for the same purpose.

Article 23 Laundering of proceeds of crime

Subparagraph 2 (a)

2. For purposes of implementing or applying paragraph 1 of this article:

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(a) Summary of information relevant to reviewing the implementation of the article

Brazil cited as applicable legal measures two laws:

LAW No. 9613, OF MARCH 3, 1998

This law addresses the crimes of money laundering or concealment of assets, rights, and valuables; the measures designed to prevent the misuse of the financial system for illicit actions as described in this law; it creates the Council for Financial Activities Control (COAF) and addresses other matters.

LAW No. 12683, OF JULY 9, 2012

This Law amends Law No 9613, of March 3, 1998, to render more effective the criminal prosecution of money laundering offences.

Article 1 of Law No. 9613 provided a wide range of broad predicate offenses.

Under Article 2, II, of this Law, conviction of a predicate offence is not necessary to prosecute someone for the crime of money laundering. The judicial proceedings and sentencing of the crimes referred to in this Law are not dependent on the judicial proceedings and sentencing applicable to predicate offences, even if these crimes were committed abroad.

The process of seizure shall take place in the form prescribed in articles 125 to 144 of Decree-Law No 3689 of October 3, 1941 - Criminal Procedure Code. According to Article 4 of Law 9.613, a seizure order can be obtained by presenting evidence that those assets constitute the object of one of the predicate crimes. On the other hand, Paragraph 2 and 3, of Article 4, determine that the liberation of seized or detained assets, rights and valuables can only be obtained after the lawfulness of their origin has been established and after the accused presents him/herself personally to the judge. Those dispositions allow the prosecution, upon demonstrating *indicia* of criminality, to shift the burden of proof to the defendant to establish the legitimate origin of the property.

Brazilian AML Law used to identify predicate offences generically, not by length of penalty, but by class of offences. For the Brazilian AML Law, predicate offences were illicit trafficking of drugs and narcotic substances; terrorism and terrorism financing; smuggling or trafficking of weapons, ammunition and supplies for its production; kidnapping for extortion; all crimes committed against Public Administration, including those committed against foreign Public Administration, financial crimes, all crimes committed by organized crime, and crimes committed by an individual against foreign public administration.

All the predicate offences used to be considered serious offences - they were “crimes”, as opposed to “misdemeanours”. Under Brazilian legislation, according to Decree No. 3914/41, a crime, as opposed to a contravention, which should be understood as a misdemeanour, shall be punished with reclusion or detention

After the enactment of Law No. 12.683 of 2012, which revoked the list of predicate offenses, any offense may be considered a predicate offense to the crime of money laundering. As such, both crimes and contraventions may now be considered predicate offenses.

(b) Observations on the implementation of the article

The Brazilian legislation used to regulate predicate offences using a list approach. However, since the enactment of Law No. 12.683, any crime may be considered as predicate offence for money laundering purposes (all-crime approach).

Article 23 Laundering of proceeds of crime

Subparagraph 2 (b)

2. For purposes of implementing or applying paragraph 1 of this article:

(b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;

(a) Summary of information relevant to reviewing the implementation of the article

The list of predicate offences originally brought by Law 9.613, of March 3, 1998 comprised offences established in accordance with UNCAC. Most of the predicate offences described in this law were broad, which encompassed other offences stated by the Convention as well.

Law No. 12.683 of 2012 revoked the list of predicate offenses. Therefore, now, any offense may be considered a predicate offense to the crime of money laundering, which includes both crimes and contraventions (misdemeanours).

(b) Observations on the implementation of the article

The reviewing experts concluded that Brazil has implemented Art. 23(2)(b) UNCAC. According to the previous legislative regime based on the “list approach”, the requirement was that the predicate offence should correspond to one of the acts listed in article 1 of Law No. 9613. However, since the enactment of Law No. 12.683, any crime may be considered as predicate offence for money laundering purposes (all-crime approach).

Article 23 Laundering of proceeds of crime

Subparagraph 2 (c)

2. For purposes of implementing or applying paragraph 1 of this article:

(c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(a) Summary of information relevant to reviewing the implementation of the article

According to Article 2 of Law 9613/98, the judicial proceedings and sentencing of the crimes referred to in this law: II- are not dependent on the judicial proceedings and sentencing applicable to predicate offences, even if these offences were committed abroad.

Furthermore, crimes perpetrated abroad that, by treaty or convention, Brazil has been bound to suppress, might be subject to the Brazilian laws. Article 7 of the Brazilian Criminal Code establishes the conditions under which the Brazilian law can be applied, in the following terms:

“§ 2 - In cases of the subsection II, the application of the Brazilian law depends on the concomitance of the following conditions:

- a) the agent enters into the national territory
- b) the fact must be liable to prosecution in the country where it has been perpetrated
- c) the crime must be included among those for which the Brazilian law authorizes extradition
- d) the agent has not been acquitted abroad nor has served time there;
- e) the agent has not been pardoned abroad or, for any other reason, the liability to prosecution has not been extinguished, pursuant to the most favourable law.”

Article 8 of the Brazilian AML Law provides that a judge will freeze and seize the proceeds of money laundering whose predicate offences were committed in another country. However, it should be pointed out that should the proceeds of crime be derived from a conduct that occurred in another country, which is not an offence in that other country, even though it constitutes a predicate offence in Brazil, there would not be an offence of money laundering.

Another important issue concerns legal persons: although Brazil does not have criminal liability for legal persons, the offence of money laundering can still be prosecuted where the predicate offence is committed abroad by a legal person.

According to Brazilian law, the offence of money laundering extends to a person who commits both the predicate crime and money laundering. Article 1 of federal law 9.613/98 makes no difference regarding the person who committed the predicate offence, and the fundamental principles of Brazilian domestic law make no restriction to punish the so called self laundering. Besides, item II of Article 2 of AML Law establishes that the judicial proceedings and sentencing of the crimes referred to in the Law are not dependent on the judicial proceedings and sentencing applicable to prior crimes referred to in the previous article, even if these crimes were committed abroad.

Also, article 69 of the Brazilian Criminal Code provides that “when one, by means of more than one action or omission, commits two or more crimes, identical or not, the custodial sentences shall cumulate. In case of cumulative penalties of prison and custody, the latter shall be executed before the former.”

In this sense, the Brazilian Supreme Court has already decided that the money laundering activities do not constitute the mere termination of the predicate offence.

Should the proceeds of crime be derived from conduct that occurred in another country, which is not an offence in that other country but which would have constituted a predicate offence had it occurred domestically, there will be no offence of money laundering. If the act, which corresponds to a predicate offence in Brazil, is not considered an offence abroad, the origin of the assets, rights or valuables is not illicit.

Therefore, if the assets, rights or valuables are introduced in Brazil, there will not be a crime. However, it is not necessary that the foreign country criminalizes that offence with the same *nomen iuris*. The dual criminality principle in Brazil is interpreted in a broad manner. In other words, it is sufficient that the conduct criminalized on the other country fulfils the legal description of the crime in Brazilian law.

(b) Observations on the implementation of the article

As confirmed by the Brazilian authorities, the money-laundering offence can be applied in a situation where the predicate offence occurs abroad. According to the previous legislative regime based on the “list approach”, the requirement was that the predicate offence should correspond to one of the acts listed in article 1 of Law No. 9613. The list under this Law included acts committed by an individual against a foreign public administration (article 1 (VIII)). A fortiori, the extraterritoriality of the predicate offence under the newly enacted “all crimes approach” is not precluded. Brazil also confirmed that there is no double criminality requirement for the predicate offence and that it does not need to establish jurisdiction over the predicate offence to exercise its competence over the money laundering offence.

Article 23 Laundering of proceeds of crime

Subparagraph 2 (d)

2. For purposes of implementing or applying paragraph 1 of this article:

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(a) Summary of information relevant to reviewing the implementation of the article

Brazil confirmed that it has provided copies of its laws No. 9613, of March 3 1008 and Law No. 12683, of July 9, 2012.

(b) Observations on the implementation of the article

During the country visit, it was noted that the required notification had been sent to the United Nations Secretary-General.

Article 23 Laundering of proceeds of crime

Subparagraph 2 (e)

2. For purposes of implementing or applying paragraph 1 of this article:

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.

(a) Summary of information relevant to reviewing the implementation of the article

Most information has been given under question n. 87, of article 23 - Laundering of proceeds of crime. In addition, money laundering, as any other offence in Brazil, applies to natural persons. Paragraph 1 and 2 of AML Act provide further clarification when using the term “anyone”. Money laundering is a wilful offence in Brazil, where there are three possible forms of *dolus*: direct, necessary or eventual. Brazilian money laundering law requires only *dolus directus*, which means the person who carries out the criminal conduct had the intention of acting and wanting the result (article 18, I of Penal Code). But eventual wilfulness is also possible, when the person had the intention of acting and assumed that the result was possible for his conduct (article 18, I, last part, Penal Code). Eventual intention requires the prosecution only to prove, by the circumstances related to the conduct, that the accused assumed the risk that the assets, rights or valuables might be proceeds of an illicit activity. There is no need to prove any specific intention with the conduct, as it would be necessary for the second form of wilfulness.

The intentional element of the offence of money laundering - called *dolus* - may be inferred from objective factual circumstances. According to article 157 of the Code of Penal Procedure, the judge may freely appreciate the evidence to reach his conclusion and rule the case. Article 239 also establishes that it is considered evidence a notorious and proven circumstance which, referring to the fact, may lead inductively to come to the conclusion that there is or are other circumstances.

If money laundering was committed by a legal person, or for his/her benefit, all natural persons who could decide on the criminal conduct would have criminal liability and would be punishable, such as Presidents, directors, financial directors, accountants, etc. The Civil Code states in Article 50 that in case of abuse of the legal person, characterized for the deviation purposes, or the patrimonial confusion, the judge may consider that the private assets of the administrators or partners of the legal entity will be liable for the illicit acts of the legal person.

In addition, Paragraph 1 of Article 2 of Law No 9.613/98 states that “the charge shall include sufficient indications of the existence of the predicate offence. The criminal acts referred to in this Law shall be punishable even when the offender in the predicate offence is unknown or exempt from punishment.”

Paragraphs 1 and 2 of Article 1 of Law No 9.613/98 describe the ancillary offences to the offence of money laundering:

Paragraph 1. The same punishment shall apply to anyone who, in order to conceal or disguise the use of the assets, rights and valuables resulting from the crimes set forth in this article:

- I. Converts them into illicit assets
- II. Acquires, receives, exchanges, trades, gives or receives as guarantee, keeps, stores, moves, or transfers any such assets, rights and valuables;
- III. Imports or exports goods at prices that do not correspond to their true value.

Paragraph 2. The same penalty also applies to anyone who:

- I. Through economic or financial activity makes use of any assets, rights and valuables that he/she knows are derived from the crimes referred to in this article;
- II. Knowingly takes part in any group, association, or office set up for the principal or secondary purpose of committing crimes referred to in this Law.

Paragraph 3 of Article 1 of Law No 9.613/98 states that any attempt to commit any of the crimes referred to in this Law are punishable in accordance with the provisions set forth in article 14, sole paragraph, of the Criminal Code (“the attempt to commit a crime is punishable with the same penalty of the consummated offence, reduced by one to two-thirds”).

Besides, as stated before, article 30 of Brazilian Penal Code establishes that anyone who concurs for the commission of a crime should respond for the correspondent penalties to the extent of its own culpability. This provision covers the ancillary offences of money laundering. Law No 12683, of July 9, 2012, which amends Law No 9.613/98, adapts the above mentioned paragraphs, so that they do not mention specific predicate offences, but rather state that the assets, rights and valuables may result from any offence.

Furthermore, according to its article 12, the Brazilian Criminal Code is also applicable to offences established in federal laws. Article 29 of Penal Code provides that “whoever, in any way, concurs for the crime will be punished by the same penalties, in accordance with his culpability”. The term “concurrer” is broad enough to cover the conduct of assisting, aiding and abetting and the penalty will be individualized according to the participation of the accused person.

Additionally, Brazil has criminalized the conduct of real favouring, which also considers an offence “to provide a criminal, except in cases of co-perpetration or receiving, with assistance to turn the proceeds of crime safe”.

And article 286 of the Penal Code criminalizes the conduct of openly inciting someone to commit a crime. All those offences, and the combination of laws can cover the conducts of conspiracy to

commit, attempt, aiding and abetting, facilitating and counselling the commission, as proper or ancillary offences of money laundering.

When it comes to money laundering and other economic or financial offences, however, apart from the legal liability of their managers, legal persons are to suffer civil and administrative consequences for their conduct, according to article 173, paragraph 5 of the Federal Constitution (Brazil's Fundamental Law).

Moreover, according to the AML Law, legal persons as well as their managers who fail to comply with the provisions set forth in the Law shall be subject to the following sanctions which can be applied together or separately: i) warning; ii) fine; iii) temporary prohibition on holding any management position in other legal entities; and iv) cancellation of the authorization to operate. Also, Law No 8.429/92 states that legal persons and third parties that abet or aid the act of administrative improbity or benefit, directly or indirectly, from it, are subject to civil liability. Therefore, in case of offences against the public administration and money laundering of the illicit assets, legal entities involved are punishable with civil penalties.

Civil and administrative sanctions are always possible for legal persons, in parallel with the criminal liability of its managers and directors.

Natural persons who commit a money laundering offence are punishable with a minimum of 3 (three) year up to 10 (ten) year imprisonment, plus a fine. The conviction will also represent the loss of all the goods, rights or values that have been laundered. The same sanction is applicable for offences of Paragraph 1 and 2 of Article 1. If the money laundering offence follows a constant pattern or is committed by a criminal organization the sentence shall be increased by one to two-thirds. As mentioned before, any attempt is punished with the penalty corresponding to the consummated crime, reduced by one to two-thirds.

According to the money laundering law, there is also the penalty of being barred from holding or maintaining a public function or to be forbidden to be a director, member of the board of administration or manager from legal public function or to be forbidden to be a director, member of the board of administration or manager for legal persons who operate in the financial sector, for the double amount of time of imprisonment imposed.

Under article 92, I, of the Penal Code, the loss of position, public function or term of office may apply to convicted natural persons. This additional sanction is not automatic, but must be specifically pronounced by the court, and can only be ordered where an imprisonment sentence of one year or more is ordered.

Legal persons involved in money laundering offences may be administratively liable according to money laundering law (article 12 and 13, Federal Law 9.613/98). Penalties range from warning, fines, temporary closing, until prohibition for the operation.

Civil liability is possible according to Federal Law 8.429/1992, when the legal person acts against public administration or against public property.

With support of the theory of the 'disregard of legal entity' (article 50 of the Civil Code) private property of the associates and managers of a legal person may respond for the illicit acts committed.

Law 8666, of June 21, 1993, allows for the exclusion from public tenders of legal persons found guilty of certain types of conduct related to public tenders. Article 88 of the Law provides for the exclusion from the public procurement process of companies which (i) have been convicted of tax fraud; (ii) have committed illicit acts with a view to thwarting the objectives of the bidding process; and (iii) have demonstrated they are unfit to enter into a contract with the Public Administration as a result of illicit acts committed.

In 2013, Law No. 12.846 was enacted to fill in a gap in the framework of liability of legal persons for acts of corruption against national and foreign public administrations. Please revert to Article 26 of the UNCAC below for more information on the new framework to punish companies for acts of corruption.

(b) Observations on the implementation of the article

Brazilian legislation provides for qualified concurrence between the offence of money laundering and other predicate offences, which covers the situation envisaged in paragraph 89. Contrary to the provisions of this paragraph, Brazilian law punishes the attempt to commit the predicate offence and an accomplice or co-author of the crime.

Article 24 Concealment

Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

The Brazilian Penal Code, Decree-Law No. 2848/40, provides for the criminalization of the offence described in Article 24 of UNCAC. This Decree-Law devotes the whole Chapter VII - Receiving Stolen Property, stating in its Article 180 that anyone commits a stolen property offence when he or she acquires, receives, transports, conducts or conceals, for his or her benefit or the benefit of a third party, anything known to be proceeds of crime, or influence a third party in good faith to acquire, receive or conceal that thing. This article also refers to any economic activity used in order to launder the proceeds of crime.

Brazilian Penal Code, Decree-Law No. 2848/40.

Receiving Stolen Goods

Article 180 - acquire, receive, transport, conduct or conceal, for one own's benefit or the benefit of a third party, anything known to be proceeds of crime, or influence a third party in good faith to acquire, receive or conceal that thing.

Penalty - incarceration from 1 (one) to 4(four) years and a fine.

Moreover, Law 9.613/98, in its Article 1, item II of Paragraph 1 and items I and II of Paragraph 2 – as amended by Law N° 12683 of 2012 states that “anyone who, in order to conceal or disguise the use of the assets, rights and valuables resulting from predicate offenses, shall be penalized if he or she acquires, receives, exchanges, trades, gives or receives as guarantee, keeps, stores, moves, or transfers any such assets, rights and valuables; through economic or financial activity, makes use of any assets, rights and valuables that he/she knows are derived from the crimes listed in that article; and knowingly takes part in any group, association, or office set up for the principal or secondary purpose of committing crimes referred to in this Law.”

(b) Observations on the implementation of the article

The offence of concealment, as described in article 24 of the Convention, falls within the scope of article 180 PC, which includes all elements required by the Convention.

Article 25 Obstruction of Justice

Subparagraph (a)

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;

(a) Summary of information relevant to reviewing the implementation of the article

There are two related offences:- the first is the crime of false testimony or false auditing, which is provided for in art. 343 of the Brazilian Penal Code, Decree-Law No. 2848/40, which refers to the giving, offering, or promising of money or any other advantage to a witness, translator or interpreter in order to persuade him to make a false statement, deny or omit the truth in testimonials, audits, calculations, translations or interpretations; and the second one is the crime of Coercion in the course of the proceedings, which is provided for in art. 344 of the Brazilian Penal Code, which relates to using violence or serious threat for the purpose of favouring one’s own interest or that of others against an authority, a party or any person working or called in to intervene in judicial, police or administrative proceedings or in arbitration.

(b) Observations on the implementation of the article

Article 25(a) of the Convention is implemented through two basic provisions: article 343 PC (“false testimony or auditing”), which refers to the giving, offering, or promising of money or any other advantage to a witness, translator or interpreter in order to persuade him to make a false statement, deny or omit the truth in testimonials, audits, calculations, translations or

interpretations; and article 344 PC (“coercion in the course of proceedings”), which relates to the use of violence or serious threat for the purpose of favouring one’s own interest against an authority, a party or any person working or called in to intervene in judicial, police or administrative proceedings or in arbitration. No relevant jurisprudence on the definition of “party” or “person called in to intervene in proceedings” was provided.

Article 25 Obstruction of Justice

Subparagraph (b)

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil makes no difference between whether the victim is an ordinary person or a justice or law enforcement official. Hence the same applicable measures cited for the previous paragraph would be applicable in this case: article 343 PC (“false testimony or auditing”) and article 344 PC (“coercion in the course of proceedings”).

(b) Observations on the implementation of the article

Article 25(b) of the Convention is implemented through the above provision, since Brazil does not differentiate between the victim as an ordinary person, a justice or law enforcement official.

Article 26 Liability of legal persons

Paragraph 1

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil cited as applicable legal measures Law 8884 of 1994 (violations against the economic order), Law 8666 of 1993 (public procurement procedures and administrative contracts) and Law 8429 of 1992 (administrative misconduct), which regulate the civil and administrative liability of a legal person.

Chapter 2 of Law 8.884/94 (violations against the economic order), establishes offences for which legal persons may be punished both civilly and administratively. In addition, Chapter 3 of the same law establishes the civil and administrative penalties, such as payment of fines, prohibition of contracting with Public Administration and participation in public biddings, patent breach of the convicted person's products, among others.

Law 8.666/93 (public procurement procedures and administrative contracts), in its Chapter IV – Administrative Penalties and Legal Protection, provides for civil and administrative measures for legal persons for fraudulent crimes such as fines, suspension or ineligibility for contracting with Public Administration.

Law 8.429/92 (administrative misconduct), in its Chapter III - Penalties, provides for civil and administrative measures for legal persons for fraudulent and misappropriation crimes such as fines, compensation, suspension for contracting with Public Administration.

The Office of the Comptroller General (CGU) prepared a Draft Bill in cooperation with the Ministry of Justice establishing the direct liability of legal persons for acts of corruption committed against the National and Foreign Public Administration - Annex 9. The Draft Bill was submitted to Congress, by President Luis Inácio Lula da Silva, on the 8th of February 2010.

The Bill was approved by the Congress and was sanctioned into Law No. 12.846 by President Dilma Rousseff on August 1st 2013. The Law entered into force in January 2014.

The Law fills a major gap identified in the Brazilian system regarding the liability of legal persons for illicit acts committed against the National Public Administration in the three branches of government - Executive, Legislative and Judiciary - and at every level of the Federation (Union, states, Federal District and municipalities), in particular acts of corruption and fraud in public procurement procedures and contracts executed with the Public Administration.

The Law establishes a comprehensive system to suppress acts of corruption and foreign bribery committed by enterprises in Brazil and abroad by providing for administrative and civil mechanisms to establish liability and a uniform system throughout the country, with a view to strengthening the fight against corruption in accordance with the unique features of the Brazilian federal system.

By establishing the direct liability of legal persons, the proposed law moves beyond the narrow discussion of individual culpability of agents in the commission of violations. Under the legislation, legal persons are held liable upon a showing of the facts, the resulting consequences of such facts and the causal connection between them.

In this way, the law effectively removes the evidentiary difficulties of demonstrating the necessary subjective elements, including the intent to cause damage, a common feature of the general and subjective procedures required to establish the liability of natural persons, particularly in the criminal sphere.

In December 2007, the Office of the Comptroller General (CGU) created the Commission of Administrative Procedures against Suppliers (CPAF) in an effort to enhance the efficiency of provisions establishing administrative penalties for companies that practice illegal acts in order to frustrate the core objectives of bids and contracts. After completion of the administrative procedure, the company can be declared ineligible to contract with the Public Administration for

two years. The list of companies declared ineligible by the CGU or by other public bodies is available on the Internet, on the National Debarment List (CEIS).

(b) Observations on the implementation of the article

The attribution of criminal liability to legal persons is only possible in limited circumstances defined in the Constitution. Instead, there are different laws regulating the civil and administrative liability of a legal person (Laws Nos. 8884/94; 8666/93; 8429/92). The constitutional basis relied upon for enacting laws that establish administrative liability for legal persons is found in article 173, paragraph 5, of the Federal Constitution.

A new Bill was enacted as Law No. 12.846 in August 2013 (“Corporate Liability Law”).

Article 26 Liability of legal persons

Paragraph 2

2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

(a) Summary of information relevant to reviewing the implementation of the article

As confirmed in the answer to Paragraph 1 of Article 26 (question 93), Law 8884 of 1994 (violations against the economic order), Law 8666 of 1993 (public procurement procedures and administrative contracts), Law 8429 of 1992 (administrative misconduct), and Law 12.846 of 2013 (acts of corruption and foreign bribery) provide for measures used to suppress violations committed by legal persons. The penalties civilly and administratively applied to legal persons in Brazil range from the payment of a fine to the ineligibility to contract with the Public Administration and to the dissolution of the company.

According to Law No ° 12.846/2013, a range of instructional and dissuasive sanctions may be applied, including fines, the mandatory publication of the sanction judgment in a major media outlet operating in the area in which the violation took place and connected to the company’s business sector, or, in the absence of a specialized outlet, in a national media outlet, and the prohibition on receiving government incentives and entering into contracts with the Public Administration.

Additionally, legal persons are subject to an array of civil sanctions intended to serve as a complement to the applicable administrative sanctions. These more severe penalties are imposed following thorough review and scrutiny by the Courts and may include the

mandatory dissolution of a legal entity constituted or employed to facilitate or promote illicit acts and the forfeiture of assets, rights and securities arising from direct or indirect advantages or benefits obtained through the commission of violations, while ensuring that the rights of all damaged parties or third parties of good faith are properly safeguarded.

The responsibility for establishing the administrative liability of legal persons for acts of national and foreign bribery falls to each body and entity in the three branches of government (Executive, Legislative and Judicial) at every level of the Federation (Union, states, Federal District and municipalities).

In respect of civil liability, the Public Prosecutor's Office may, in addition to the competent federative bodies, adjudicate actions against legal persons, with a view to supplementing the administrative sanctions applied by the public entity through the imposition of more severe penalties, including dissolution. Further, in the event a public entity fails to establish the administrative liability of a legal person the Public Prosecutor's Office may file a civil liability action against the legal person and petition the Courts to apply the administrative and civil sanctions corresponding to the infraction.

(b) Observations on the implementation of the article

A new Bill was enacted as Law No. 12.846 in August 2013 ("Corporate Liability Law"). The Law sets forth civil and administrative liability of legal persons for performing acts against the national or foreign public administration. As reported by the Brazilian authorities, it filled a major gap identified in the Brazilian legal system regarding the liability of legal persons for illicit acts committed against a national or foreign public administration at the executive, legislative and judicial levels and at every level of the Federation (Union, states, federal district and municipalities), in particular acts of corruption and fraud in public procurement procedures and contracts executed by the public administration.

Money-laundering is not included in the list of offences for which a legal person can be held liable. In general, and in view of the limited statistics provided for the purposes of the report by the Brazilian authorities (only a few in relation to investigations), the inability to assess the level of enforcement in money laundering cases was noted by the reviewing experts.

With regard to civil liability, the Federal Prosecution Service may, in addition to the competent federative bodies, adjudicate actions against legal persons, with a view to supplementing the administrative sanctions applied by the public entity through the imposition of severe penalties, including dissolution. Furthermore, even where the administrative liability of a legal person is not established, the Federal Prosecution Service may file a civil liability action against the legal person before the courts.

(d) Challenges, where applicable

Brazil should ensure that legal persons can be held liable for money laundering offences.

Article 26 Liability of legal persons

Paragraph 3

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

(a) Summary of information relevant to reviewing the implementation of the article

Under domestic criminal law, legal persons are only punished for environmental crimes. As for corruption, the current state of the law in Brazil centres on the culpability of the natural person within a legal entity, rather than the legal entity itself. Under the legal theory in Brazil, a legal person is considered to have an “abstract, intangible and unreal existence” and therefore has no capacity for criminal liability. Accordingly, it is considered that the will of a legal person is determined by the natural persons who run or manage it, and therefore it is only natural persons who have the capacity for criminal liability.

Article 173, paragraph 5 of the Federal Constitution states that:

“the law, without prejudice to the individual liability of the officers of the corporation, will establish the latter’s liability subjecting it to penalties appropriate to their nature, in respect of acts committed against the economic and financial order and against the popular economy.”

For instance, Article 12 of Law. 8.429/92, establishes that the individual responsible for the act of improbity is subject to penalties, independently of the criminal, civil and administrative sanctions provided in a specific law. The crime committed by the individual shall have its correlation with the crimes stated by the Brazilian Penal Code under Title XI - Crimes against Public Administration, with criminal penalties ranging from deprivation of liberty to incarceration and fine.

Also, Law No 12.846 of 2013, which deals with administrative and civil liability of legal persons for the practice of acts against the public administration (domestic or foreign). The purpose of the matter is to provide that the entity answers objectively, under both administrative and civil law, by committing acts of corruption in its interest or benefit, against the Government, even if the act performed did not provide it with an advantage or that an effective possible advantage does not accrue directly or exclusively.

Under article 2 of Law 12.846/2013, the liability of the legal entity for performing acts against the public administration is based on a strict liability concept. That means that the sanctions set forth in the law will be applied when an act by a company causes harmful effects to public administration regardless of the performance of its representatives.

The liability of the legal entity, however, does not exclude the individual liability of its directors, officers or any other individual who is the offender, co-offender or participant in the harmful act. Also, the strict liability of the legal entity does not depend on the liability of the individuals mentioned above. In this case, there will be two different procedures that will run separately.

Subject to the provisions of the Law, all companies and the ordinary business companies, personified or not, regardless of the status of the organization or corporate structure, and any foundations, associations, organizations or persons, or foreign companies that have headquarters or a branch representation in the Brazilian territory, consisting of fact or law, even temporarily. State-owned companies, either fully or partially owned, are also subject to application of the Law.

(b) Observations on the implementation of the article

The liability of legal entities does not exclude the individual liability of their directors, employees or any natural person participant in the harmful act.

Article 26 Liability of legal persons

Paragraph 4

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

(a) Summary of information relevant to reviewing the implementation of the article

The provisions set forth in article 91, subsection II, lines a and b, of the Brazilian Penal Code and article 7, subsection I, of Law 9613/98 shall also be applied to legal persons, which include amongst others forfeiture, confiscation, fines, ineligibility to contract with Public Administration.

Law 12.846 of August 1st 2013, which sets forth civil and administrative liability of legal entities for performing acts against national or foreign public administration, represents an important tool in combating harmful acts committed for the benefit or in the interest of companies. The Law provides for strong penalties, for example, a fine of 0.1% to 20 % of the gross revenues of the company and, in certain cases, the compulsory dissolution of the company. The law also has an important role in promoting ethics and integrity in the private sector because it takes into account, when applying the penalty, the existence of mechanisms and procedures of integrity, audit and encouragement to report irregularities. Thus, in addition to recognizing the importance of such mechanisms, the law will

encourage companies to adopt policies and procedures of integrity, thereby contributing to mitigate the occurrence of corruption in the sector.

Penalties established by Law n. 12,846/2013:

Article 6. Within the administrative sphere, the sanctions listed below shall apply to legal entities held liable for the wrongful acts provided for in this Law:

I – a fine in the amount of 0.1% (zero point one percent) to 20% (twenty percent) of the gross revenues earned during the fiscal year prior to the filing of administrative proceedings, excluding taxes, which shall never be lower than the obtained advantage, when it is possible to estimate it; and

II – extraordinary publication of the condemnatory decision.

Paragraph 1. The sanctions will be applied on a grounded manner on an isolated or cumulative basis, according to the peculiarities of the concrete case and to the severity and nature of the perpetrated offences.

Paragraph 2. The application of the sanctions set forth in this Article shall be preceded by a legal opinion prepared by the Public Advocacy Office or the body of legal assistance, or its equivalent, of the public entity.

Paragraph 3. The application of the sanctions set forth in this Article does not exclude, in any case, the obligation of full restitution for the damage caused.

Paragraph 4. In the event of item I of the head provision, in case it is not possible to adopt the criterion regarding the value of the legal entity's gross earning, the applicable fine will range from BRL 6,000.00 (six thousand Brazilian reais) to BRL 60,000,000.00 (sixty million Brazilian reais).

Paragraph 5. The extraordinary publication of the condemnatory decision will be made as a summary of the decision at the legal entity's expenses, through a means of communication widely circulated in the area where the violation was committed and the legal entity has business or, in its absence, in a nationally circulated publication, as well as by fixing a public notice, for the minimum term of 30 days, at the establishment or at the place where the activity is conducted, in a manner visible to the public, and at an electronic site in the world wide web. (The prerogative of territory, nationality or other forms of extra-territorial jurisdiction over the crime of international bribery);

Article 18. The liability of the legal entity in the administrative sphere does not exclude the possibility of its liability in the judicial sphere.

Article 19. The Federal Government, the States, the Federal District and the Municipalities, through their respective Public Advocacy Offices or legal representation bodies, or their equivalent, and the Public Prosecution Office may file a judicial action in relation to the wrongful acts set forth in Article 5 of this Law, with a view to the application of the following sanctions to the responsible legal entities:

I – loss of the assets, rights or valuables representing the advantage or profit directly or indirectly obtained from the wrongdoing, except for the right of the damaged party or of third parties in good faith;

II – partial suspension or interdiction of its activities;

III – compulsory dissolution of the legal entity;

IV – prohibition from receiving incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or government-controlled entities from 1 (one) to 5 (five) years.

Paragraph 1. The compulsory dissolution of the legal entity will be established when the following is evidenced:

I – the corporate personality was used on a regular basis to facilitate or promote the performance of wrongful acts; or

II – the legal entity was organized to conceal or dissimulate illegal interests or the identity of the beneficiaries of the acts performed.

Paragraph 2. (VETOED).

Paragraph 3. Sanctions may be applied in an isolated or cumulative manner.

Paragraph 4. The Public Prosecution Office or the judicial representative body of the public entity, or their equivalent, may request the freezing of assets, rights or values necessary to guarantee the payment of the fine or to ensure the full restitution for the damages caused, as provided for in Article 7, except for the right of third parties in good faith.

It is also worth noting that according to art. 10 of Law 12.846/2013, the public entity undertaking an administrative procedure to determine the liability of a legal entity may solicit all judicial measures necessary for the investigation and processing of offences, including search and seizure, through its judicial representation body, or equivalent. In Brazil, measures such as search and seizure are, as a rule, judicial measures, and therefore cannot be performed exclusively by administrative means without proper judicial authorization.

Statistics:

Relatively to the administrative liability, the Federal Government of Brazil created the Registry of Ineligible and Suspended Companies (*Cadastro de Empresas Inidôneas e Suspensas - CEIS*), which posts a list on the Internet with data on enterprises punished for irregularities in tenders, tax frauds or non-compliance with contracts with the Public Administration, so as to prevent them from withholding this information for entering into a contract with a public agency.

The CEIS, which can be accessed through the Transparency Portal (www.portaldatransparencia.gov.br), is an initiative of the CGU which gathers, in a single database, constantly updated information provided by Brazilian federal, state and municipal institutions on suppliers that committed irregularities. It makes it easier for public managers to identify corrupt enterprises that failed to provide sound services to the society and enables other companies to avoid business relations with these enterprises once they become aware of their illegal practices. As of February 2014, the CEIS counts 9,755 acts of suspension and ineligibility.

Several states and municipalities hold a list of suspended or ineligible companies; some of them allow for consultation by the enterprises' National Registry of Legal Persons (CNPJ - Cadastro Nacional de Pessoas Jurídicas). The CEIS gather the data and convert them to a more accessible way, indicating the following fields:

- The CNPJ;
- Corporate name (real or assumed)

- Initial and final dates of sanction;
- Body responsible for the sanction
- Source of information.

(b) Observations on the implementation of the article

Law No. 12.846 of 2013 provides for civil and administrative sanctions against legal entities, including a fine of 0.1% to 20 % of the gross revenues of the company and, in certain cases, the compulsory dissolution of the company. Legal entities are also subject to such measures as forfeiture, confiscation and prohibition from receiving incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or government-controlled entities for a period between 1 (one) to 5 (five) years from the date of the imposition of civil sanctions

In December 2007, the Office of the Comptroller General (CGU) created the Commission of Administrative Procedures against Suppliers (CPAF) in an effort to enhance the efficiency of provisions establishing administrative penalties for companies that practice illegal acts in order to frustrate the core objectives of bids and contracts. After completion of the administrative procedure, the company can be declared ineligible to contract with the Public Administration for two years. The list of companies declared ineligible by the CGU or by other public bodies is available on the Internet, on the National Debarment List (CEIS).

(c) Successes and good practices

The creation of the Commission of Administrative Procedures against Suppliers (CPAF) within the Office of the Comptroller General (CGU) created in an effort to enhance the efficiency of provisions establishing administrative penalties for companies that practice illegal acts in order to frustrate the core objectives of bids and contracts.

Article 27 Participation and attempt

Paragraph 1

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil cited as applicable measures Article 29 of the Penal Code.

Common rules to the freedom-restricting sentences:

Article 29 - he who in any way contributes to a crime is liable to the sanctions set forth for this crime to the extent of his culpability. (Provision set forth by the Law No. 7.209 of 11.7.1984)

§1st - If the participation is of lesser importance, the sentence shall be decreased from one sixth to one third (Provision set forth by the Law No. 7.209 of 11.7.1984)

§ 2nd - If any of the perpetrators wanted to take part in the less serious crime, the sentence of the less serious crime shall be given to him/her, which shall be increased in half if it were possible to predict the outcome of the more serious crime. (Provision set forth by the Law No. 7.209 of 11.7.1984)

(b) Observations on the implementation of the article

Article 29 of the PC is applicable to all forms of participation required by the Convention.

Article 27 Participation and attempt

Paragraph 2

2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil cited as the applicable legal measure Article 14 of the Penal Code.

Article 14 - The crime is said to be

I - committed, when it involves all the elements of its legal definition;

Attempt

II - attempted, when the performance is begun, but it is not carried out through circumstances foreign to the wishes of the offender.

Penalty for attempt

Sole paragraph - Except where provided to the contrary, an attempt is punishable with the penalty corresponding to that of the committed crime, reduced by from one to two thirds.

(b) Observations on the implementation of the article

In addition, article 14 PC covers the attempt to commit a criminal offence.

Article 27 Participation and attempt

Paragraph 3

3. *Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.*

(a) Summary of information relevant to reviewing the implementation of the article

The Brazilian Penal Code does not provide specifically for *the preparation for an offence*.

However, Article 286 of the Brazilian Penal Code establishes a penalty of three to six months imprisonment for the public incitement for the commission of a crime. In addition, art. 1 paragraph 1 Law No. 12850, defines the criminal organisations.

(b) Observations on the implementation of the article

The Brazilian PC does not include a specific description for preparation with a view to committing an offence. However, in certain cases the preparation of a criminal offence may be covered by such offences as public incitement to commit a crime (article 286 PC) or the association of 4 (four) or more persons structurally organized for an informal purpose of obtaining, directly or indirectly, an advantage of any kind through the practice of criminal offenses whose maximum penalties exceed 4 (four) years or which are transnational in character. (Art. 1 paragraph 1 Law No. 12850)

(c) Challenges, where applicable

Brazil should consider criminalizing all forms of preparation of a corruption offence

Article 29 Statute of limitations

Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.

(a) Summary of information relevant to reviewing the implementation of the article

The statute of limitations periods in Brazil are established according to the penalty amount for each crime. Thus, with reference to Article 109 of the Brazilian Penal Code, which states statute of limitations period before the sentence is *res judicata*, for example, active and passive bribery and embezzlement would have limitations period of twenty years. Article 110 of the Brazilian Penal Code provides for the statute of limitations

period **after** sentence is *res judicata*, and Article 111 states when to start the statute of limitations period.

There is no limitation period distinction when the alleged offender has evaded the administration of justice. However, Article 366 of the Criminal Procedure Code determines that the proceedings shall be suspended for the limitations period established for the crime when the offender is proclaimed an outlaw. Only after this period has finished the statute of limitations period is started.

(b) Observations on the implementation of the article

The statute of limitations period is calculated on the basis of the maximum sentence for the offence, pursuant to articles 109 and 110 PC, which provides respectively for the statute of limitations period before and after the sentence. Under article 109 PC, the statute of limitations is set as follows: 20 years for sentences of more than 12 years of imprisonment; 16 years for sentences between 8 and 12 years of imprisonment; 12 years for sentences between 4 and 8 years of imprisonment; 8 years for sentences between 2 and 4 years of imprisonment; 4 years for sentences between 1 and 2 years of imprisonment; and 3 years for sentences of less than one year of imprisonment.

The “interruption” of the limitation period for the prosecution of offences is governed by clauses I to IV of article 117 PC as follows: by receipt of the accusation or complaint; by the indictment; by the decision confirming the indictment; and by “a verdict of guilt”, which can be appealed. Under paragraph 2 of article 117, a new limitation period starts to run after each interruption.

There are two relevant limitation periods. First, the limitation period begins on the day the crime was committed. However, following final sentence, the limitation period may be “altered in accordance with the judge’s tangible setting of the penalty” and, thus, be recalculated based on the actual sentence (with a lower sentence resulting in a shorter limitation period). This specificity was found to be prone to exploitation in cases of “an infinite number of appeals” and excessive use by defendants of Brazil’s three instances of appeal and revision (at least) between the court of first instance and the Supreme Court.

(c) Challenges, where applicable

Ensure that the statute of limitations period for corruption offences allows adequate time for the investigation, prosecution, sanctioning, and the completion of the full judicial process, including in cases where the final sentence is at the lower end of the scale.

Article 30 Prosecution, adjudication and sanctions

Paragraph 1

1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.

(a) Summary of information relevant to reviewing the implementation of the article

Under Brazilian Law, law enforcement take into account various factors. Firstly, under the law that defines them, all offences have a minimum penalty as well as a maximum penalty. This can be seen in the legal texts applicable to all issues comprised in Chapter III - Criminalization and law enforcement. For instance:

- a. active bribery of a national public official - from two to twelve years incarceration and a fine.
- b. passive bribery of a national public official - from two to twelve years incarceration and a fine.
- c. active bribery of a foreign public official - from two to eight years incarceration and a fine.
- d. embezzlement - from two to twelve years incarceration and a fine.
- e. trading in influence - from two to five years incarceration and a fine.
- f. and so forth.

When convicting a defendant, the judge shall apply a three-part method, from which the base penalty derives, necessarily being comprised between those limits. This method is set forth in Article 68 of the Brazilian Penal Code.

To establish the base penalty, the judge has to consider what is set forth in Articles 59 and 60 (fine as a penalty) of the Brazilian Penal Code. In addition, provided what is set forth in Article 59 of the Brazilian Penal Code, the judge shall establish the penalty, its amount, the initial form of deprivation of liberty and an alternate penalty, taking into account the individual's responsibility, personality, social behaviour, antecedents, mens rea, circumstances and consequences, as well as the victim's behaviour.

It should be noted that Bill No. 3760/2004 defined as "heinous crimes" those crimes committed against the Public Administration, including those established by the following articles of the PC: 312 and 313 (embezzlement); 317 (passive bribery); 319 (prevarication); 325 (breach of secrecy); and 333 (active bribery). The legal consequences are twofold ie the imposition of a stricter regime for the serving of sentences and the non-use of bail provisions while in custody.

Brazil also gave some information about the National Register of Convicts for Administrative Improbity, which is a database gathering information on individuals convicted of acts of administrative improbity.

(b) Observations on the implementation of the article

In general, Brazil's legislation provides for proportionate, dissuasive and effective sanctions for corruption offences, taking into account their gravity.

(c) Successes and good practices

The above mentioned database was considered as a proactive tool for achieving social control of the acts of public administration, as well as a means of making the adjudication of cases more effective, especially with regard to reimbursement of amounts to the treasury, compliance with civil fines and prohibition from contracting with the public administration.

Article 30 Prosecution, adjudication and sanctions

Paragraph 2

2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

The Federal Constitution and the Criminal Procedural Code set forth cases of immunities and jurisdictional prerogatives. For example, they refer to the President of the Republic's immunities, as well as to other high authorities such as judges, ministers or governors amongst others.

However, in general, such cases of immunities and jurisdictional prerogatives do not hinder investigation, prosecution and adjudication. What is worth mentioning is that there is a special system of competence for judging certain authorities, which is known as "privileged forum according to public functions".

Through such system, certain investigations and proceedings are not supervised by an ordinary judge, of first degree, but by Courts, according to what the Federal Constitution states:

- a. municipal mayors - Court of Justice (or Federal Regional Court, in case of federal offence) - Article 29, X;
- b. state representatives - idem;
- c. judges of law (state) - Court of Justice;
- d. federal judges, military audit judge, labour judges and members of the Federal Prosecutor General – Federal Regional Court - Article 108, I, a;
- e. state and Federal District's governors, higher judges at States' and Federal District's Courts of Justice, members of the Courts of Accounts of States and the Federal District, members of the Federal Regional Courts, Labour and Electoral Regional Courts, members of the Municipal Councils or Courts of Accounts, and members of the Federal Prosecutor General - Superior Court of Justice - Article 105, I, a;
- f. the president of the Republic, the vice-president of the Republic, members of the National Congress, ministers of the Federal Supreme Court, Prosecutor General, state ministers and Navy, Army and Air Force commanders, members of the Superior Courts,

of the Court of Accounts of the Union and permanent diplomatic missions heads - Federal Supreme Court - Article 102, I, b and c.

In these cases, investigation is supervised by a judge of a competent court and, after the charge is provided (with indictment), the suit is adjudicated by the court, according to Articles 1 to 12 of Law No. 8.038, dated May 28, 1990.

(b) Observations on the implementation of the article

According to article 86, paragraphs 3 and 4 of the Constitution, the President of the Republic enjoys criminal immunity for acts outside his functions and therefore criminal proceedings cannot be brought against him/her. Members of government, and high level public officials, such as the President of the Republic as well as judges, ministers and governors enjoy jurisdictional privileges according to the Federal Constitution and the Criminal Procedural Code. For those categories of public officials, there is a special system of competence, which is known as "privileged forum according to public functions". No more information was provided by the Brazilian authorities to judge how the immunity of the President or the jurisdictional privileges could be lifted and how the balance between those immunities and the effectiveness of investigation, prosecution and adjudication of corruption offences is achieved. Therefore the review team was not in a position to assess this matter.

(d) Challenges, where applicable

Brazil should make every effort to ensure an appropriate balance between the jurisdictional privileges of certain categories of public officials and the possibility of effectively investigating, prosecuting and adjudicating corruption offences.

Article 30 Prosecution, adjudication and sanctions

Paragraph 3

3. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

(a) Summary of information relevant to reviewing the implementation of the article

Brazilian Law makes limited use of the so-called "plea bargaining", typical of American law. In Brazil, the Criminal Law generally applies the principles of compulsory prosecution and the unavailability of prosecution, along with the principle of acting ex officio. In the few cases in which there is some discretion, the parameters required are enough to ensure the effectiveness of criminal prosecution.

The principle of compulsory prosecution means that prosecutors are compelled to open a criminal case, whenever the facts examined characterize a criminal charge. In other words, the prosecutor is not authorized to exercise an assessment of convenience or opportunity on the subject. The lack of discretion leads to the conclusion that the prosecutor is bound by bringing a criminal action, provided that all legal requirements are met.

The unavailability of prosecution is a consequence of the principle of compulsory prosecution and reflects the idea that prosecutors may not abandon a prosecution already proposed, which means he cannot give up the pursuit of a criminal case. It differs from the principle of time obligation : while the compulsory prosecution relates to the opening of a criminal action, the unavailability applies to a case after the filing of the criminal lawsuit.

Finally, the principle of acting ex officio, also deriving from the idea of compulsory prosecution, clarifies the duties of the state authorities (police and prosecutors) to act on its own motion (ex officio) to investigate all crimes brought to their knowledge.

Therefore, in Brazil, cases of corruption are subject to unconditional public prosecution. For this reason, it is mandatory that the facts must be investigated ex officio by the state authorities (principle of acting ex officio), they must necessarily result in the bringing of a criminal action provided there is sufficient evidence (principle of compulsory prosecution), and, finally, the prosecutor is not allowed to give up any ongoing criminal proceedings (principle of unavailability).

Despite these rules, some recent laws have loosened these parameters in exceptional and very limited situations. The changes included more specifically the following laws:

- 1) Law No. 9,099 of September 26, 1995, as amended by Law No. 11,313 of June 28, 2006, which deals with crimes of lower offensive potential, the transaction of criminal goods and probation process;
- 2) Law No. 12,850 of August 2, 2013 amended investigation and criminal procedural rules. As it was reported for the OECD during its Phase 3 evaluation, it is worth highlighting, in particular, the definition of criminal organization (Article 1); the broadened approach to plea agreements (Articles 4 to 7); and the possibility to infiltrate police officers in criminal organizations for investigation purposes (Article 3, item VII). Before **Law No. 12,850/2013**, Brazilian Criminal Law did not provide for a consistent definition of “organized criminal group”. As of now, we are capable of using this concept just as the international community does for the purpose of fighting corruption and money laundering.

2)

Even the unintentional conducts subject to criminal activity are subject to strict criteria laid down in art. 76. Brazilian doctrine tends to classify this type of negotiating power as a “mitigated compulsory prosecution” or a “ruled discretion”, although in fact, the Law does not properly confer discretionary powers onto prosecutors, but a clear set of rules

that provide a solution that is different from the start of a criminal action. If the objective requirements of the law to enact the transaction are found, it is possible to apply penalties, such as restricting rights or a fine, without having to initiate the corresponding criminal case.

In order to allow for this activity, in addition to the characterization of the crime as a violation of lower offensive potential, one must verify the requirements of § 2 of art. 76, that forbids the granting of the transaction if: 1) the author of the offense has previously been sentenced to imprisonment, due to the commitment of a crime, in a final judgment, 2) the author has already carried out a criminal act in the previous five years, or 3) there is no indication that the transaction will be necessary and sufficient to the case according to the background, the social conduct or the personality of the individual, as well as the reasons and circumstances of the crime. It is seen, therefore, that the use of that proposal is highly limited to acts of corruption, since the corruption offenses do not usually fall into a lower offensive potential category.

Furthermore, Law No. 9099/1995, also provides the conditional suspension of the process, which is set out in art. 89.

“Art. 89. For those crimes whose minimum penalty is equal to or less than one year, covered or not by this Act, the Public Prosecutor’s Office, when bringing a charge against someone, may propose the suspension of the procedure for two to four years, provided that the defendant is not being prosecuted for or has not been convicted of another crime, if other requirements authorizing the conditional suspension of the penalty are present. (article 77 of the Penal Code).

Paragraph 1. If a proposal is accepted by the defendant and their counsellor in the presence of a Judge, he may suspend the process after knowing all the accusations, subjecting the accused to a trial period under the following conditions:

I – reparation of the damage, unless unable to do so ;

II - prohibition to attend certain places;

III - prohibition to leave the county where the accused resides, without the permission of the Judge;

IV – personal and mandatory attendance before the Judiciary, on a monthly basis, so as to inform about and justify his/her activities to the Judge.

Paragraph 2° The Judge may specify other conditions which the suspension shall be subject to, provided that they are adequate with the fact and the personal circumstances of the accused.

Paragraph 3° The suspension will be withdrawn if, in the course of the said period, the beneficiary becomes prosecuted for another crime or does not repair the damage without good reason.

Paragraph 4° The suspension may be revoked if the accused becomes prosecuted, in the course of the said period, for a misdemeanor, or if he/she breaches any other conditions imposed on him/her.

Paragraph 5° If the deadline expires without revocation, the judge will declare the punishment as spent.

Paragraph 6° The Statute of Limitations will not be applicable during the period of suspension of the process.

§ 7° If the defendant does not accept the provisions of this article, the process will continue in its later terms.”

The probation process may be applied after the issuance of the complaint by the prosecutor, but only applies to crimes whose minimum sentence (not maximum) is equal to or less than one year. As occurs in the transaction, the main intentional crimes related to corruption are not covered by this standard, since the minimum sentence of most of them is over two years.

Still, the suspension only applies if the accused is not being prosecuted or has not been convicted of another crime, and also if the guilt, background, social behaviour and personality of the individual as well as the reasons and circumstances of the crime enable the granting of the benefit. Thus, the chances to suspend its proceedings in cases related to corruption are very limited. Additionally, pursuant to art. 89, the suspension does not completely paralyze the process, since it entails the imposition of certain conditions for the accused, including the obligation to repair the damage, a ban from going to certain places and a prohibition to absencing from the county of residence without judicial authorization.

Finally, regarding the level of discretion granted to the prosecutors, it is worth mentioning the reward for whistleblowers, set in some special laws in Brazil, such as the Law of Hideous Crimes (Law No. 8072, 1990), the Law against Criminal Organizations (Law No. 12.850 of 2013) and the Money Laundering Law (Law No. 9613, 1998, amended by Law 12.683 of 2012).

All these acts allow some level of sentence reduction for the accused, provided there is cooperation with the authorities to provide information leading to the investigation of criminal offenses and of its perpetrators, or even leading to the location of properties, rights or assets related to the crime.

In such cases, the powers in question cannot be properly classified as discretionary powers, since the conditions for their use are well defined. The amount of penalty reduced or replaced is also sufficiently specified in the legislation. The use of this reward for whistleblowers can only be used if there is real cooperation from the accused, which represents an important and effective tool for confronting criminal organizations involved in corruption.

Therefore, it appears that in general in Brazil there is no discretion in relation to criminal prosecution. The far and few cases in which there is a regulated discretion, the rules set proper parameters in order to maximize the effectiveness of law enforcement and in order to serve as a deterrent to crime.

(b) Observations on the implementation of the article

In general, the rule of mandatory prosecution is the guiding principle. Nevertheless, Brazil has begun lightening the rule of compulsory prosecution by introducing reforms inspired by plea bargaining. Plea-bargaining is provided for in Law No. 12850 of 2013 (investigation and criminal procedural rules in cases involving organized criminal groups – articles 4 and 5); Law No. 9099/1995 (crimes of lower offensive potential and transaction of criminal and probation process); and Law No. 9613/1998 on money laundering (article 13).

Article 30 Prosecution, adjudication and sanctions

Paragraph 4

4. In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

(a) Summary of information relevant to reviewing the implementation of the article

In general, according to the Brazilian criminal legislation, the defendant will have pre-trial liberty. Only in exceptional occasions will he or she be detained preventively. Those hypotheses are set forth in Articles 311 and 312 of the Criminal Procedure Code.

Criminal Procedure Code, Decree-Law No. 3689/41.

Article 311. “At any phase of the police or criminal investigation or of the prosecution, preventive detention shall be ruled by the judge, recalling his or her duty, before a request of the Prosecutor General or the plaintiff, or by law enforcement of the authority's representation.”

Article 312. “The preventive detention may be declared as a guarantee of public order, economic order, for prosecution convenience, or to safeguard criminal law enforcement, when there is evidence of crime existence or sufficient indication of perpetration.”

Sole Paragraph. The preventive detention may be also declared in cases of non-compliance with any obligations pursuant to other preventive measures (art. 282, § 4) (Provision included by Law No. 12,403, 2011).

As mentioned above, Bill No. 3760/2004 foresees the exclusion of bail for some corruption offences (art.s 313, 317. 319, 325 and 333 PC).

(b) Observations on the implementation of the article

The need to ensure the presence of the defendant in criminal proceedings is dealt with in articles 311, 312, as well as 282, paragraph 4 of the Criminal Procedure Code (CPC) on pre-trial detention.

Article 30 Prosecution, adjudication and sanctions

Paragraph 5

5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.

(a) Summary of information relevant to reviewing the implementation of the article

The Brazilian legislation provides for early release or parole (*livramento condicional*) of inmates who can show that they satisfy a number of requirements, including having already served a minimum sentence imposed on them (at least one-third to one-half of their sentence, depending on the prisoner's prior record), and having "demonstrated satisfactory conduct during the term of the sentence" (article 131 of Lei de Execução Penal; article 83 PC (listing requirements)). No further information was provided by the Brazilian authorities regarding the time needed to judge whether a prisoner qualifies for early release.

(b) Observations on the implementation of the article

The Brazilian legislation provides for early release or parole (*livramento condicional*).

Article 30 Prosecution, adjudication and sanctions

Paragraph 6

6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.

(a) Summary of information relevant to reviewing the implementation of the article

In Brazil, the loss of public function and political rights suspension only happen if adjudication is *res judicata*; however, according to what is stated in the Sole Paragraph of Article 20 of Law n. 8429/92, the Law on Administrative Improbity, the public official may be removed, if it is necessary for judicial proceedings.

The Brazilian Penal Code states in its Article 92 that the loss of public function or position or elective office can also be the result of the conviction.

(b) Observations on the implementation of the article

According to article 20 of Law No. 8429/92 on Administrative Improbity, the public official, when accused of an offence, may be removed, if it is necessary for judicial proceedings.

Article 30 Prosecution, adjudication and sanctions

Subparagraph 7

7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:

(a) Holding public office; and

(b) Holding office in an enterprise owned in whole or in part by the State.

(a) Summary of information relevant to reviewing the implementation of the article

The Brazilian PC states in its article 92 that the loss of public function or position or elective office can also be a legal consequence of a conviction. The Federal Constitution, through articles 14 (paragraph 9), 15 and 37 (paragraph 4), provides for situations of ineligibility and sanctions in case of conviction, especially for administrative improbity. Article 14 states that a complementary law will establish other cases of ineligibility and limitation periods. That refers to Complementary Law No. 64/90.

Law No. 8112/90, which establishes the legal regime of civil servants of the Union, federal government agencies and federal public foundations, states in article 137 that any public servant who is dismissed or removed from commissioned office for breach of art. 132, sections I, IV, VIII, X and XI must not return to the federal public service. According to article 132 of the same Law, the dismissal shall be applied, inter alia, in the following cases: crimes against public administration; administrative misconducts; misuse of public funds; fraud on public money and squandering of the national heritage; and corruption.

(b) Observations on the implementation of the article

It is considered that Brazil has implemented this provision.

Article 30 Prosecution, adjudication and sanctions

Paragraph 8

8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.

(a) Summary of information relevant to reviewing the implementation of the article

Based on the promulgation of Decree No. 5.480, of June 2005, the organization of disciplinary activities was established as a system, in respect of which the Office of the Comptroller General (CGU) is the core body. The above mentioned law declares, as a relevant legal framework, the National Disciplinary Board (CRG) to be competent to carry out its achievements as head of the disciplinary system. The CRG is a body within the structure of the CGU, which then has taken on the task of promoting coordination and harmonization of all actions related to prevention and investigation of irregularities in the federal executive branch, by starting, conducting and monitoring disciplinary procedures in that sector. Since 2003, the CGU has taken on the complex job of investigating public officials' liability at the administrative level, not disregarding the guiding aspect this activity should incorporate.

The disciplinary actions are taken in parallel with civil and/or criminal actions.

A Disciplinary Coordination Commission, a collegial body with advisory functions, aims to promote integration and uniform understanding of agencies and units that integrate the Disciplinary System.

A central component of the CGU's strategy in this area involves building the capacity of federal personnel to actively participate in administrative disciplinary procedures (processos administrativos disciplinares - PAD), with a view to validating the investigations into alleged irregularities by public officials and the applicable penalties.

The Comptroller's Office makes the training materials applied in PAD course programs available to all interested parties over the Internet. Course content consists of lecture notes, flowcharts and simulated exercises involving three hypothetical cases. The material offers a valuable instrument to enhance the federal public service, thus ensuring efficient and expedited investigations of alleged irregularities in the administrative sphere.

A software developed mid 2007, called the Disciplinary Procedures Management System (CGU-PAD), aims at the storage and availability, in a quick and safe way, of information on the disciplinary procedures of the Federal Executive Branch. Through CGU-PAD, the agencies are able to control the disciplinary procedures, identify critical points, construct risk maps and establish guidelines for corruption prevention and repression and other administrative infractions.

(b) Observations on the implementation of the article

Based on Decree No. 5.480/2005, the organization of the disciplinary activities was established as a system, in which the Office of the Comptroller General (CGU) is the core body. The Decree defines the competence of the National Disciplinary Board (CRG) – a body within the structure of the GGU - to carry out disciplinary proceedings. Disciplinary actions are taken in parallel with civil and/or criminal actions. The work of the National Disciplinary Board is facilitated by the establishment of sectional disciplinary units.

(c) Successes and good practices

The development of the Disciplinary Procedures Management System (CGU-PAD)

Article 30 Prosecution, adjudication and sanctions

Paragraph 10

10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Social reintegration of convicted individuals is promoted through the application of alternative sanctions (other than imprisonment), community councils that work in tandem with parole magistrates and through actions such as the Project Fresh Start, designed by the National Council of Justice in an attempt to establish a social network with business and entrepreneurs to hire former detainees. It has been a year since the project was first launched and has so far created more than five thousand posts.

(b) Observations on the implementation of the article

The social reintegration of convicted persons is in line with the Convention.

Article 31 Freezing, seizure and confiscation

Subparagraph 1 (a) –(b)

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;

(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

By law, concerning Item II-b of Article 91 of the Brazilian Penal Code, other effects of a conviction are to be considered such as the loss of proceeds of crime or any other goods or values which derived from the above or constitute a benefit for the individual because of the commission of a crime.

In addition, the Criminal Procedure Code also provides for freezing and seizing measures for the proceeds of crime through its sequence of articles, (Article 125 to Article 143). As far as property confiscation is concerned, Article 125 and following articles describe the procedures for the seizure of immovables even if they have already been transferred to a third party; in such circumstances, the judge might simply consider the presence of strong evidence regarding the provenance of illicit goods.

The National System of Seized Properties ("Sistema Nacional de Bens Apreendidos - SNBA") was created by the National Justice Council ("Conselho Nacional de Justiça - CNJ") through resolution 63/2008. The SNBA is an electronic tool that consolidates, in a data base, all the information about seized properties and assets in criminal procedures all over the Country, thereby allowing better control.

(b) Observations on the implementation of the article

Confiscation exists as a sanction under article 91 PC, which states that one of the effects of a conviction is the “loss, to the Federal government, except as regards to the right of an injured party or a third party in good faith, of the proceeds of the criminal offence, provided that they consist of things whose manufacture, sale, use, bearing or detention constitutes an illegal act; and of a product of the criminal offence or of any good or security constituting a gain made by the offender from committing the criminal offence”. The term “product” covers any item directly acquired as the result of the crime, or money acquired from the disposal of such item and can be an asset or security of monetary value. It remains unclear, however, whether an advantage obtained which is not in a monetary or tangible form is covered. Transformed or converted property or proceeds of crime which have been intermingled with property acquired from legitimate sources does not seem to be covered by the Brazilian confiscation provisions, based on the information provided. Similarly, it is noted that proceeds of legal origin and proceeds destined for use are not subject to confiscation.

The confiscation procedure is set forth in article 122 CPC, which stipulates that the judge may issue a confiscation order after a minimum of 90 days have elapsed since the issuance of the final sentence.

(c) Challenges, where applicable

Brazil should amend domestic legislation to allow for the confiscation of proceeds of crime that are themselves of legal origin, and for proceeds of crime destined for use.

Article 31 Freezing, seizure and confiscation

Paragraph 2

2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

(a) Summary of information relevant to reviewing the implementation of the article

The confiscation procedure is set forth in article 122 CPC, which stipulates that the judge may issue a confiscation order after a minimum of 90 days have elapsed since the issuance of the final sentence.

Article 125 CPC provides for interim measures, including pre-trial seizure of assets, but only for the purposes of securing and preserving evidence. Under article 126 CPC, seizure can be ordered by a judge at any stage of criminal proceedings provided there is a clear indication of the illicit origin of the items in question. In addition, article 4 of Law No. 9613/98 on money laundering provides that during investigations or judicial proceedings, upon a request made by the prosecutor or a police authority, in this case after hearing the prosecutor within twenty-four hours, having sufficient evidence, the judge may order the seizure or the freezing of assets, rights and valuables that are connected, or are the object or the result of a crime referred to in the Law. By virtue of article 130 CPC, the seizure can be rejected when the defendant demonstrates the lawful origin of the property or goods.

(b) Observations on the implementation of the article

Measures and general procedures for the purpose of eventual confiscation of proceeds of crime are described in the Brazilian Penal Code, and the Criminal Procedure Code.

Article 31 Freezing, seizure and confiscation

Paragraph 3

3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

The National System of Seized Properties ("Sistema Nacional de Bens Apreendidos - SNBA") was created by the National Justice Council ("Conselho Nacional de Justiça - CNJ") through resolution 63/2008. The SNBA is an electronic tool that consolidates, in a data base, all the information about seized properties and assets in criminal procedures in the whole Country, thereby allowing better control.

Also, if it is the case of large amounts of goods, or goods that require specialized management, as stocks, cattle or industrial facilities, the money laundering law provides that the judge shall appoint a qualified manager.

There is no entity to manage confiscated assets, which are kept under a depository's custody.

(b) Observations on the implementation of the article

A National Database System of Seized Properties was created by the National Justice Council as an electronic tool that consolidates all information about seized properties and assets in criminal procedures throughout the country, for their control and monitoring. However, there is no entity responsible for centralizing the administration of seized and confiscated property.

(c) Successes and good practices

The development of a National Database System of Seized Properties by the National Justice Council as an electronic tool that consolidates all information about seized properties and assets in criminal procedures throughout the country, for their control and monitoring

(d) Challenges, where applicable

Brazil should continue working towards ensuring the full and effective implementation of article 31, paragraph 3, of the Convention, possibly through the establishment of an asset management office or other alternative which might fit better in the Brazilian system.

Article 31 Freezing, seizure and confiscation

Paragraph 4 -6

4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil has based its answer on the information provided to the previous paragraph.

(b) Observations on the implementation of the article

The reviewing experts have noted that there is no explicit reference in the Brazilian legislation to proceeds of crime transformed or converted into other property and proceeds of crime intermingled with legitimate property, or to income or other benefits derived from such proceeds of crime. Additionally, Brazil does not require that an offender demonstrates the lawful origin of the alleged proceeds of crime or other property liable to confiscation.

(d) Challenges, where applicable

Brazil should amend domestic legislation to explicitly provide that proceeds of crime transformed or converted into other property and proceeds of crime intermingled with legitimate property, as well as income and other benefits derived from proceeds of corruption, are subject to the measures set forth in article 31 of the Convention (article 31 para. 4-6).

Article 31 Freezing, seizure and confiscation

Paragraph 7

7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

(a) Summary of information relevant to reviewing the implementation of the article

The Federal Constitution guarantees privacy rights, but courts have the authority to order the seizure of any proceeds of crime. The National Council of Justice has adopted other measures to enforce privacy rights. Among those measures and besides the system mentioned above, judges must immediately inform in a special data bank every order addressed to financial and telecommunication companies to disclose their commercial records, and to the National Traffic Department to make a property record available.

According to Complementary Law No 105, financial records must be made available to courts, and only to them, with breach of secrecy being authorized, when necessary for the investigation of any illicit act at any stage, especially when it refers to crimes such as terrorism against public administration or against the national financial system, money laundering, amongst others.

Although bank secrecy is protected in Brazil, as a result of the constitutional right to privacy, courts have the power to determine the access to its data. This is valid for a number of serious crimes (Complementary Law 105, the range is broad enough to contain the UNCAC crimes), and even for non-criminal investigations of corruption, as civil-administrative offense of impropriety (or improbity acts), regulated by Law 8429 of 1992.

(b) Observations on the implementation of the article

Although bank secrecy is protected in Brazil (article 5, clauses X and XII of the Federal Constitution), there are exceptions to this rule allowed both by case law and by provisions of Complementary Law No. 105/2001, by court order. Article 1, paragraph 4, of the Complementary Law provides that “breaking confidentiality can be declared when necessary for establishing the occurrence of any illegal act, in any stage of the investigation or the court case” and especially in the case of such crimes as, inter alia, crimes against public administration, crimes against the national financial system and money laundering. The range is broad enough to cover offences established by the Convention, as well as civil and/or administrative offences of impropriety (or improbity acts), regulated by Law No. 8429/ 1992.

Article 31 Freezing, seizure and confiscation

Paragraph 8

8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.

(a) Summary of information relevant to reviewing the implementation of the article

Article 130 of the Criminal Procedure Code refers to two cases in which the seizure can be rejected by a proper action called embargo: a.) when the defendant demonstrates that the property or goods are not from proceeds of crime; b.) when a third party, to whom goods or property have been transferred, shows the goods or property have been acquired in bona fide. In any case, no decision on these embargoes can be made before sentence is *res judicata*.

(b) Observations on the implementation of the article

The response provided by Brazil was noted.

(d) Challenges, where applicable

Brazil could consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or of any other property liable to confiscation.

Article 31 Freezing, seizure and confiscation

Paragraph 9

9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.

(a) Summary of information relevant to reviewing the implementation of the article

The rights of bona fide third parties are respected. The aforementioned article 91 PC clearly states that the confiscation cannot be imposed against an injured party or a third party in good faith. Pursuant to article 125 CPC, confiscation or seizure of property (even when such property has been transferred to a third party) can be impeded if a bona fide third party proves that he or she has paid for the goods or property. Article 130 CPC states that the seizure can be rejected when a third party to whom goods or property have been transferred, demonstrates that these goods or property have been acquired in good faith. According to sole paragraph of article 133 PC, "from the money raised, what is not for payment of the damaged person or the bona fide third party will be collected to the National Treasury".

With regard to confiscation of proceeds held by a third party not acting in good faith which is a legal person, civil sanctions in the Corporate Liability Law include "loss of the assets, rights or valuables representing, directly or indirectly, the advantage or benefit gained from the infringement" (article 19.I). A limitation was introduced in the Corporate Liability Law: confiscation of the profits under article 19.I is excluded in cases of successor companies, companies held jointly liable and leniency agreements. In those cases the successor company, however, may be subject to a fine and the obligation to pay compensation for damages.

(b) Observations on the implementation of the article

Article 32 Protection of witnesses, experts and victims

Paragraph 1

1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.

(a) Summary of information relevant to reviewing the implementation of the article

Witness protection is coordinated by the Federal Government and implemented at state level. Law No. 9807/1999 provides for the protection of witnesses (and victims insofar as they are witnesses) who contribute to criminal investigations through specially organized programmes comprising actions such as, inter alia, security at home, including control of telecommunications; transfer from residence or temporary accommodation to a location compatible with added protection; the preservation of identity, image and data; monthly financial assistance to provide the necessary expenses, where the protected person is unable to develop regular work or has no source of income.

The Law, through its Article 2, Paragraph 2, states that the protection can also be addressed or extended to the spouse or partner, ascendants, descendants and dependants who have regular interaction with the victim or witness, as specifically required in each case.

“Experts” may also be covered provided that they are witnesses in the investigation of a criminal case.

The National Victims and Threatened Witnesses' Assistance System comprises the Federal Victims and Threatened Witnesses' Assistance Programme, established by Decree No. 3518/00, as well as state protection programmes, and it is managed by the Human Rights Secretariat.

The victims and threatened witnesses' protection programmes operate through a structure envisaged by Law No. 9807/1999: a Deliberative Council, Execution Body, Technical Team and the Protection Solidarity Net. The Deliberative Council is in charge of determining people's entry or exclusion in the programme and is composed by representatives from the Judiciary, the Prosecutor General and public and private institutions linked to public security and human rights defence. The Execution Body hires the Technical Team and promotes the articulation with the Protection Solidarity Net. The Technical Team is formed by specialized professionals in charge of social, legal and psychological assistance. The Protection Solidarity Net is a group of civil associations, entities and other non-governmental organizations which are willing to assist people under protection by providing them with housing and opportunities in a place other than their usual residence.

For inclusion in the programme, the factors taken into account include the level of risk, the causal relation, the personality and conduct of the person to be protected, as well as his/her consent.

Since 1999, 9,530 people have been protected under the different forms established by law, although there is no record of protective measures for corruption-related offences. There have been trainings for technical teams on witness protection issues, while a Human Rights and Protection Net is used by agents for exchanging information and sharing experiences at the Federal and state levels.

(b) Observations on the implementation of the article

Article 32 Protection of witnesses, experts and victims

Subparagraph 2

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

(a) Summary of information relevant to reviewing the implementation of the article

As mentioned before, Law n. 9807/99, establishes rules for the organization and maintenance of special programs which aim at the protection of victims and threatened witnesses, as well as the protection of accused and convicted people who have voluntarily offered good collaboration to police investigations or criminal proceedings.

Through its Article 7, this Law states what type of protection may be offered, which includes home security, bodyguard and security on commuting from home for work or testimony, and house moving or temporary housing compatible with the protection, amongst others.

No assessment has been conducted, but considering that no attempt to any person has ever been registered while they are under protection, we can assume the program is an effective measure.

(b) Observations on the implementation of the article

The Law, through its Article 2, Paragraph 2, states that the protection can also be addressed or extended to the spouse or partner, ascendants, descendants and dependants who have regular interaction with the victim or witness, as specifically required in each case.

“Experts” may also be covered provided that they are witnesses in the investigation of a criminal case.

Article 32 Protection of witnesses, experts and victims

Paragraph 3

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil has entered into an agreement with Portugal for the relocation of protected witnesses. Relocations can also be based on reciprocity.

(b) Observations on the implementation of the article

From the information provided, Brazil is considered to meet requirements under article 32 of the UNCAC.

Article 32 Protection of witnesses, experts and victims

Paragraph 4

4. The provisions of this article shall also apply to victims insofar as they are witnesses.

(a) Summary of information relevant to reviewing the implementation of the article

Law No. 9.807/99 makes no distinction in relation to the fact that a victim can also be a witness. Whether the person is under any of those positions, she or he may be subject to protection, if criteria are met. Without prejudice of any other norm, Law No. 9.807/99, through its Articles 13, 14 and 15, also provides for judicial pardon with related criminality extinction, measures to safeguard physical integrity, considering threat and eventual or effective coercion.

(b) Observations on the implementation of the article

The victims and threatened witnesses' protection programmes operate through a structure envisaged by Law No. 9807/1999

Article 32 Protection of witnesses, experts and victims

Paragraph 5

5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil reiterated that since 1999, 9,530 people have been protected under the different forms established by law, although there is no record of protection measures for corruption-related offences. There have been trainings for technical teams on witness protection issues, while a Human Rights and Protection Net is used by agents for exchanging information and sharing experiences at the Federal and state levels.

(b) Observations on the implementation of the article

Brazil's response was noted under paragraph 5 article 32 of the UNCAC.

Article 33 Protection of reporting persons

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

There are several provisions concerning whistleblowers such as article 55 of Law No. 8443 of 16 July 1992, which establishes that reports made to the National Court of Accounts (TCU) will be treated as confidential until a final decision on the matter. However, the scope of the article is very narrow and applies only to reports made to the TCU and not to law enforcement authorities, and concerns reports regarding a limited number of offences involving defrauding of the Brazilian State. Another piece of legislation which may be of relevance in this field is Law No. 12527/2011 on Access to Information. That law protects officials from criminal, civil and administrative liability when they report "irregularities" in accordance with their reporting obligations.

Normative Ruling N° 01 CRG/OGU, 24th JUNE 2014 signed by the National Disciplinary Board and the Federal Ombudsman Unit, which establishes rules for the reception and handling of anonymous complaints and also establishes the guidelines for whistleblower's identity protection; it further regulates and standardizes the procedures that shall be adopted by every agency and entity of the Federal Executive Branch. A federal public ombudsman office was designated with responsibility for handling complaints, requests, suggestions and compliments concerning government policies and services, provided by any form or regime, in order to improve public management. In the same vein, Article 126-A of Law 8112/1990 states that no public official can be held responsible, in any civil, criminal or administrative proceeding, just because he/she reported to the proper authority his/her suspicion that another employee is engaged in unlawful activity.

(b) Observations on the implementation of the article

Brazil has measures to protect whistle-blowers in corruption cases.

(d) Challenges, where applicable

Brazil should continue to develop and strengthen the application and the development of specific legislation on the protection of reporting persons (article 33). In doing so, the following considerations may be taken into account:

The introduction of the concept of “protection of whistleblowers”: specific legislation on the protection of reporting persons can be conducive to introducing this protection as a key concept in cases adjudicated by the courts, which – currently – end up as unfair dismissal cases;

Retaliation against whistleblowers should be expressis verbis forbidden and retributive actions should also be referred to as a form of discrimination in the legislative text;

Article 34 Consequences of acts of corruption

With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil cited as applicable legal measures Law No 8666/93.

Law No 8666/93, which sets rules for public procurement, states in article 49 that the public procurement proceeding must be annulled in case of illegality, which includes the occurrence of corruption. Paragraph 2 of that same article states that the annulment of a public procurement proceeding due to illegality also implies the annulment of the contract. Articles 77 and 78 of Law 8666/93 state the cases of contract termination. Articles 89 through to 99 of Law 8666/93 anticipate that crimes related to public procurement might happen in concurrence with corruption.

(b) Observations on the implementation of the article

The Brazilian legislation has provisions on the consequences of illegal acts, including corruption, for the validity of contracts and proceedings based on administrative laws (especially public procurement, see articles 49 (annulment of contract and public procurement proceeding), 77-78

(contract termination) and 89-99 (offences related to public procurement) of Law No. 8666/93).

Article 35 Compensation for damage

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

(a) Summary of information relevant to reviewing the implementation of the article

Article 5, XXXV, of the Federal Constitution of Brazil states that the law shall not exclude from the appreciation of the Judicial Branch any threat or damage to any right a person may be entitled to. That means that the Brazilian legal system protects the interests of every person who has suffered damages, including those caused by corruption.

The Civil Code (Law 10.406/2002) also states that any person, who intentionally or by negligence violates other's rights and causes him/her damages, commits an illicit act (article 186).

The Penal Code (Decree-Law 2848/40) states in its article 91, I, that the condemnation for a crime implies the compensation of the damages suffered. As said before, corruption is a crime further to articles 317 and 333 of the Penal Code and therefore, damages suffered as a result of an act of corruption must be compensated.

Article 12 of Law 8429/92 sets as one of the consequences for those who perpetrate acts of improbity, such as corruption, full reparation of the damages caused.

Until June 2013, the number of administrative improbity lawsuits filed by AGU had increased by 247%, totalizing 842 lawsuits, and the number of lawsuits that AGU had participated in as assistant had increased by 346%, totalizing 1,396. The lawsuits issued by AGU involved R\$ 1,689,570,000.00 and the total of the assets of the defendants that were frozen in order to guarantee the reparation of damage was R\$1,276,720,000.00.

As statistical developments of actions in the fight against corruption and recovery of assets, the Office of the Attorney General presents the following framework (statement of importance in Brazil of civil actions for this purpose):

| | In 2009 | Until June 2013 | Increasing (in 41/2 years) |
|---|----------------|------------------------|---|
| (1) Administrative improbity lawsuits filed | 340 | 842 | 247 % |

| | | | |
|--|---|--|--|
| (2) Administrative improbity lawsuits as assistant | 403 | 1,396 | 346 % |
| (3) Other civil lawsuits related to corruption fight and asset recovery | 2,020 | 10,313 | 510 % |
| (4) Total Amount involved | R\$ 1,689.57 milhões US\$ 971,01 millions (rate of exchange 1,72) | R\$ 16,409.34 milhões US\$ 8,204.67 millions (rate of exchange 2,00) | 971 % (in reais) 844 % (in dollars) |
| (5) Frozen assets of defendants (in order to guarantee the reparation of damages) | <i>17 % of the amount related to the items (1) and (2)</i> | R\$ 1,276.72 milhões US\$ 638.36 millions (rate of exchange 2,00) | |

(b) Observations on the implementation of the article

The Brazilian legislation also provides for the possibility of injured parties to have full reparation and restitution of damages suffered as a result of criminal offences, including corruption (article 91.I PC, article 186 of the Civil Code, article 12 of Law 8429/92). In cases of "administrative improbity", the seizure of a percentage of related assets served the securing of the compensation of the victims.

Article 36 Specialized authorities

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

(a) Summary of information relevant to reviewing the implementation of the article

Concerning the specialization in combating corruption through law enforcement, some Brazilian governmental bodies are to be considered such as the Court of Accounts, the Prosecutor General, the Federal Police and the Judges.

The start of criminal investigations is almost always the responsibility of the Federal, State or Military Prosecution Service. It acts when the crime has damaged a federal public body or involves a federal public servant in any manner due to his public duties. The Military Prosecution Service acts only in relation with military crimes. The State Prosecution Service acts in all the remaining cases. The Federal, State and Military Police have the responsibility of investigating crime, in order to provide the Prosecution Service with appropriate evidence. In some cases, the Prosecution Service has the possibility of also developing criminal investigation, although this is yet pending judgment of the Supreme Federal Court.

The Prosecutor General's independence, as well as its unity and indivisibility, is described in Paragraph 1 of Article 127 of the Federal Constitution. In particular, the Public prosecution is not legally part of the judiciary, nevertheless it has financial and administrative authority and is free from any interference from the executive power. Of the same importance, we shall mention the judges' and prosecutors life tenure and irremovability (a judge or prosecutor may not be transferred to a different post or switched to other functions without his/her consent), which make them able to carry out their functions without any undue influence. The Head of the Prosecution Service is appointed directly by the President.

It should be noted that within the Prosecution Service, there is no department specifically assigned to the investigation of corruption offences. However, the need to have such departments is broadly recognised.

In case a prosecutor committed an offence, the Prosecutor-General would appoint a prosecutor from a different State, geographically distant from the one in which the alleged offence has been committed, in order to carry out the investigation.

Article 95 provides for guarantees judges are granted with, which include life tenure, irremovability, stay of compensations, all the above also secured for Public Prosecution members.

Article 73 of the Federal Constitution sets forth the definition of the Court of Accounts, and states, in its Paragraph 3, that its ministers shall be granted the same guarantees, prerogatives, impediments, compensations and perquisites as of the Superior Court of Justice's ministers.

Article 144 provides for the establishment of the public security, comprising the Federal Police, whose duties are described in Paragraph 1, which includes being the criminal police of the Union, among others.

Civil servants working at the Public Prosecution, Court of Accounts, Federal Police and judges in general, take office after being submitted to an nationwide public contest. This public contest comprises written exams, position-oriented technical writing, specialized training (also called *formation course*) and may also include sometimes personal

interviews and attribution of better ranking to candidates holding higher diplomas than those required for the position.

Concerning resources, for instance, in 2014 those bodies were granted a budget of:

Court of Accounts: R\$ 1,618,711,662.00

Prosecutor General: R\$ 4,931,955,705.00

Federal Police: R\$ 4,885,536,945.00

Judiciary (as a whole, including the National Council of Justice): R\$ 34,858,559,050.00

Resolution No. 314, as of May 12, 2003, of the Federal Justice Council, demands that Federal Regional Courts the specialization of federal criminal courts for exclusive or concurrent competence of suing and judging crimes against the national finance system, as well as laundering or concealment of goods/assets, rights and values.

Civil servants in Brazil are lifetime career employees, meaning that they also expect legitimacy for carrying out their duties towards fighting corruption and for them to be fired, they have to have committed irregularities punishable by an expelling penalty.

Civil servants working at the Public Prosecution, Court of Accounts, Federal Police and judges in general, take office after being submitted to a nationwide public contest. This public contest comprises written exams, position-oriented technical writing, specialized training (also called *formation course*) and may also include sometimes personal interviews and attribution of better ranking to candidates holding higher diplomas than those required for the position.

Besides regular training courses such bodies may offer to their public officials, for instance at the National Police Academy, Magistrates' School, public officials working in fighting against corruption rely on the National Programme of Capacity Building and Training to Combat Corruption and Money Laundering, which was created to promote integration and coordination among public officials, having basic courses and training programmes in skills and abilities required in the adoption of preventive measures and investigations, as well as criminal acts on money laundering. Launched by the Ministry of Justice, the Programme, which has included the direct support of COAF in a number of specific courses offered, had provided training to 12,761 professionals as at September 2013, as reflected in the chart below:

| YEAR | PROFESSIONALS |
|-------------|----------------------|
| 2004 | 253 |
| 2005 | 490 |
| 2006 | 909 |
| 2007 | 1,097 |
| 2008 | 1,746 |
| 2009 | 1,681 |
| 2010 | 1,192 |
| 2011 | 1,899 |

| | |
|-------|-------|
| 2012 | 1,713 |
| 2013* | 1,781 |

* from March to September

(b) Observations on the implementation of the article

The specialized federal entities entrusted with anti-corruption tasks and mandates include the Office of the Comptroller General (Portuguese: Controladoria-Geral da União, CGU); the National Court of Accounts (TCU) (independent under article 73 of the Federal Constitution); the General Prosecutor's Office, the Federal Prosecutor Office, the Prosecution Service (independent under article 127 of the Federal Constitution); and the Federal Police Department and the Office of the Attorney General of the Union (Portuguese: Advocacia-Geral da União, AGU).

The Office of the Comptroller General (CGU) is an agency of the federal government in charge of assisting the President of the Republic in matters within the executive branch that are related to defending public assets and enhancing management transparency through internal control activities, public audits, corrective and disciplinary measures, corruption prevention and combat, and coordinating ombudsman's activities. CGU is also in charge of technically supervising all the departments making up the internal control system, the disciplinary system, and the ombudsman's units of the federal executive branch, providing normative guidance as required.

Brazil's Supreme Audit Institution – the Federal Court of Accounts (TCU) – assesses the governance arrangements for the external audit of the Accounts of the President of the Republic. The Court assists the Congress in its constitutional incumbency to exercise external audit over the Executive Branch. Its members, called ministers, are appointed by the National Congress and the President of Brazil. The TCU employs a body of civil servants to prevent, investigate and sanction corruption and malpractice of public funds.

The Federal Police Department and the General Prosecutor's Office, as Head of the Federal Prosecution Service (FPS), are responsible for taking action on a criminal case, including for corruption offences. Pursuant to article 5 CPC, the police inquiry is initiated ex officio or by a request from the judicial authorities, the Federal Prosecution Service, the General Prosecutor's Office, or the victim for “the crimes of a public case” (which include corruption-related offences). Pursuant to paragraph 3 of article 5 CPC, any person may inform the police of knowledge of a criminal offence which is subject to public prosecution, and the police, after checking the source of the information, will order the institution to be investigated.

Within the police, since 2011, the Service for Investigations of the Misuse of Public Funds (SRDP) is responsible for coordinating, monitoring and regulating the activities carried out by the Department of Federal Police (DPF), which holds responsibility for investigating cases of misuse of public funds. The SDRP is placed within the Department of Investigations of Organized Crime (DICOR/DPF), a central body located in Brasilia.

(c) Successes and good practices

The National Strategy against Corruption and Money Laundering (ENCCLA) as a group integrated by public institutions and bodies as well as some corporative entities and which discusses initiatives to combat corruption and money laundering regarding the implementation of public policies.

Article 37 Cooperation with law enforcement authorities

Paragraphs 1-4

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.

2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

4. Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Please, refer to paragraph 3 of Article 30 on this matter.

**Section I
Plea Agreements**

Article 4. A judge may, at the request of the parties, grant judicial pardon to, or reduce by up to 2/3 (two-thirds) or replace with a sentence of restrictive rights the custodial sentence of those who have cooperated effectively and voluntarily with the investigation and criminal prosecution, provided that such cooperation produced one or more of the following results:

I – Identification of joint principals and accessories that integrate a criminal organization and of the criminal offenses committed by them;

II – The disclosure of the hierarchical structure and the division of tasks within a criminal organization;

III – Prevention of criminal offenses arising from the activities performed by a criminal organization;

IV – Full or partial recovery of the products or proceeds derived from criminal offenses committed by a criminal organization;

V – Location of any victims of a criminal organization provided their physical integrity is preserved.

Paragraph 1. In any case, the granting of this benefit shall take into account the personality of the collaborator of Justice, the nature, circumstances, severity and social impact of the criminal offense and the effectiveness of the collaboration.

Paragraph 2. Depending on the relevance of the collaboration, the Prosecution Office, at any time, and the chief of police, in the records of the police investigation with the manifestation of the Prosecution Office, may both require or ask the judge to grant judicial pardon to the collaborator of Justice, even if such benefit has not been provided for in the initial proposition, subject to the provisions established in Article 28 of Decree Law No. 3,689, of October 3, 1941 (Code of Criminal Procedure) where applicable.

Paragraph 3. The timeframe to file criminal charges against the collaborator of Justice or to file an action against him/her may be suspended for up to 6 (six) months, and extended for equal period of time, during which the statute of limitations is also suspended, until the cooperation measures are fulfilled.

Paragraph 4. In the event of the circumstances referred to in the head provision of this Article, the Prosecution Office may refrain from filing criminal charges against the collaborator of Justice if he or she:

I – is not the leader of a criminal organization;

II – is the first person to effectively collaborate with investigations pursuant to the terms and conditions established in this Article.

Paragraph 5. In the event of collaboration rendered after the entering of a judgment, the penalty may be reduced by half or the system of imprisonment may be changed even if the objective requirements have not been met.

Paragraph 6. The judge shall not participate in the negotiations organized by the parties for the purpose of executing a collaboration agreement, which is to bring together the chief of police, the suspect and his/her counsel, with the manifestation of the Prosecution Office or, depending on the case, the Prosecution Office and the suspect or the criminal defendant and his/her counsel.

Paragraph 7. After the execution of an agreement in accordance with the provisions established in Paragraph 6, the respective instrument, accompanied by the statement of the collaborator of Justice and a copy of the investigation, will be forwarded to the competent judge who may ratify it after checking its correction, lawfulness, and willfulness, and may, for this purpose, confidentially hear the collaborator of Justice in the presence of his/her counsel.

Paragraph 8. The judge may not ratify a proposition that does not meet legal requirements, or may adapt it to the recorded case.

Paragraph 9. After the ratification of the agreement, the collaborator of Justice may be heard, provided his /her counsel accompanies him /her, by a member of the Prosecution Office or by the chief of police responsible for conducting the investigations.

Paragraph 10. In case the parties revoke the proposition, all self-incriminating evidence produced by the collaborator of Justice shall not be solely used to his/her disadvantage.

Paragraph 11. The decision shall review the terms and conditions of the ratified agreement and the effectiveness of the said instrument.

Paragraph 12. Even if the collaborator of Justice is granted judicial pardon or is not subject to criminal charges, he/she may be heard in court at the request of the parties or upon initiative of the judicial authority.

Paragraph 13. The registration of acts of collaboration will employ, whenever possible, means or resources of magnetic recording, digital stenography or similar technique, including audiovisual resources, for the purpose of securing the maximum fidelity of the provided information.

Paragraph 14. The collaborator of Justice, in the presence of his/her counsel, will waive the right to silence when testifying and will be heard under oath or affirmation.

Paragraph 15. When negotiating, confirming or collaborating, the collaborator of Justice shall be assisted by a counsel.

Paragraph 16. No judgment of conviction will be entered based solely on the statements of the collaborating agent.

Law No. 9613 of March 3, 1998, on money laundering (article 1, Paragraph 5):

"Art 1 To conceal or disguise the nature, source, location, disposition, movement or ownership of property, rights or values derived directly or indirectly from crime:

§ 5 The penalty will be reduced by one to two thirds and begin to be fulfilled in open system, and the judge may fail to apply it or replace it with penalty of restriction of rights, if the author, co-author or accomplice voluntarily cooperates with the authorities, providing explanations that lead to the investigation of those offenses and its perpetrators, or location of property, rights or values that are object of these crimes".

The Commission that is currently in charge of amending the Criminal Code is considering the possibility to grant immunity from prosecution.

(b) Observations on the implementation of the article

Under the above-mentioned plea-bargaining agreements, a judge may, at the request of the parties, grant judicial pardon (article 4 of Law No. 12850/2013) or reduce the sentence or replace it with the penalty of restriction of rights of those who have

cooperated effectively and voluntarily with the investigation and prosecution authorities, providing explanations that facilitate the investigation of the offences in question and the identification of perpetrators, or location of property, rights or values that are objects of these crimes.

Article 37 Cooperation with law enforcement authorities

Paragraph 5

5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil is able to provide assistance in this matter, as it is possible to do so in Brazilian proceedings. Assistance can be provided on the basis of bilateral or multilateral treaties, as well as on the basis of reciprocity.

The treatment of the person referred to in paragraph 1 of this article as set forth in paragraphs 2 and 3 of this article is provided for in the Brazilian law as follows:

1 - The Brazilian Penal Code, in its article 65, III, d, classifies the spontaneous confession of a crime as a possibility to lessen the penalty.

2 - Law 8.137/90, which refers to crimes relating to fiscal, economic and consumer relations matters, in the sole paragraph of its article 16, determines that the participant that brings forth spontaneously all the details of the crime to the police authority, will have its penalty reduced by one or two thirds.

3 - Law 9.613/98, the Brazilian anti-money laundering law, establishes in its paragraph 5 of article 1, that, in the event that the accused or his/her accomplice freely agrees to cooperate with the authorities by providing information that lead to the detection of a crime and the identification of those responsible for it, or to the discovery of assets, rights and valuables that were the object of the crime, the sentence may be reduced by one or two-thirds. The accused may also be allowed to start serving time in an open system of imprisonment. The judge may also decide whether to apply the penalty or substitute it for the restriction of rights.

Also, it is worth mentioning Law 9.807/99, which establishes standards for the organization and maintenance of special protection programmes for victims and intimidated witnesses, creates the Federal Program of Assistance to Victims and Witnesses Threatened and provides for the protection of defendants or convicts who have voluntarily provided effective collaboration to police investigation and criminal prosecution, especially Articles 13 and 14 of the Law:

“PROTECTION OF ACCUSED PERSONS WHO COLLABORATE WITH THE INVESTIGATION

Article 13. The judge may, ex officio or at the request of the parties, grant judicial forgiveness and the consequent extinction of punishment to the accused, if being accused of a crime for the first time, and if s/he has effectively and voluntarily cooperated with the investigation and criminal prosecution, provided that such collaboration resulted in:

- I - the identification of the co-authors or participants in the criminal action;
- II - the location of the victim with his physical integrity preserved;
- III - full or partial recovery of proceeds of crime.

Single paragraph. The grant of judicial forgiveness will take into account the personality of the recipient and the nature, circumstances, seriousness and social repercussions of a criminal act.

Article 14. The accused person who voluntarily collaborates with the police investigation and criminal prosecution in the identification of co-authors or participants in the crime, the location of the victim with life and full or partial recovery of proceeds of crime, will have his/her penalty reduced by 2/3 (two thirds) if s/he is sentenced.”

(b) Observations on the implementation of the article

Brazil confirmed the ability of its authorities to protect collaborators of justice also through bilateral or multilateral treaties, as well as on the basis of reciprocity.

Article 38 Cooperation between national authorities

Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:

(a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or

(b) Providing, upon request, to the latter authorities all necessary information.

(a) Summary of information relevant to reviewing the implementation of the article

The Federal Constitution provides for the integration and interaction among governmental bodies concerning several measures towards cooperation between public authorities. This cooperation may refer to civil, criminal or administrative investigations,

accounting, financial, budgetary, operational and heritage inspections, internal control, among others.

Law 9.613/98 establishes that the Council for Financial Activities Control shall notify competent authorities of any irregularity observed in any citizen's bank transactions.

Another important measure taken for promoting bodies' sharing of information is called ENCCLA – National Strategy to Combat Corruption and Money Laundering (Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro), which was created in 2003, aiming at deepening the coordination among governmental agents involved in several phases related to the prevention and fight against money laundering and (from 2007) corruption.

ENCCLA is coordinated by the National Secretariat of Justice, a body within the Ministry of Justice, and up to date gathers about 70 bodies from the Executive, Legislative and Judiciary Branches, both at federal and state levels and the Public Ministry. Once a year, those bodies meet to join forces, in order to optimize public moneys and share information. The main goal is to reach efficient public policy in the public sector, in a way the State can organize in a consistent manner. For 2010, for instance, some measures, among others, are to be addressed by ENCCLA:

1. use of offshores as illicit money destination;
2. corruption associated with outsourced services;
3. irregularities in biddings and public works contracts for the 2014 World Cup and the 2016 Olympic Games.

Very well acknowledged by the general public are the Special Operations conducted by the Office of the Comptroller General (CGU), the Federal Police and the Federal Public Ministry. From 2003 to date, more than 70 special operations have been carried out, most of them in order to investigate and arrest people or groups who committed crimes against the public administration, such as embezzlement, active and passive bribery, among others.

The National Strategy to Combat Corruption and Money Laundering and the Special Operations carried out by the Office of the Comptroller General, the Federal Police and the Federal Public Ministry are good examples of successful actions taken by Brazil.

(b) Observations on the implementation of the article

Cooperation and consultation between investigative authorities and other government organizations is achieved through a variety of coordination mechanisms and channels for information exchange.

The review team took note of the National Strategy Against Corruption and Money Laundering (ENCCLA).

(c) Successes and good practices

Brazil has developed the National Strategy against Corruption and Money Laundering (Portuguese: *Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro*, ENCCLA), consisting of representatives of public entities and organizations, as well as some corporations. This strategic group analyzes initiatives to fight corruption and money laundering. These initiatives include draft bills, databases, specific cases, experience exchange, etc. Year after year, the group meets in order to set the goals for the following year and to plan significant actions.

Article 38 Cooperation between national authorities

(Please include here only what was not mentioned in paragraphs (a) and (b).)

Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:

(a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or

(b) Providing, upon request, to the latter authorities all necessary information.

(a) Summary of information relevant to reviewing the implementation of the article

Very well acknowledged by the general public are the Special Operations conducted by the Office of the Comptroller General (CGU), the Federal Police and the Federal Public Ministry. From 2003 to date, more than 70 special operations have been carried out, most of them in order to investigate and arrest people or groups who committed crimes against the public administration, such as embezzlement, active and passive bribery, among others.

Investigative Audits are specifically directed towards fighting corruption. As such, they constitute a special instrument that derives from findings ascertained during the monitoring of government programme's execution and management performance in the public sector. Investigative audits can also arise from formal complaints, representations brought by other agencies, including the Federal Police and the Public Prosecutor's Office, and even requests from public managers themselves. They are designed to collect evidence on the facts and on the responsible parties and ensure adequate material proof is assembled to assist subsequent law enforcement and judicial investigations.

These combined efforts, coupled with continuous information exchanges among State control bodies on a regular and concerted basis, serves to strengthen inter-institutional cooperation, promoting the involvement and initiative of State control agencies in the

three branches of government, with a view to ensuring that corruption is effectively prevented and fought against. This coordinated action is marked by information exchanges during all stages of the process to ensure the resulting work is adequately organized on the basis of the data and evidence subsequently collected, which must be capable of fully supporting the corresponding law enforcement and judicial investigations.

Some joint actions developed in articulation with the Federal Police and the Public Ministry are:

- Operação Hygeia/MT - aimed at staunching the leakage of federal resources in various municipalities in the state of Mato Grosso. The actual loss to the public coffers is over R\$ 50 million.
- Operação Fumaça/CE - leakage of resources for sanitation works in municipalities in the state of Ceará. Potential loss to the public coffers can reach R\$ 25.9 million.
- Operação João de Barro/MG, RJ, TO e ES - comprised the evaluation of federal resources application (part of which coming from Growth Acceleration Program - PAC) allocated at the Ministries of the Cities, National Integration, Health, Tourism and Sport.
- Operação Vassoura de Bruxa/BA - investigation on illegal procedures which allowed for the leakage of federal resources, especially those concerning the FUNDEB, PNAE and PAB (medicines acquisition) in 31 municipalities in the south of the state of Bahia.
- Operação Vampiro - Special audit on the Ministry of Health, checking for bidding procedures, payments and other steps of the centralized bidding process for medicines acquisition. A R\$ 21 million loss was recorded.
- Operação Gafanhoto - Special audit in the state of Roraima for identifying and breaking a scheme that involved hiring “phantom civil servants” using federal resources. A R\$ 36.2 million loss identified.

(b) Observations on the implementation of the article

The cases investigated jointly by the federal police and the prosecuting authorities and the many special operations mentioned above are examples of cooperation between national public authorities and government officials. The same applies to the annual assessment by Brazil of the effectiveness of measures adopted under the National Strategy against Corruption and Money Laundering (ENCCLA). Brazil is in compliance with this provision.

Article 39 Cooperation between national authorities and the private sector

Paragraph 1

1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Law No. 9.613/98, known as the Law on Money Laundering, provides for how legal persons have to cooperate with the Council for Financial Activities Control (COAF), Brazilian Financial Intelligence Unit. This cooperation basically refers to customer identification and record-keeping and reports of financial transactions. Information may be shared with the competent authorities of other countries and international organizations on the basis of reciprocity or formal agreements.

Article 15 of the above mentioned Law establishes that the COAF shall inform competent authorities, for the initiation of due procedures, the existence of substantial evidence of commission of crimes provided by law.

The Council for Financial Activities Control (Conselho de Controle de Atividades Financeiras - COAF), Brazil's Financial Intelligence Unit (FIU), has organized a number of training programs for specialized human resources (including Board staff personnel and officials), in cooperation with other government agencies. All training programs involving COAF, whether those directly administered by the Council or in which the entity's staff participate, includes course content on money laundering and the related predicate offenses, among them the foreign bribery offense. In 2007, COAF provided training to approximately 1,052 participants, an additional 1,816 in 2008 and 2,907 in 2009 on issues related to the detection of money laundering.

Additionally, every year COAF offers a Financial Intelligence Training Course to professionals employed in financial institutions, oversight agencies and prosecution services. Launched by COAF in 2000, the programme is supported by a variety of government academies and educational institutions. Individual courses addressed subjects ranging from money laundering, including the related predicate offenses, to financing of terrorism.

(b) Observations on the implementation of the article

The cooperation between the national authorities and the private sector was confirmed mainly in the field of money-laundering. Law No. 9613/1998 on money-laundering specifies the framework for such cooperation, especially between financial institutions and the Council for Financial Activities Control (COAF). This cooperation basically refers to customer identification and record-keeping and reports of financial transactions. Information may be shared with the competent authorities of other countries and international organizations on the basis of reciprocity or formal agreements. Additionally, COAF offers every year a financial intelligence training course to professionals employed in financial institutions, oversight agencies and prosecution services. Launched by COAF in 2000, the programme is supported by a variety of government academies and educational institutions. The reviewing experts welcomed the above clarifications and suggested the expansion of such cooperation between national investigative and prosecuting authorities and entities of the private sector to cover other offences than money laundering.

Article 39 Cooperation between national authorities and the private sector

Paragraph 2

2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

As for corruption, it can be reported to several agencies, including the Federal Court of Accounts, the CGU, the Federal Police, the Ministério Público Federal (Federal Prosecutor's Office), the Administrative Board of Economic Defense or to the agency where the act of corruption took place, by means of the agency's ombudsman or disciplinary board. Reports are generally received on the Internet, by telephone, or directly at the agencies' office.

Various mechanisms are available to Brazilian citizens to report criminal offences that they become aware of, and the report can be made to several agencies. An instrument known as disque-denúncia (hotline) exists for reporting by individuals, and is generally used by the police agencies to receive official reports related to various criminal offences.

(b) Observations on the implementation of the article

The reviewing experts concluded that Brazil has implemented this paragraph of the Convention.

Article 40 Bank secrecy

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

(a) Summary of information relevant to reviewing the implementation of the article

Although bank secrecy is protected in Brazil (article 5, clauses X and XII of the Federal Constitution), there are exceptions to this rule allowed both by case law and the provisions of Complementary Law No. 105/2001, by court order. Article 1, paragraph 4, of the Complementary Law provides that "breaking confidentiality can be declared necessary for establishing the occurrence of any illegal act, in any stage of the investigation or the court case" and especially in the case of such crimes as, inter alia, crimes against public administration, crimes against the national financial system and

money laundering. The range is broad enough to cover offences established by the Convention, as well as civil and/or administrative offences of impropriety (or improbity acts), regulated by Law No. 8429/ 1992.

(b) Observations on the implementation of the article

Complementary Law Non. 105, as of January 10th, 2001, through its Article 1, Paragraphs 3 and 4, allows for the breach of bank secrecy for the purpose of investigation and criminal proceedings.

Article 41 Criminal record

Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Article 8 of the Brazilian Penal Code establishes that the penal sentence served abroad shall mitigate the penalty imposed in Brazil for the same crime, if the two sentences are different. If both sentences are identical, the time served abroad must be deducted from the Brazilian sentence.

Article 42 of the Brazilian Penal Code establishes that time served in provisional arrest, in Brazil or abroad, must be taken into account, for the calculation of time to be served under liberty constraint measures or under security measures.

Article 63 of the Brazilian Penal Code establishes that the perpetrator a crime is considered to relapse when he commits another crime, after receiving a final conviction for a previous crime, in Brazil or abroad.

Finally, Paragraph I of article 696 of the Brazilian Code of Penal Procedure states that the execution of a criminal sentence may be suspended, since "[the sentenced] has not been the subject, whether in Brazil or abroad, of a final condemnation involving a loss of liberty for another crime...".

(b) Observations on the implementation of the article

Sentences served abroad or within Brazil for offences committed in the past, are taken into account in domestic criminal proceedings (see, for example, articles 8, 42 and 63 PC, as well as article 696 CPC).

Article 42 Jurisdiction

Subparagraph 1 (a)

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

(a) The offence is committed in the territory of that State Party; or

(a) Summary of information relevant to reviewing the implementation of the article

Article 5 of the Brazilian Penal Code establishes that the Brazilian law is applicable to crimes committed in the national territory, with no prejudice of Conventions, Treaties and rules of international law.

In addition, the Criminal Procedure Code, through its Articles 70, 71, 88, 89 and 90, refers to determining where the infraction has been committed.

Brazilian Penal Code, Decree-Law No. 2848/40.

Territoriality

Article 5 - the Brazilian Law shall apply, without prejudice to conventions, treaties and rules of international law, to the crime committed in the national territory.

§ 1st - For criminal purposes, Brazilian vessels and aircrafts of a public nature or at the service of the Brazilian government wherever they are as well as Brazilian vessels and aircrafts, merchant or privately-owned, located respectively in the corresponding airspace or in high seas shall be considered as an extension of the national territory.

§ 2nd - Brazilian law is also applicable to the crimes perpetrated aboard foreign privately-owned aircrafts or vessels, when the former are landing in the national territory or during aflight in the corresponding airspace and when the latter anchor in a Brazilian harbor or in the Brazilian territorial sea.

Criminal Procedure Code

Art 70. As a rule, the jurisdiction will be determined by where the offence takes place or, if attempted, the place where it the last implementing act (*“ato de execução”*) was practiced.

§ If the offence was initially started in the national territory but then concluded outside the jurisdiction, it will be determined by the place where the last implementing act was practiced in Brazil.

§ 2 When the last implementing act (*“ato de execução”*) is carried out abroad, the judge who will have jurisdiction is the one of the place where the crime was produced or or should have produced its result, albeit partially.

§ 3 When the territorial boundary between two or more jurisdictions is not certain, or when there is uncertainty as to when the offense was carried out or attempted with two or more different jurisdictions, the jurisdiction will be established by the dominant jurisdiction principle (*“prevenção”*, in Brazilian Portuguese).

Article 71. In the case of continued or permanent breach, committed in the territory of two or more jurisdictions, the jurisdiction will be established by the dominant jurisdiction principle.

Article 88. For crimes committed outside the Brazilian territory, the jurisdiction shall be of the State capital where the accused last resided. If he or she has never resided in Brazil, the competent court will be the one in the Capital of the Republic.

Article 89. The crimes committed aboard any vessel situated in territorial waters of the Republic, or in border rivers and lakes, as well as aboard national vessels at sea, will be prosecuted and tried by the jurisdiction of the first Brazilian port where the boat docks, after the crime, or, if it gets distant from the country, by the jurisdiction of the last port where it docked.

Article 90. The crimes committed aboard a national aircraft, within the airspace above the Brazilian territory, or at sea, or aboard a foreign aircraft within the airspace above the national territory, will be prosecuted and tried by the district jurisdiction where it has landed after the crime, or the country from which the aircraft has left.

(b) Observations on the implementation of the article

Article 5 PC provides for jurisdiction on the basis of the principle of territoriality.

(c) Successes and good practices

(d) Challenges, where applicable

Article 42 Jurisdiction

Subparagraph 1 (b)

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

(a) Summary of information relevant to reviewing the implementation of the article

Paragraph 1 of Article 5 of the Brazilian Penal Code establishes that for penal sanctions, the following are considered as extensions of the Brazilian Territory, and, therefore, subject to the Brazilian Law, as established in article 5:

- Brazilian ships and aircrafts of a public nature or at the service of the Brazilian government, no matter where they are; and

- Brazilian ships and aircrafts, merchant or of a private nature, if they are in the corresponding airspace or at sea.

Brazilian Penal Code, Decree-Law n. 2848/40.

Territoriality

Article 5 - the Brazilian Law shall apply, without prejudice to conventions, treaties and rules of international law, to the crime committed in the national territory.

§ 1st - For the criminal purposes, it shall be considered an extension of the national territory the Brazilian vessels and aircrafts of public nature or at the service of the Brazilian government wherever they are, and also Brazilian vessels and aircrafts, merchant or privately-owned, which are located respectively in the corresponding airspace or in high seas.

§ 2nd - The Brazilian law is also applicable to the crimes perpetrated aboard foreign privately-owned aircrafts or vessels, when the former are landing in the national territory or during the flight in the corresponding airspace and the latter at the harbor or in the Brazilian territorial sea.

According to article 6 PC, the criminal offence is deemed to have occurred in the place where the act or omission, in whole or in part, occurred, as well as where the result was produced or planned to be produced.

(b) Observations on the implementation of the article

Based on the concept of “territorial jurisdiction”, the Brazilian law is also applicable to the crimes committed aboard the State’s aircrafts or ships, or those in the service of the Brazilian government, wherever they may be, as well as offences perpetrated aboard foreign privately-owned aircrafts or vessels, when the former are landing in the national territory or during the flight in the corresponding airspace and the latter are at a harbour in Brazilian territory or in the Brazilian territorial sea.

Article 42 Jurisdiction

Subparagraph 2 (a)

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State Party; or

(a) Summary of information relevant to reviewing the implementation of the article

The Brazilian Penal Code establishes, in paragraph 3 of its article 7, that crimes committed abroad against a Brazilian will be subject to Brazilian law, if:

- a) the individual enters the national territory;
- b) the crime is also punishable in the country where it was committed;

- c) the crime is included among those for which Brazil authorizes extradition;
- d) the individual has not been cleared by a foreign court or has not served full sentence; AND
- e) the individual has not been forgiven abroad or, by other means, cannot be punished any longer, according to the most favourable law.

(b) Observations on the implementation of the article

Article 7 PC provides for extraterritorial jurisdiction, including on the basis of the active and passive personality principle. Article 7 clause II.b extends jurisdiction over offences committed abroad by Brazilian citizens. Article 7 clause II, paragraph 3 PC provides that the Brazilian law applies to criminal offences committed abroad by foreigners against Brazilian citizens. The establishment of extraterritorial jurisdiction in both cases is subject to the requirement of dual criminality. Another condition is that the offender “enters the national territory”. This requirement could act as an impediment to establishing jurisdiction in relation, for example, to the perpetrator of the foreign bribery crime. The Brazilian authorities confirmed, however, that if one of their nationals (*i.e.* the offender) re-enters Brazil either voluntarily or through extradition, this would be sufficient to meet the re-entry requirement prescribed by the law. No supporting examples were available. Brazil has also established its jurisdiction over offences against public goods and public faith, and against public administration, when the individual is acting on behalf of the public administration (article 7 b) and c) PC).

Article 42 Jurisdiction

Subparagraph 2 (b)

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

(a) Summary of information relevant to reviewing the implementation of the article

Article 7.I, a) of the Brazilian Penal Code establishes that the Brazilian law applies if the crimes were committed by a Brazilian, even if committed abroad.

(b) Observations on the implementation of the article

The reviewing experts concluded that Brazil has implemented Article 42 (2) (b) UNCAC.

Article 42 Jurisdiction

Subparagraph 2 (c)

2. *Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:*

(c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory; or

(a) Summary of information relevant to reviewing the implementation of the article

As for the money laundering practice in Brazil regarding proceeds of predicate offences used in foreign jurisdictions, Brazilian Money Laundering Law (9613/1998) is explicit in its article 2, II that this offence of money laundering is punishable by Brazilian jurisdiction.

As for money laundering partly practised in Brazil, jurisprudence sees it as a continued crime, therefore, if only part of an act is practiced in Brazil, the crime in whole is considered as practiced in Brazil. Also, by our Penal Code, the place of the crime is the place of both the action and result of it.

(b) Observations on the implementation of the article

Money-laundering is treated in Brazilian law as a “continuous crime” and therefore if acts foreseen in article 23, paragraph 1(b)(ii) of the Convention are committed abroad and only a part of the offence in Brazilian territory, then the offence is considered in its entirety to be subject to the Brazilian legislation.

Article 42 Jurisdiction

Subparagraph 2 (d)

2. *Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:*

(d) The offence is committed against the State Party.

(a) Summary of information relevant to reviewing the implementation of the article

According to Article 7 of the Brazilian Penal Code, even if committed abroad, crimes are subject to the Brazilian law if crimes where perpetrated:

- a) against the life or the liberty of the President of the Republic;
- b) against public goods or the public faith of any territorial unity of Brazil, or against a public company and other enterprises instituted by the Government;
- c) against the public administration, when the individual is acting on the behalf of the public administration.

(b) Observations on the implementation of the article

The reviewing experts concluded that Brazil has implemented Article 42 (2) (c) UNCAC.

Article 42 Jurisdiction

Paragraph 3

3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

(a) Summary of information relevant to reviewing the implementation of the article

Several extradition treaties in force in Brazil provide for this measure.

Brazil, in accordance with its Federal Constitution, does not extradite its nationals. However, in order to contribute to crime suppression at the international scene, Brazil takes all necessary measures to establish under its jurisdiction the prosecution of the defendants.

We have received some cases of investigations concluded in other countries regarding Brazilian defendants present in Brazil. As Brazil cannot extradite nationals, our competent authorities shall start new investigations in our territory based on the information provided by the other country. After that, the Public Prosecutor Office must present a criminal charge against the Brazilian person.

Although Brazil has never received this kind of request based on the UNCAC, it is possible to grant assistance in this matter, as has been the case under reciprocity basis requests received.

Whereas extradition of nationals is not authorized by Brazilian Constitution (except for naturalized nationals and only by drug related crimes practiced before naturalization), Brazilian Penal Code dictates that the offences carried out by a Brazilian national abroad might be prosecuted by Brazilian jurisdictions (Article 7, II, b, with Article 7, paragraph 2).

(b) Observations on the implementation of the article

As mentioned above, Brazil does not extradite its nationals. In practice, where a request for extradition is refused on the ground of nationality, the Brazilian authorities forward the case to the prosecution authorities without delay, in application of the principle “*aut dedere aut judicare*”.

- (c) **Successes and good practices**
- (d) **Challenges, where applicable**

Article 42 Jurisdiction

Paragraph 4

4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.

(a) Summary of information relevant to reviewing the implementation of the article

This provision is covered by many of the extradition treaties in force.

(b) Observations on the implementation of the article

The review team took note of the response provided by Brazil.

Article 42 Jurisdiction

Paragraph 5

5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

(a) Summary of information relevant to reviewing the implementation of the article

The Brazilian Central Authority for extraditions, the Department of Foreigners of the Ministry of Justice, coordinates with foreign States when necessary. For the time being, Brazil counts 24 extradition treaties in force. Other ones have been submitted to the National Congress. Also, within the Ministry of Justice, there are some negotiations of other treaties to be signed with other States. This policy has been sought by the Brazilian Government in an attempt to broaden and deepen international legal cooperation in this matter.

(b) Observations on the implementation of the article

The review team took note of the response provided by Brazil.

Article 42 Jurisdiction

Paragraph 6

6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

(a) Summary of information relevant to reviewing the implementation of the article

The UNCAC, as a Convention in force in Brazil, has the status of Ordinary Law in Brazil. Thus, this provision applies. Also, Article 5 of the Brazilian Penal Code establishes that the Brazilian Law is applicable, without prejudice to conventions, treaties and rules of international law committed in the national territory.

(b) Observations on the implementation of the article

The review team took note of the response provided by Brazil.

Chapter IV. International cooperation

Article 44 Extradition

Paragraph 1

1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

(a) Summary of information relevant to reviewing the implementation of the article

Extradition is regulated in Brazilian legislation by Article 102 (I) (g) of the Federal Constitution, by Art. 76 et seq. of Law No. 6815/1981 (the Foreigners Statute) and by Decree 6.061/2007 (which provides for the structure of the Ministry of Justice).

Brazil makes extradition conditional on the existence of a treaty and considers the Convention as a legal basis for extradition.

Article 5 (LI), of the Brazilian Federal Constitution states that a Brazilian national shall not be extradited.

Article 77 of Law No. 6815/1981 provides for the situations in which extradition will not be granted. One of such situations refers to the dual criminality requirement, as follows:

Art. 77. Extradition shall not be granted when:

(...)

II - the fact which motivates the request is not considered a crime by Brazil or by the requesting State;

Law No. 6815/1981 does not state any exceptions to this rule.

Brazilian legislation demands that the fact is deemed a crime (a felony) under Brazilian and foreign legislation. In this context, extradition will not be granted if the fact is deemed a misdemeanour by either legislation.

The Supreme Federal Court is the body responsible for analysing the extradition requests and their conformity with the Brazilian legislation (Art. 77, paragraph 2, Law No. 6815/81), whereas the Department of Foreigners (DEEST) of the Ministry of Justice is Brazil's Central Authority in extradition matters.

Outgoing extradition requests are received from the Judicial Branch by the DEEST, by means of its Division of Compulsory Measures. The DEEST reviews the corresponding documentation, in order to verify the conformity of the request with the relevant legislation, and then transmits the request by Ministerial Note to the Ministry of Foreign Affairs (MRE) for submission to the requested country. If the Requested State grants extradition, the Brazilian authorities remove the extradited person to foreign territory within the time period provided in the relevant international treaty, or on the date designated by the Requested State.

Incoming extradition requests are received from the requesting State by the DEEST through diplomatic channels (MRE). If the request is in conformity with the applicable international treaty or the Statute of Foreigners, it is transmitted, by means of a Ministerial Note, to the Federal Supreme Court. Once the Federal Supreme Court approves extradition in the time period established in international treaty or in Law 6815/1980, the Requesting State shall remove the individual from the national territory.

Federal Constitution

Article 102. The Supreme Federal Court is responsible, essentially, for safeguarding the Constitution, and it is within its competence:

I. to institute legal proceedings and trial, in the first instance, of:

(...)

g. extradition requested by a foreign state;

To supplement the legal provision the State under review provided examples of rulings by the Supreme Federal Court on the requisite of double criminality. Ext 796, Rel. Min.

Sydney Sanches, ruled in 13-9-2001, Plenary, DJ de 19-10-2001, Ext 1027 / RFA - Germany, Rapporteur: Min. GILMAR MENDES, Ruling: 15/12/2006, Ruling Body: Plenary), (Ext 1064 / Portugal, Rapporteur: Min. GILMAR MENDES, Ruling in: 09/08/2007, Ruling Body: Plenary), Ext 1.051, Rel. Min. Marco Aurélio, ruled in 21-5-09, Plenary, DJE de 7-8-09).

Forfeiture of a vessel is not a crime under Brazil law; therefore, in this matter, it fails to fulfil dual criminality (Ext 796, Rel. Min. Sydney Sanches, ruled in 13-9-2001, Plenary, DJ de 19-10-2001)

Extradition and dual criminality: The formalistic difference between the nomen juris of the offences shall not be used as grounds for denying extradition, as it need only be established that the same underlying conduct is criminalised in both Brazil and the requesting country. Dual criminality rule - which is required in extradition matters – demands that the crime the party is charged with be crime in both in Brazil and in the requesting State. What is important in order to meet the prerequisite of dual criminality is the presence of the elements of the crime set forth as necessary for the indictment under the laws of both Brazil and the requesting State, regardless of the name given to the crime.

(b) Observations on the implementation of the article

Extradition is regulated in the Brazilian legal system by Article 102 (I) (g) of the Federal Constitution; Art. 76 et seq. of Law No. 6815/1981 (the Foreigners Statute); and by Decree 6.061/2007 (which provides for the structure of the Ministry of Justice).

Article 76 of Law No. 6815/1981 stipulates that extradition can be provided on the basis of a convention/treaty or reciprocity. With regard to treaty-based extradition relations, Brazil considers the Convention as a legal basis for extradition.

Article 44 Extradition

Paragraph 2

2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.

(a) Summary of information relevant to reviewing the implementation of the article

Dual criminality is required in extradition matters, according to art.77(II) of Law No. 6815/81. However, Brazil has a flexible approach on the issue of determining dual criminality by focusing on the underlying conduct of dual criminality, as it is mitigated by the Supreme Federal Court.

For instance, the Supreme Federal Court has ruled that it is not required that the elements of the offence are the same, or use the same terminology. Where dual criminality is required, it only needs to be established that the same underlying conduct is criminalized (either as a stand alone offence or otherwise) in both Brazil and the requesting country. It is not necessary to establish that each element of the offence is identical. Precedents will be attached to this question.

However, Brazil has ratified bilateral and multilateral treaties that provide the possibility of assistance regardless of dual criminality, such as, for instance, the Agreement on Cooperation and Mutual Legal Assistance in Criminal Matters between Brazil and Spain (ratified in December 2008), the US-Brazil Mutual Legal Assistance Treaty (17 October 1997) and the (OAS) Interamerican Convention on Mutual Assistance in Criminal Matters (ratified in January 2008). Also holding similar provision is Article 2, item I, of the Extradition Treaty of Mercosur.

It should be further noted that the Supreme Federal Court has accepted the UN Convention against Corruption as a basis for supplementing the dual criminality requisite in the Extradition case n. 1103, which will be attached to this question.

Ruling(s) from the Brazilian Supreme Federal Court Extradition and dual criminality support this statement. The formalistic difference between the *nomen juris* of the offences shall not be used as grounds for denying extradition, as it need only be established that the same underlying conduct is criminalised in both Brazil and the requesting country. Double criminality rule - which is required in extradition matters – demands that the crime the party is charged with be a crime in both in Brazil and in the requesting State. What is important in order to meet the prerequisite of dual criminality is the presence of the elements of the crime set forth as necessary for the indictment under the laws of both Brazil and the requesting State, regardless of the name given to the crime. (Ext 953, Rapporteur Min. Celso de Mello, ruled on 28-9-05, Plenary, DJ de 11-11-05).

(b) Observations on the implementation of the article

Brazil generally requires dual criminality for extradition, but also adopts a flexible approach by focusing on the underlying conduct and not on the denomination of the offence, as well as by criminalizing “equivalent conduct offences” in cases of offences covered by the Convention which have not been implemented (such as illicit enrichment).

(c) Successes and good practices

The flexible interpretation of the dual criminality requirement in both extradition and MLA proceedings based on the underlying conduct of the offence.

Article 44 Extradition

Paragraph 3

3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.

(a) Summary of information relevant to reviewing the implementation of the article

Article 77 of Law No. 6815/1981 provides for the situations in which extradition will not be granted. One of such situations refers to the length of imprisonment requirement, as follows:

Art. 77. Extradition shall not be granted when:

(...)

IV - Brazilian law determines as a sanction for the crime an imprisonment equal or inferior to 1 (one) year;

If an extradition request refers to more than one offence, this requirement must be met by each offence separately. As it can be noted in the questions relating to Chapter III of UNCAC, Brazilian legislation rarely determines for the crimes described in the Convention an imprisonment equal or inferior to one year.

Furthermore, an extradition request can be partially granted by the Supreme Federal Court. In this case, the request, which relates to more than one offence, can be granted for such offence(s) that follow all the requirements of Brazilian legislation, but not for such offence(s) that fall outside the requirements of Brazilian legislation. Extradition treaties can establish a different length of time for this requisite.

The gravity of the offence is analysed by the sanction prescribed for it. In the Extradition Treaty concluded between Brazil and Argentina, the countries undertook to extradite everyone committing crimes with sanctions of imprisonment of over two years.

(Ext 803, rapporteur Min. Nelson Jobim, ruled on 04-12-02, Plenary, DJ 29-8-03)
Extradition: formal requisites met; exclusion of facts which are being prosecuted in Brazil or in relation to which dual criminality is not met. Extradition partially granted. Request reject in relation to the facts described in items 6, 7, 8 and 9. (Ext 719, Rapporteur Min. Sepúlveda Pertence, ruled on 4-3-98, Plenary, DJ of 29-8-03)

Paragraph 3 addresses the grant of extradition requests for offences which are not extraditable by reason of their length of imprisonment, provided one is extraditable and, even in the absence of a domestic legal provision regarding this possibility, there are bilateral agreements in place that encompass this scenario, such as the Extradition Treaty signed with Australia, which would certainly be invoked, by analogy, in the event domestic legal questions were raised.

In addition, it is our view that article 77, subsection IV, of Law No. 6815/80, which sets the minimum imprisonment time for extradition, does not prevent the Supreme Court from proceeding to render the minimum time requirement, where prejudicial for one or

more offences, irrelevant for the purposes of granting extradition for all remaining offences which meet the condition.

In this light, the Federal Supreme Court handed down the following decision:

“Additionally, it is important to observe the need to conduct separate reviews for this circumstance based on whether the extradition is requested for the purpose of prosecution or sentence execution. This is due to the fact that the base sentence impacts directly on the calculation of the statute of limitations on the criminal proceeding and the criminal sentence alike, hindering, in the latter case, the exercise of jurisdiction.”

(b) Observations on the implementation of the article

Brazil’s legislation provides for a one-year period of imprisonment as a minimum penalty for extradition. Corruption offences generally comply with this minimum penalty. Moreover, corruption offences can be considered extraditable in other extradition treaties taking into account the following:

- a) the aforementioned conclusion that, in general, Brazil’s legislation provides for proportionate, dissuasive and effective sanctions for corruption offences, which are also beyond the minimum penalty requirement for granting an extradition request;
- b) the confirmation of the Brazilian authorities that they always intend to include the widest possible range of offences in its extradition treaties. It was confirmed that the Supreme Federal Court of Brazil had already used the Convention to complement the list of offences included in the bilateral extradition treaty with the United States of America.

If an extradition request refers to more than one offence, this requirement must be met by each offence separately. However, certain treaties allow for accessory extradition.

Article 44 Extradition

Paragraph 4

4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.

(a) Summary of information relevant to reviewing the implementation of the article

Currently, Brazil has 28 extradition treaties in force with the following countries: Angola; Argentina; Australia; Belgium; Bolivia; Cape Verde; Chile; Colombia; Dominican Republic; East Timor; Ecuador; Equatorial Guinea; France; Guinea-Bissau; Italy; Lithuania; Mexico; Mozambique; Panama; Paraguay; Peru; Portugal; Romania; Russia; São Tomé and Príncipe; South Korea; Spain; Suriname; Switzerland; Ukraine; Uruguay; the United Kingdom and North Ireland; the United States; and Venezuela. (See, respectively, Decrees 7935/2013; 62979/1961; 2010/1996; 41909/1957; 9920/1942 and 5867/2006; 7935/2013; 1888/1937 and 5867/2006; 6330/1940; 6738/2009; 7935/2013; 2950/1938; 7935/2013; 5258/2004; 7935/2013; 863/1993; 4528/1939; 2535/1938; 7935/2013; 8045/2013; 16925/1925, 4975/2004 and 5867/2006; 5853/2006; 1325/1994; 6512/2008; 6056/2007; 7935/2013; 4152/2002; 99340/1990; 7902/2013; 23997/1934; 13414/1919, 4975/2004 and 5867/2006; 2347/1997; 55750/1965; and 5362/1940, in Portuguese). Other treaties are being negotiated or being already analysed by the National Congress of Brazil.

Brazil always intends to include the widest possible range of offences in its Extradition treaties. The extradition request is based both on the provisions of domestic law and the principle of reciprocity (Foreigners Statute art.76):

Art. 76. Extradition may be granted when the Requesting State bases the request on an existing treaty, or when it promises reciprocity to Brazil.

It should be noted as well that, as described in question n. 155, the Supreme Federal Court of Brazil has already used the UNCAC to complement the list of offences included in an extradition treaty, namely the Treaty between Brazil and the United States of America. On the issue of political crimes, Brazil does not have a political offences list; The Federal Supreme Court of Justice has the exclusive authority to evaluate the nature of the offence. Article 77 of Law No. 6.815/80 states that extradition, however, will not be granted when the fact represents a political crime, as per regulation of the Constitution (article 5). Extradition of an alien shall not be granted on the basis of a political crime of crime of opinion.

In accordance with article 77 of Law No. 6815/1981, extradition is not granted if the offence for which it is requested is a political crime. There is no definition of the “political offence”, nor is a list of “political crimes” contained in the domestic legislation. Decisions regarding this matter are subject to the jurisprudence of the Supreme Court of Justice and are dealt with on a case-by-case basis.

The extradition process in Brazil takes place in three stages. The first is administrative, beginning with the receipt of the request by the executive branch of the Government. The second is judicial, in which the Federal Supreme Court rules on the extradition request, including assessing its legality, and whether the executive is authorized to grant the extradition. In the final stage, the executive branch decides whether or not to grant the extradition, and if it is granted, the administrative authorities carry out the decision.

(b) Observations on the implementation of the article

The reviewing experts were not in a position to judge whether considerations of “political nature” could hinder extradition for offences covered by the Convention given that the Brazilian authorities did not provide specific information on this matter.

(c) Challenges, where applicable

Brazil should ensure that consistent jurisprudence of the Supreme Federal Court guarantees that any crime established in accordance with the Convention is not considered or identified as a political offence that may hinder extradition.

Article 44 Extradition

Paragraph 5

5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil’s ability to grant an extradition request is not limited to the countries with which Brazil has signed a treaty. Extradition can be requested by or to any country. When a treaty has not been signed, the request shall use documents stated by Law No. 6.815/80 (Foreigners Statute) and shall be based on the promise of reciprocity. This Convention shall also be used as a legal basis for requests.

Brazil provides information on extraditions granted without a treaty, using this Convention as the legal basis.

(b) Observations on the implementation of the article

Article 76 of Law No. 6815/1981 stipulates that extradition can be provided on the basis of a convention/treaty or reciprocity. With regard to treaty-based extradition relations, Brazil considers the Convention as a legal basis for extradition.

Article 44 Extradition

Subparagraph 6 (a-b)

6. A State Party that makes extradition conditional on the existence of a treaty shall:

(a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

(a) Summary of information relevant to reviewing the implementation of the article

This provision does not apply to Brazil to the extent that, as set forth above, the country does not condition extradition on the existence of a treaty.

(b) Observations on the implementation of the article

In the absence of a treaty, the extradition request is based both on the provisions of domestic law and the principle of reciprocity.

Article 44 Extradition

Paragraph 7

7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil reiterated the response provided on provisions 44 (5) and 44 (7).

(b) Observations on the implementation of the article

Brazil has a favorable legal framework for the implementation of this provision.

Article 44 Extradition

Paragraph 8

8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

(a) Summary of information relevant to reviewing the implementation of the article

Reference is made to the information provided in the previous provisions.

Other cases in which extradition can be refused are also included in art. 77 of Law No. 6815/80. A description of them follows below:

Art. 77. Extradition shall not be granted:

I - when the person is Brazilian, except if the nationality was acquired after the fact that motivates the request;

(...)

III - Brazil is competent, according to its legislation, to prosecute and judge the offence committed by the person;

(...)

V - the person is being prosecuted or has been already convicted or acquitted in Brazil for the same fact in which the request is based upon;

VI - the offence has prescribed according to the Brazilian or to the requesting State statutes of limitations;

(...)

VIII - the person will be prosecuted, in the requesting State, by a Court of Exception.²

Information on conditions and grounds upon which extradition requests were refused

Examples of rulings by the Supreme Federal Court. Other rulings which also relate to refusals of extradition requests can be found in other items.

EXTRADITION - COMMON AND POLITICAL CRIMES - CONTAMINATION. Once the interweaving of political crimes and common crimes is established, it is imperative to refuse extradition. Precedent: Extraditions No 493-0 and 694-1, reported by ministers Pertence and Sydney Sanches, respectively. (Ext 994/Italy, Rapporteur Min. Marco Aurélio, ruled on 14/12/2005, Plenary).

In view of a possible life sentence in the requesting State, the extradition request should be granted on condition that the requesting State assumed, on a formal commitment, to change the life imprisonment sentence to a maximum of thirty years. (Ex 1069, Rep. Min Gilmar Mendes, trial 08/09/2007, 09/14/2007 DJ). In the same vein: Ext 1060, Rep. Min Gilmar Mendes, trial in 15 -10-07, DJ 31/10/2007.

(b) Observations on the implementation of the article

² The exception of Art. 77 (I) was included in the Brazilian Federal Constitution, under article 5, of Individual and Collective Rights and Duties:

Art. 5 (LI) of the Brazilian Federal Constitution - no Brazilian shall be extradited, except the naturalized ones in case of common crime committed before naturalization or proven involvement in the illicit traffic of narcotics and related drugs, according to the law.

The grounds for refusal of extradition requests are enumerated in article 77 of Law No. 6815/1981. Significantly, extradition is precluded when the person is of Brazilian nationality at the time of the commission of the offence (also by virtue of article 5 of the Federal Constitution).

Article 44 Extradition

Paragraph 9

9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

(a) Summary of information relevant to reviewing the implementation of the article

Some treaties to which Brazil is signatory provide for the possibility of simplified extradition. These include the Extradition Treaty of Mercosur (Decree 4.975/2004, Art.27), the Extradition Treaty of Mercosur, Bolivia and Chile (Decree 5.867/2006, Art. 27) and the Extradition Convention of the Member States to the Community of Portuguese Speaking Countries, of November 23rd 2005 (Article 19).

In simplified extradition cases, the defendant agrees to be extradited without trial in the Supreme Court of Brazil.

Moreover, Brazil is about to implement the Convention on the Transfer of Sentenced Persons within the Member-States of the Community of Portuguese speaking Countries (Legislative Decree 174/2009) and the MERCOSUR's Agreement on the Transfer of Sentenced Persons among States-Parties (Legislative Decree 291/2007). Both treaties will also address the issue of simplifying evidentiary requirements.

Simplified extradition procedures are not sent to the Federal Supreme Court for appreciation. Therefore, it falls solely within the competencies of the *Department of Foreigners* (DEEST, namely its Division of Compulsory Measures) of the Ministry of Justice, the Brazilian Central Authority in extradition matters, as described in the provision 44.1.

The DEEST is implementing at this moment a new computerized system to store the data relating to extradition requests (incoming and outgoing ones). The implementation is scheduled to be finished in the first trimester of 2011 and the Division of Compulsory Measures is one of the few remaining departments in this last phase of the implementation process.

Finally, Brazil informed the reviewers that INTERPOL "red notices" are not legally treated as valid request for extradition. Instead, they are used as "alerts" and prompt Brazil to contact the country in question to encourage the submission of a formally valid extradition request.

Brazil cited as applicable legal measure art. 27 of both Extradition Treaty of Mercosur and of the Extradition Treaty of Mercosur, Bolivia and Chile and art. 19 of the Extradition Convention of Member States to the Community of Portuguese Speaking Countries:

Article 27

Simplified or Voluntary Extradition

The requesting State Party may grant an extradition if the requested person, under due legal assistance and before a judicial authority of the requested State Party, declares his/her express consent to be delivered to the requesting State Party, after being informed of his/her right to a formal proceeding of extradition and of the protection it entails.

Article 19

Simplified or Voluntary Extradition

The requesting State Party may grant an extradition if the requested person, under due legal assistance and before a judicial authority of the requested State Party, declares his/her express consent to be delivered to the requesting State Party, after being informed of his/her right to a formal proceeding of extradition and of the protection it entails.

(b) Observations on the implementation of the article

The extradition process in Brazil takes place in three stages. The first is administrative, the second is judicial, in which the Federal Supreme Court rules on the extradition request, including checking its legality, and whether the executive is authorized to grant the extradition. In the final stage, the executive branch decides whether or not to grant the extradition, and if it is granted, the administrative authorities carry out the decision.

Simplified extradition procedures are foreseen in some bilateral treaties to which Brazil is a party to address cases in which the person sought agrees to be extradited.

However, no information has been provided regarding the average duration of the extradition process as a whole and at its different stages, including the appeal hearings.

Given that no analytical statistical data on extradition proceedings were provided, the reviewing experts highlighted the need for a more systematic approach in compiling statistical data on extradition cases.

(d) Challenges, where applicable

As said earlier, Brazil should continue its efforts to put in place – or improve - and render a fully operational information system, compiling in a systematic manner information on extradition and mutual legal assistance cases, with a view to facilitating the monitoring of such cases and assessing in a more efficient manner the effectiveness of

implementation of international cooperation arrangements; and devote more human resources for this purpose.

With regards to the rights of the person whose extradition is sought, ensure that extradition proceedings are conducted in expeditious manner, also in those cases where the simplified extradition process does not apply.

Article 44 Extradition

Paragraph 10

10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

(a) Summary of information relevant to reviewing the implementation of the article

In urgent cases, preventive custody for the purposes of extradition may be requested from the Requested State through diplomatic channels or INTERPOL, as stated in Article 82 and its paragraphs of Law No. 6815/80.

Once the individual is in custody, the requesting State is granted a period of ninety days to formally submit the extradition request. The individual will not be held beyond this period, nor will a new preventive arrest order be issued for the same offense without a formal extradition request. However, following formal submission of the extradition request, the individual will remain in custody to appear before the Federal Supreme Court, in order to ensure effective surrender and transfer of the individual in the event the request is granted.

Information on recent court or other cases in which a person whose extradition was sought and who was present in Brazil has been taken into custody and cases in which other appropriate measures were taken to ensure his or her presence at extradition proceedings:

Examples of rulings by the Supreme Federal Court Extradition. Oriental Republic of Uruguay. Murder. Meeting the requirements of Law No. 6.815/80. The limitation period has not expired both from the perspective of the foreign law and of Brazilian criminal law. Review of facts underlying the investigation. Impossibility.

System contentious limited. Precedents. Investigation still ongoing. Possibility of extradition. Withdrawal of the warrant: There are no exceptional circumstances justifying the withdrawal of the arrest warrant of the wanted person. Constitutional legitimacy of the prison for precautionary purposes. Precedents. Request granted. 1. The request by the Eastern Republic of Uruguay, based on the Extradition Agreement between the States Parties of MERCOSUR meets the assumptions required for its approval, pursuant to Law No. 6.815/80. 2. The fact attributed to extraditing criminal matches in Brazil the crime of manslaughter, as provided for in Art. 121 of the Brazilian

Penal Code, thereby satisfying the requirement of dual criminality as foreseen in art. 77, subsection II of Law No. 6.815/80. 5. Provisional arrest is appropriate and in the nature of precaution, "intended, in his major duty instrumental function, to ensure the implementation of any extradition order" (Ext No. 579-Q, Full Court, Rapporteur Minister Celso de Mello, DJ 10/9/1993), pursuant to Articles 579-Q, Full Court, Rapporteur Minister Celso de Mello, DJ 10/9/1993), pursuant to Articles 81 and 84 of Law No. 6.815/90, which precludes the granting of bail when you're facing an exceptional situation, which is not the case the species. 9. According to art. 91, item I of Law No. 6.815/80 and Article 17 of the Extradition Agreement between the States Parties of MERCOSUR, the Republic of Uruguay shall ensure the deduction of the time the person claimed has remained jailed in Brazil under the request. 10. Extradition upheld. (Ext. 1178/ Uruguay, rapporteur Min. Dias Toffoli, ruled on 10/06/2010, Plenary).

SUMMARY: HABEAS CORPUS. DETENTION PENDING EXTRADITION.

NON-OCCURRENCE OF DURESS. DISMISSAL. 1. Detention for extradition purposes (Law 6.815/1985, art. 81) is a precondition for the extradition request, not to be confused with arrests of procedure of the Code of Criminal Procedure. 2. For it is a regular police custody, despite the pending appeal of the arrest warrant, there is no evidence of unlawful detention. (HC 83540/São Paulo, Rapporteur Min. Joaquim Barbosa, ruled on 27/11/2003, Plenary).

(b) Observations on the implementation of the article

Brazil avoids the preventive detention, as established by its legal framework, but it may be appropriate in those cases where the gravity of the offence so suggests. Thus, Article 82 of Law 6815/80 states that in urgent cases, the accused may be remanded, pending the conclusion of the extradition process. In this regard, it is considered that this country has a favorable legal framework for the implementation of this provision.

Article 44 Extradition

Paragraph 11

11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil does not extradite its own nationals as this is prohibited by the Federal Constitution (art.5, item LI), unless the Brazilian nationality has been acquired after the commission of the offence for which extradition is sought. In cases where the nationality of the suspected offender prevents extradition, the Brazilian authorities are required to prosecute the national who has committed the crime (Criminal Code, art.7(II)(b)). In such

instances, the matter must be referred to the Prosecutors Office as soon as the request is received by the competent authority from the requesting state.

Brazil has specific legal provisions governing the conduct of such prosecutions. As soon as it is determined that an extradition request involves a Brazilian national, the Requesting State is informed of the refusal and, at the same time, is requested to amend the extradition request to facilitate the fact-finding phase of the Brazilian criminal proceedings. Decree-Law 394/1938 provides that the Brazilian authorities will seek from the Requesting State the evidentiary elements required for the proceeding, so that the competent judge may proceed, in accordance with Brazilian procedural rules. The Requesting State will be informed of the final decision or resolution (art.1, para.3).

Examples of Supreme Federal Court rulings on the matter:

SUMMARY: EXTRADITION. INDICTMENT FOR THE CRIME OF FELONY MURDER.

PROOF OF THE BRAZILIAN CITIZENSHIP OF THE PERSON IN QUESTION. Request refused. Imposition of the principle of *aut dedere aut judicare*. Being unable to meet the request for international cooperation, Brazil, in these cases, must assume the obligation to prosecute the person sought to avoid the impunity of the crime committed by its national elsewhere. Extradition denied (Ext 916 - Argentina, Rap. Min. Carlos Britto, ruled on 19/05/2005, Plenary).

(b) Observations on the implementation of the article

As mentioned above, Brazil does not extradite its nationals. In practice, where a request for extradition is refused on the ground of nationality, the Brazilian authorities forward the case to the prosecution authorities without delay, in application of the principle “*aut dedere aut judicare*”.

(d) Challenges, where applicable

Brazil should continue to ensure that domestic criminal proceedings are initiated when extradition is denied on the ground of nationality or other grounds, in application of the principle “*aut dedere aut judicare*” (article 44, paragraph 11);

Article 44 Extradition

Paragraph 12

12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and

other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil reiterated the response provided in the previous paragraph.

The extradition of Brazilian nationals is prohibited, with the exception of naturalized Brazilians, for criminal offences committed prior to naturalization or following an involvement in illicit trafficking of narcotic drugs, pursuant to law. In this case, therefore, the paragraph must be interpreted in accordance with the applicable constitutional principles.

(b) Observations on the implementation of the article

As said earlier, Brazil does not extradite its own nationals, by disposition of the Federal Constitution (art. 5)

Article 44 Extradition

Paragraph 13

13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.

(a) Summary of information relevant to reviewing the implementation of the article

Article 9 of the Brazilian Penal Code only allows for upholding a verdict rendered in a foreign jurisdiction for purposes of civil damages or execution of a detention order. However, the prosecution in Brazil of a criminal offence committed in a foreign territory remains possible.

Brazil further clarified that sentences are not homologated nor is extradition granted for the partial or full serving of the sentence and, should the extradendus be a Brazilian national, it could only be taken into account as recidivism provided that a criminal offence is committed after the extradition request.

(b) Observations on the implementation of the article

Brazil does not grant extradition of Brazilian nationals. In any case, Brazil does not enforce foreign sentences in lieu of extradition of nationals to partially or totally serve foreign sentences. If the extraditable person is a Brazilian national, foreign sentences may

only be considered as proof of recidivism, provided that the person sought has committed an offence after the extradition request. However, a bilateral treaty signed with the Netherlands provides for foreign sentence to be enforced in Brazil where the extradition of a Brazilian national is refused.

(c) Challenges, where applicable

Brazil should consider taking legislative measures to allow the enforcement of foreign criminal judgments, including in cases where such enforcement is an alternative to extradition when the latter is denied on the grounds of nationality (article 44, paragraph 13).

Article 44 Extradition

Paragraph 14

14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

(a) Summary of information relevant to reviewing the implementation of the article

The 1988 Constitution of Brazil guarantees due process of law to every judicial and administrative procedures (Art. 5, particularly items LII to LVII). In this context, extradition requests must follow the due process of Law No. 6.815/80 to be granted or refused (except in the case of simplified extradition procedures). Legal assistance is guaranteed properly to the persons subjected to extradition procedures and if they cannot afford an attorney, a public defender will be assigned to his/her case.

The right to an adversarial proceeding and to a full defense is ensured under articles 209 and 210 of the Internal Rules of Procedure of the Federal Supreme Court.

(b) Observations on the implementation of the article

The Federal Constitution and the jurisprudence of Brazil asserts the respect for the right to defence. Consequently, persons that are subject to extradition are guaranteed a fair treatment at all stages of the proceedings, including enjoyment of all rights and guarantees provided by the domestic legislation.

Article 44 Extradition

Paragraph 15

15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

(a) Summary of information relevant to reviewing the implementation of the article

As described before, under Brazilian legislation, extradition can be refused if requested for cases of political crimes and cases in which the person will be judged by a Court of Exception.

Furthermore, as stated in article 91 of Law 6815/80, even if the extradition is granted, it will not be implemented if the requesting State does not guarantee the following:

Art. 91. The delivery of the extradited person will not be executed if the requesting State does not undertake:

I - not to arrest or prosecute the person for facts occurred before the request;

II - to take into consideration the detention time served in Brazil due to the extradition;

III - to change corporal or capital punishments for imprisonment, except for the cases in which the Brazilian legislation allows for capital punishments;

IV - not to deliver the extradited person to another State, without Brazil's consent; and

V - not to consider any political reason to increase the sanctions.

(b) Observations on the implementation of the article

If the extraditable person is a refugee or sought refuge, extradition proceedings shall be suspended until the refuge claim is solved, since this issue has priority.

Brazilian legislation provides as a condition to execute an extradition decision that the latter extradition is not granted for political reasons or facts that are not framed within the criminal law. In this sense, it is estimated that Brazil has a favorable legal framework and practice for the application of this provision.

Article 44 Extradition

Paragraph 16

16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil does not refuse MLA requests on the grounds that the offence is considered to involve fiscal matters. Although some of the multilateral treaties to which Brazil is a

party do provide that a requested state may refuse assistance in such cases, Brazil does not exercise these options.

For example, Brazil is a party to the *Inter-American Convention on Mutual Legal Assistance in Criminal Matters* (Decree 6340/2008).

Article 9(f) of that Convention provides that a requested State may refuse to provide MLA when it determines that the request pertains to a tax crime, except where the offence is committed by way of an intentionally false statement or failure to declare income derived from any other offence covered by the Convention. However, Brazil is also a party to the Optional Protocol to this Convention (promulgated by the same Decree) which provides that countries shall not exercise their right to refuse to provide MLA solely on the ground that the request concerns a tax crime if the requesting country is also a party to this Protocol (art.1) or if the act specified in the request corresponds to a similar tax crime under the laws of the requested State (art.2). As well, Brazil's bilateral MLA agreements with the following countries specifically do not provide for refusing a request on the basis that the offence involves fiscal or tax matters: Cuba, China, Colombia, France, Italy, Korea, Peru, Portugal, Ukraine and the United States.

The Brazilian judicial authorities may issue court orders allowing competent authorities to access financial records, regardless of bank secrecy or confidentiality, at any stage of an investigation or legal proceedings involving any illicit activity, and particularly in cases involving crimes of: ML or concealment of assets, rights and valuables; terrorism; drug trafficking; arms trafficking; extortion through kidnapping; acts against the Brazilian financial system or Public Administration; acts against the fiscal and social security order; and acts committed by a criminal organisation (Complementary Law 105/2001 art.1, para.4 - attached to item 119 relating to paragraph 7 of Article 31 of the UNCAC). Similarly, BACEN and CVM must provide any information required from them by the Judicial branch under court order, on the condition that such information shall not be used for purposes other than those pertaining to the investigation (Complementary Law 105/2001 art.3).

(b) Observations on the implementation of the article

The grounds for refusal of extradition requests are set forth in Article 77 of Law 6815/80. Extradition cannot be refused on the ground that the offence involves fiscal matters.

Article 44 Extradition

Paragraph 17

17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

(a) Summary of information relevant to reviewing the implementation of the article

The Federal Supreme Court of Brazil is responsible for analysing extradition requests and for verifying their compliance with legal requisites. It is a judicial process in which the requesting State must submit all necessary documents and information and where the person subject to extradition procedures is entitled to a proper defence.

(b) Observations on the implementation of the article

It was estimated that Brazil has a favorable legal framework for the implementation of this provision.

Article 44 Extradition

Paragraph 18

18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

(a) Summary of information relevant to reviewing the implementation of the article

As described previously, Brazil has currently 28 bilateral extradition treaties and others are in the process of negotiation or approval by the National Congress.

(b) Observations on the implementation of the article

Brazil is bound by regional and multilateral extradition treaties, including bilateral extradition treaties with 28 countries and territories.

Article 45 Transfer of sentenced persons

States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil also has specific mechanisms that allow for the transfer of Sentenced Persons (Decree 6061/2007 art.9(III)). This Decree aims to transfer persons to serve their sentences in their own countries. The Department of Foreigners (DEEST) is Brazil's Central Authority in such matters.

Outgoing prisoner transfer requests are received by the DEEST from Brazilian citizens serving sentences abroad. The corresponding documents are transmitted to the Criminal Enforcement Court where the Brazilian convict's family lives, and the Court shall

arrange a place at a Brazilian correctional facility. If the person in question requests the transfer and the Central Authorities of both the transferring and receiving State render a final decision approving of the transfer, the Brazilian public officials transport the convict to the sentencing State for the purpose of serving the remainder of the foreign sentence. The transfer is only possible in case of final convictions.

Incoming prisoner transfer requests are received by the DEEST from foreign convicts serving sentences in Brazil. The DEEST brings the application, including any supporting documents, before the Judicial Branch and translates the documents into the official language of the foreign convict's country of origin. Following acquiescence by the National Secretariat of Justice, the proceeding is transmitted to the receiving country through diplomatic channels. If the foreign authorities grant the request, the receiving country shall arrange the removal of the convict from the Brazilian territory, at a place and on a date agreed upon by the Parties. The transfer of custody of the foreign convict to the police officers of his/her country of origin occurs at the same time as the rendition act.

Moreover, Brazil has signed treaties in order to regulate the Transfer of Sentenced Persons to serve their sentences in their countries of origin with the following countries: Argentina; Bolivia; Chile; Canada; Panama; Paraguay; Peru; Portugal; Spain; Kingdom of the Netherlands; and the United Kingdom of Great Britain and Northern Ireland. Those agreements typically provide for a remaining sentence of at least 1 or 2 years to be served in order for the transfer to be admissible. Other agreements are currently under negotiation in this area.

In addition, Brazil has implemented the Inter-American Convention on Serving Criminal Sentences Abroad (Decree 5919/2006) and the Convention on the Transfer of Sentenced Persons of Member States to the Community of Portuguese Speaking Countries, of November 23rd 2005.

The largest amount of requests for the transfer of sentenced persons come from Paraguay.

Overall, it is estimated that the whole transfer procedure takes approximately eight months, and 99% percent of the transfers concern drug-trafficking offences. No cases of transfer for corruption-related offences have been recorded so far.

Finally, it is worth noting that the transfer of convicted persons may be passive, by which the convicted offender is extradited, or active (wherein Brazil convicts the person in question and subsequently transfers such person to his or her country of origin). In both cases, the objective is to ensure the humanitarian character of the procedure.

During the direct dialogue, the Brazilian authorities stated that the transfer of sentenced persons requires a lot of resources, since Brazil is surrounded by 10 borders and these kinds of proceedings are highly requested. They added that, although there are a significant number of foreign convicted persons, their transfer is voluntary and must be requested by the convict.

(b) Observations on the implementation of the article

Decree 6061/2007 art.9(III) governs the transfer of prisoners into and out of Brazil. Brazil has concluded 11 bilateral treaties on transfer of prisoners and is a party to relevant regional instruments.

Article 46 Mutual legal assistance

Paragraph 1

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil is able to provide assistance for cooperation with respect to the investigation, prosecution and judicial proceedings related to the freezing, seizure, confiscation and return of the proceeds of offences in general, including those established in accordance with the Convention.

The provision under review is being implemented through the provision of cooperation on a reciprocal basis.

Also, bilateral agreements in order to provide assistance in criminal matters are in force with:

Canada, China, Colombia, Cuba, France, Honduras, Italy, Panama, Peru, Portugal, Spain, South Korea, Surinam, Switzerland, Turkey, Ukraine, Mexico, Nigeria, United Kingdom and the United States of America.

Agreements were also negotiated and approved by the Congress as regards Angola, Lebanon and Germany.

Agreements with Belgium, Jordan and El Salvador have been signed, but await approval from the Congress.

Agreements are being negotiated with Algeria, Albania, The Bahamas, Belarus, the British Virgin Islands, Cameroon, , Costa Rica, Hong Kong, India, Iran, Ireland, South Africa, Israel, Indonesia, Bolivia, Kazakhstan, Morocco, Nicaragua, Philippines, Romania, Syria and Thailand.

Brazil is also a party to the United Nations Convention against Transnational Organized Crime and to its Protocols, and is party to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, that serves as a basis for mutual legal assistance in criminal matters.

Please, refer to the attached file with information and figures on MLA requests.

(b) Observations on the implementation of the article

Brazil does not have in place specific legislation for the provision of mutual legal assistance. It can afford mutual legal assistance on the basis of a relevant treaty (either bilateral or multilateral, including the Convention) or on the principle of reciprocity.

Article 46 Mutual legal assistance

Paragraph 2

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.

(a) Summary of information relevant to reviewing the implementation of the article

Even though a legal person cannot be held criminally liable for corruption in Brazil, assistance can be afforded to foreign jurisdictions where such a criminal liability exists, using the UNCAC as a basis for the request or under a reciprocity basis.

(b) Observations on the implementation of the article

Brazil would be able to provide mutual legal assistance in cases involving legal persons.

Article 46 Mutual legal assistance

Subparagraph 3 (a)-(k)

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

- (a) Taking evidence or statements from persons;*
- (b) Effecting service of judicial documents;*
- (c) Executing searches and seizures, and freezing;*
- (d) Examining objects and sites;*
- (e) Providing information, evidentiary items and expert evaluations;*
- (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;*
- (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;*
- (h) Facilitating the voluntary appearance of persons in the requesting State Party;*
- (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;*

(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;

(k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

All of the bilateral and multilateral treaties that Brazil is a party to allow for this possibility and assistance are provided accordingly. Assistance can also always be provided on the basis of reciprocity.

- Information on recent court or other cases in which Brazil has made a request to execute searches, seizures, and freezing:

In 2008, Brazil made 4 requests for freezing assets.

Brazil has not received requests for freezing assets.

Brazil has not sent requests for examining objects and sites.

Brazil has not received requests for examining objects and sites.

Brazil has not received requests for providing information, evidentiary items and expert evaluations.

Between 2005 and 2009, Brazil has made 16 requests for tracing proceeds of crime.

In at least 16 requests for asset tracing, identification and freezing, relevant documents, including bank, financial, corporate or business records were requested.

In 2008, Brazil received one request for identifying proceeds of crime.

Brazil has not yet sent nor received requests for facilitating the voluntary appearance of persons in the requesting State Party.

Between 2006 and 2009, Brazil made 7 requests for identifying, tracing and freezing proceeds of crime to be recovered. As at today's date, none of them has been completely executed.

Brazil has made 7 requests for the recovery of assets. One has been refused and the funds were released to the defendant. The others are still being executed.

(b) Observations on the implementation of the article

Information provided for the purposes for which MLA could be requested was noted. The Brazilian authorities have confirmed that a range of measures can be used to respond

to mutual legal assistance requests, including: the service of documents; depositions by suspects and witnesses; the examination of people, goods, and places; the production of documents, records and goods; and the search and seizure of goods.

Information provided for the purposes for which MLA could be requested was noted. The Brazilian authorities have confirmed that a range of measures can be used to respond to mutual legal assistance requests, including: the service of documents; depositions by suspects and witnesses; the examination of people, goods, and places; the production of documents, records and goods; and the search and seizure of goods.

Article 46 Mutual legal assistance

Paragraphs 4- 5

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

(a) Summary of information relevant to reviewing the implementation of the article

Many of the bilateral and multilateral treaties that Brazil is a party to allow this possibility and assistance is provided accordingly. Assistance can also always be provided on the basis of reciprocity.

The Prosecutor General is one of the bodies competent to do so, as well as others within the Executive Branch, such as the Office of the Comptroller General, in matters relating to corruption.

There is no specific norm allowing for information transmission to foreign authorities in criminal matters.

Brazil has not transmitted spontaneous information as described in this paragraph.

Brazil has disclosed exculpatory evidence under paragraph 5 of the Convention, but has not requested or received exculpatory evidence disclosed by the authorities of a requested State Party.

(b) Observations on the implementation of the article

The spontaneous transmission of information prior to an MLA request is possible through the implementation of the pertinent provisions of bilateral and multilateral treaties to which Brazil is a party.

Article 46 Mutual legal assistance

Paragraph 6

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

(a) Summary of information relevant to reviewing the implementation of the article

In Brazil, treaties have the status as ordinary laws. Thus, this provision is in force and has law standard since Decree N° 5.687, from January 31st, 2006 promulgated the UNCAC.

(b) Observations on the implementation of the article

As mentioned above, Decree N° 5.687, of January 31, 2006, which promulgates the UNCAC confers the status of ordinary law to the Convention.

Article 46 Mutual legal assistance

Paragraph 7

7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.

(a) Summary of information relevant to reviewing the implementation of the article

The use of the best instrument for each MLA case is sought by the Brazilian Central Authority, the Department for Assets Recovery and International Legal Cooperation of the Ministry of Justice - DRCI. In the case of Brazilian requests, national authorities

receive information on the best instrument for their requests. If a demand is received from abroad, the DRCI will suggest, if need be, the best instrument so that Brazil will better provide the assistance sought.

In more than 20 recent cases, Brazil has received or sent requests for mutual legal assistance based on reciprocity or on bilateral or regional treaties.

There is no case in which Brazil and another country have expressly agreed to apply the provisions of UNCAC in order to facilitate cooperation.

(b) Observations on the implementation of the article

It was considered that Brazil meets the requirements of this provision.

Article 46 Mutual legal assistance

Paragraph 8

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

(a) Summary of information relevant to reviewing the implementation of the article

National authorities and foreign authorities, via MLA procedures, have the same range of access to information originated in the lifting of bank secrecy. It is possible, by means of previous authorization by the Judicial branch, to lift bank secrecy in respect of the investigation of any criminal act in any phase of the inquiry or the judicial proceeding, particularly in relation to the crimes of terrorism, illicit trafficking of narcotic drugs or others, smuggling or trafficking of arms and ammunition or material used in their production, extortion by kidnapping, crimes against the national financial system, against the Public Administration, against the tax and social security order; money laundering or concealing of assets, rights and valuables, crimes perpetrated by a criminal organization (article 1, paragraph 4 of Complementary Law 105, dated 10 January 2001 - please find full text attached).

Many of the bilateral and multilateral treaties Brazil entered into force provide for this possibility and assistance is provided accordingly. Assistance can also always be provided on the basis of reciprocity.

(b) Observations on the implementation of the article

Bank secrecy is not a ground for refusal of mutual legal assistance requests. National authorities, acting upon a court order, and foreign authorities, via MLA procedures, may have access to information on bank and financial records.

Article 46 Mutual legal assistance

Subparagraph 9 (a-c)

9. (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;

9. (b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;

9. (c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

(a) Summary of information relevant to reviewing the implementation of the article

Many of the bilateral and multilateral treaties Brazil entered into provide for this possibility and assistance is provided accordingly. Assistance can also always be provided on the basis of reciprocity.

Requiring dual criminality to provide international legal cooperation is an optional requisite in most treaties of this kind. In addition, in order to verify this requisite, the responsible Brazilian bodies are guided by the interpretation of the courts in the sense that: i) first degree arrangements (summons, subpoena, notification and evidence gathering) do not require the existence of dual criminality; ii) only the essential elementary features of the crime description in the foreign legal system and the underlying conduct of the criminal must be taken into consideration, not the denomination attributed to the crime by each legal system.

The Brazilian tradition in rendering MLA regularly does not take into account if the request involves matters of a de minimis nature. The Brazilian Central Authority does not have records of the refusal of a single case on such grounds.

- Information on recent cases in which Brazil's request for mutual legal assistance was refused on the ground of absence of dual criminality:

In a recent case, Brazil has requested mutual legal assistance from a European country which is studying the possibility to cooperate, as dual criminality is not clear in their view.

Brazil is able to provide all mutual legal assistance regardless of dual criminality. Dual criminality is not a prerequisite to Brazil being able to provide MLA involving first degree arrangements (summons, subpoena, notification and evidence gathering). Where dual criminality is required, it needs only to be established that the same underlying conduct is criminalised (either as a stand alone offence or otherwise) in both Brazil and

the requesting country. It is not necessary to establish that each element of the offence is identical.

(b) Observations on the implementation of the article

Generally, dual criminality is not required, although it is foreseen as an optional condition in most MLA treaties to which Brazil is a party. The requirement is mainly applicable in relation to coercive measures. Where this requirement is applicable under a treaty, Brazil takes a flexible approach based on the underlying conduct. In this connection, it was noted that the Inter-American Convention on MLA, provides in its article 5 that requests for provisional measures, confiscation, and searches may be granted in absence of dual criminality.

(c) Successes and good practices

The flexible interpretation of the dual criminality requirement in both extradition and MLA proceedings based on the underlying conduct of the offence

Article 46 Mutual legal assistance

Subparagraphs 10-12

10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

- (a) The person freely gives his or her informed consent;*
- (b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.*

11. For the purposes of paragraph 10 of this article:

- (a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;*
- (b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;*
- (c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;*
- (d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.*

12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

(a) Summary of information relevant to reviewing the implementation of the article

Many of the bilateral and multilateral treaties Brazil entered into provide for this possibility and assistance is provided accordingly. Assistance can also always be provided on the basis of reciprocity.

(b) Observations on the implementation of the article

It was considered that Brazil meets the requirements of this provision.

Article 46 Mutual legal assistance

Paragraph 13

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent Authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

(a) Summary of information relevant to reviewing the implementation of the article

The designated Central Authority for UNCAC matters is the DRCI - Departamento de Recuperação de Ativos e Cooperação Internacional (Department of Recovery of Assets and International Cooperation), from the Ministry of Justice. For some countries, the central authority for Mutual Legal Assistance is the Federal Prosecution Service.

The majority of the Mutual Legal Assistance Treaties in Criminal Matters concluded by the Brazilian State appoints the Ministry of Justice as the Brazilian Central Authority.

Besides, the Decree 6.061 of 15 March 2007 established that the Department of Asset Recovery and International Legal Cooperation-DRCI is the unit of that Ministry to which this function was assigned.

Brazil has notified the Secretary-General of the United Nations as prescribed above.

Brazil does not require that such requests and related communications be addressed to it through diplomatic channels, but requests can be addressed to the central authority directly. In urgent circumstances, MLA requests and related communications can be addressed through Interpol and any other channel, including faxes, e-mails or telephone calls are acceptable for the transmission of an urgent request. Every action possible to guarantee the effectiveness and timeliness of the request is done in advance, but the assistance itself is to be afforded when the formal written documentation is received.

Any MLA request transmitted under the Convention shall be submitted directly to the Central Authority. Incoming requests are received by the DRCI which, after analyzing the prerequisites, sends them to the appropriate competent national authority for its execution. If the execution of the request depends on the initiative of the Judicial Branch, the Public Prosecution shall, in turn, submit the request to the competent Court. Incoming requests for assistance for acts which, under the Brazilian legislation, do not need intervention of the Judiciary, may be executed by the DRCI or transmitted to the competent administrative authority for execution. Outgoing MLA requests are transmitted by the national competent authorities to the DRCI, which analyses the request to ensure that it complies with the prerequisites set out in the Convention.

(b) Observations on the implementation of the article

Article 46 Mutual legal assistance

Paragraph 14

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

(a) Summary of information relevant to reviewing the implementation of the article

There are no specific and rigid means for submitting requests; however, internationally recognized standards for those means must be observed.

The Interpol and any other channels, including faxes, e-mails or telephone calls are acceptable for the transmission of an urgent request. Every action possible for the

guarantee of the effectiveness and timeliness of the request will be done in advance, but the assistance itself will only be executed when the formal written documentation is received.

Concerning the acceptable languages for the transmission of MLA requests these are Portuguese, Spanish and English. The Secretary-General of the United Nations has been notified accordingly.

(b) Observations on the implementation of the article

The acceptable languages and means for submitting requests are regulated by Brazil.

Brazil has notified the Secretary-General of the United Nations of language(s) acceptable for the submission to it of MLA requests.

Article 46 Mutual legal assistance

Paragraphs 15-16

15. A request for mutual legal assistance shall contain:

(a) The identity of the authority making the request;

(b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

(e) Where possible, the identity, location and nationality of any person concerned; and

(f) The purpose for which the evidence, information or action is sought.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil does not have in place specific legislation for the provision of mutual legal assistance, but may grant such assistance directly, based on the CPC, existing treaties, reciprocity and the Convention. This framework permits judicial authorities to respond to mutual legal assistance requests in the broadest possible sense. Decree N° 5.687, of January 31, 2006, which promulgates the UNCAC confers the status of ordinary law to the Convention.

The information demanded by the UNCAC text is enough for the vast majority of cases. There might be cases, nevertheless, in which additional information to be provided by the requesting State may be necessary in order to provide effective and timely cooperation.

(b) Observations on the implementation of the article

It was considered that Brazil meets the requirements of this provision. The Brazilian authorities have confirmed that a range of measures can be used to respond to mutual legal assistance requests, including: the service of documents; depositions by suspects and witnesses; the examination of people, goods, and places; the production of documents, records and goods; and the search and seizure of goods.

Article 46 Mutual legal assistance

Paragraph 17

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

(a) Summary of information relevant to reviewing the implementation of the article

Many of the bilateral and multilateral treaties Brazil entered into provide for this possibility and assistance is provided accordingly. Decree N° 5.687, of January 31, 2006, which promulgates the UNCAC confers the status of ordinary law to the Convention. Assistance can also always be provided on the basis of reciprocity.

MLA requests

Incoming MLA requests are received from the requesting country by the **Department of Asset Recovery and International Legal Cooperation of the Ministry of Justice – DRCI**, which analyses the request to ensure that it complies with the applicable prerequisites. Any applicable treaty or convention, internationally recognized standards, as well as national legislation and rules are taken into account in this analysis. If the prerequisites are met, the request is transmitted to the appropriate competent national authority for its execution (e.g. the Public Prosecution or Police Authority). If the execution of the request depends on the initiative of the Judicial Branch, the Public Prosecution shall, in turn, submit the request to the competent Court.

Incoming requests for assistance for acts which, under the Brazilian legislation, do not need intervention of the Judiciary (e.g. many administrative measures requests), may be executed by the DRCI or transmitted to the competent administrative authority for execution.

Outgoing MLA requests are transmitted by the national competent authorities to the DRCI, which analyses the request to ensure that it complies with the prerequisites set out in any applicable treaty or convention. Internationally recognized standards and known foreign rules and legislation are also taken into account in this analysis, especially if the request is based on reciprocity. If the prerequisites are met, the request is transmitted to the Central Authority of the requested country for execution.

Letters rogatory

Letters rogatory can be used to take procedural or investigative action, as well as for provisional measures (Constitution art.105(I) line i); CPC art.783-786); Decree 6061/2007 art.11(VI); Administrative Rule 26/1990; Superior Court of Justice-STJ Resolution 09/2005).

Brazil's Central Authority for processing letters rogatory is the DRCI. However, the **International Legal Co-operation Division of the Ministry of Foreign Affairs – DCJI** also plays an important role.

Incoming Letters Rogatory are received by the DCJI (diplomatic channel), which transmits them to the DRCI, which, after analyzing the prerequisites, sends them to the Superior Court of Justice (STJ), if need be. This need is determined by the matter of the request, which may or may not require analysis by the STJ. If no STJ's intervention is necessary, the DRCI shall take the measures deemed necessary for execution. Even if labelled as letters rogatory, requests for assistance for acts which, under the Brazilian legislation, do not need intervention of the Judiciary, may be executed by the DRCI or transmitted to the competent administrative authority for execution.

If STJ's analysis is necessary, the Court verifies if the request meets the formal requirements, and is in accordance with Brazil's public order, national sovereignty and fundamental principles. If the request meets all of the mandatory prerequisites, the *exequatur* is granted by the STJ, and the request is transmitted to the Lower Federal Court which is competent to execute the requested measure. When the letter rogatory is executed, it shall be returned to the President of the STJ within 10 (ten) days to be forwarded, within the same time limit, to the original judicial authority by the DRCI, by means of the DCJI.

Outgoing Letters Rogatory are transmitted by the national judicial authority to the DRCI, which, after analyzing the prerequisites, transmits them to the DCJI for transmission to the requested state via diplomatic channels.

Information on requests executed in ways different from those specified in the request due to domestic legal requirements

In recent cases involving Brazil and other countries, the authorities have specifically asked for confidentiality in the treatment of requests. Also, when the mentioned request aims at the service of the process, according to the Brazilian Criminal Code, the defendant has the right to present his previous defense to the criminal charge brought before him within 10 (ten) days.

(b) Observations on the implementation of the article

Regarding, the applicable law on executing requests, it was considered that Brazil meets the requirements of this provision.

Article 46 Mutual legal assistance

Paragraph 18

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

(a) Summary of information relevant to reviewing the implementation of the article

Articles 185 and 222 of the Brazilian Code of Criminal Procedure provide for the use of videoconference in criminal proceedings. Many of the bilateral and multilateral treaties Brazil entered into provide for this possibility and assistance is provided accordingly. Decree N° 5.687, of January 31, 2006, which promulgates the UNCAC confers the status of ordinary law to the Convention. Assistance can also always be provided on the basis of reciprocity.

Similarly to extradition and MLA, the reviewing experts were not provided with analytical statistical data on the effectiveness of the hearings by videoconference.

(b) Observations on the implementation of the article

Brazilian legislation provides for the use of videoconference in criminal proceedings. Several agreements partly provide for this possibility and assistance is afforded accordingly.

Article 46 Mutual legal assistance

Paragraph 19

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

(a) Summary of information relevant to reviewing the implementation of the article

Many of the bilateral and multilateral treaties Brazil entered into provide for this possibility and assistance is provided accordingly. Decree N° 5.687, of January 31, 2006, which promulgates the UNCAC confers the status of ordinary law to the Convention. Assistance can also always be provided on the basis of reciprocity.

In a case in which the Federal Prosecutor (MPF) received documents from Switzerland with usage restrictions in criminal proceedings for a tax crime, the MPF itself filed a lawsuit with the aim of excluding the documents used for this purpose, in compliance with the commitment to that country.

(b) Observations on the implementation of the article

The rule of speciality is adequately covered by domestic law, applicable treaties or the Convention.

Article 46 Mutual legal assistance

Paragraph 20

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

(a) Summary of information relevant to reviewing the implementation of the article

Many of the bilateral and multilateral treaties Brazil entered into provide for this possibility and assistance provided accordingly. Decree N° 5.687, of January 31, 2006, which promulgates the UNCAC confers the status of ordinary law to the Convention. Assistance can also always be provided on the basis of reciprocity.

There is no recent case in which Brazil was not able to comply with the requirement of confidentiality. Normally, except to extent necessary to execute the request, Brazil keeps the fact and the substance of the request confidential. An example of the successful implementations of domestic measures adopted to comply with the requirement of confidentiality are based on our Criminal Process Code, article 20, which affirms that the authority will ensure the investigation secrecy necessary to elucidate the fact or required by the interests of society.

Moreover, the UNCAC is in force in Brazil and has the force of an ordinary law, which, by itself, is enough to create the obligation of confidentiality based on the Convention.

(b) Observations on the implementation of the article

Confidentiality as set forth in the Convention is deemed to be fully applicable .

Article 46 Mutual legal assistance

Subparagraphs 21 (a –d)

21. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, order public or other essential interests;

(c) (c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

(a) Summary of information relevant to reviewing the implementation of the article

The Decree N° 5.687, of January 31, 2006, which promulgates the UNCAC confers the status of ordinary law to the Convention. Thus, the requirements of the UNCAC for an MLA request are necessary for the provision of MLA based on the Convention. Nevertheless, if a request is based on another treaty or on reciprocity, the requirements may differ.

There is no recent court or other cases in which Brazil refused mutual legal assistance due to considering that the execution of the request was likely to prejudice Brazilian public order, security, sovereignty, or other essential interests, neither on another ground concerning this article.

In 2010, Brazil was refused mutual legal assistance in one case because the foreign Court decided the requested action was prohibited by the domestic law.

(b) Observations on the implementation of the article

The requirements and grounds for refusal set forth in the Convention (article 46, paragraph 21) are applied directly domestically.

Article 46 Mutual legal assistance

Paragraph 22

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil does not refuse MLA requests when they involve fiscal matters. Brazilian law defines various types of tax crimes, so that hardly a request for international legal

cooperation would be refused for lack of compliance with the principle of double jeopardy (dual criminality).

Brazil has ratified bilateral Mutual Legal Assistance Treaties with 19 countries. All of them have a broad scope for mutual legal assistance and may include requests about fiscal matters, although the MLAT between Brazil and Switzerland foresees that a request may not be refused on the sole ground that the offence is also considered to involve fiscal matters.

(b) Observations on the implementation of the article

Brazil does not refuse MLA requests when they involve fiscal matters.

Article 46 Mutual legal assistance

Paragraph 23

23. Reasons shall be given for any refusal of mutual legal assistance.

(a) Summary of information relevant to reviewing the implementation of the article

The Brazilian Central Authority for the Merida Convention, the Department for Asset Recovery and International Legal Cooperation of the Ministry of Justice, DRCI, examines all cases of refusal of assistance, whether under the UNCAC or not. Should any case of refusal arrive at the Central Authority, DRCI will make sure there is no chance of providing the assistance as requested, and only then, write a letter to the requesting Authority informing the reasons for the denial and, if possible, any other means of obtaining the requested assistance.

(b) Observations on the implementation of the article

There are no specific legislative requirements, but this provision seems to be part of the Central Authority's general practice.

Article 46 Mutual legal assistance

Paragraph 24

24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

(a) Summary of information relevant to reviewing the implementation of the article

The Brazilian Central Authority for the Merida Convention, the Department for Asset Recovery and International Legal Cooperation of the Ministry of Justice - DRCI, executes or forwards for execution all requests of MLA within two to three working days.

The average time between receiving requests for mutual legal assistance and responding to them is six months. The same goes for outgoing requests.

In most cases, after three months without any answer, the requesting State enquires about the status and progress of the measures taken by Brazilian authorities.

When the requesting authority asks about the status and progress of a request, the Brazilian Central Authority gets in touch with the competent authority by means of an Official letter or e-mail and, at the same time, informs the requesting authority about these actions. Also, the Brazilian Central Authority commits to forward the response as soon as it arrives in its office. Similar actions are undertaken for the outgoing requests.

(b) Observations on the implementation of the article

Similar to extradition, the reviewing experts were not provided with analytical statistical data on the effectiveness of MLA proceedings.

(c) Challenges, where applicable

Brazil should continue its efforts to put in place – or improve - and render fully operational an information system, compiling in a systematic manner information on extradition and mutual legal assistance cases, with a view to facilitating the monitoring of such cases and assessing in a more efficient manner the effectiveness of implementation of international cooperation arrangements; and it should also devote more human resources for this purpose.

Article 46 Mutual legal assistance

Paragraph 25

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

(a) Summary of information relevant to reviewing the implementation of the article

Many of the bilateral and multilateral treaties Brazil entered into provide for this possibility and assistance is provided accordingly. Decree N° 5.687, of January 31, 2006, which promulgates the UNCAC confers the status of ordinary law to the Convention.

The Brazilian Authority has no record of cases in which it postponed the provision of mutual legal assistance on the ground that it interfered with an ongoing investigation, prosecution or judicial proceeding.

The Brazilian Central Authority would apply directly the Convention for deciding on postponement and communicating such decision to a requesting State.

The Brazilian Central Authority consults with its counterparts before refusing requests, generally by e-mail or other electronic means, such as the Secure Information Exchange System provided by the Organization of the American States.

(b) Observations on the implementation of the article

Brazil meets the requirements of this provision.

Article 46 Mutual legal assistance

Paragraphs 26-29

26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

29. The requested State Party:

(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records,

documents or information in its possession that under its domestic law are not available to the general public.

(a) Summary of information relevant to reviewing the implementation of the article

Many of the bilateral and multilateral treaties Brazil entered into provide information about the consultations before refusing, safe conduct of witnesses, costs and the availability of documents and, therefore assistance is provided accordingly.

Decree N° 5.687, of January 31, 2006, which promulgates the UNCAC confers the status of ordinary law to the Convention.

(b) Observations on the implementation of the article

On the consultations before refusing, safe conduct of witnesses, costs related to the mutual legal assistance proceedings and the availability of public documents, the Convention could be used as the legal basis.

Article 46 Mutual legal assistance

Paragraph 30

30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil has concluded several MLATs and multilateral agreements that cover the subject of the UNCAC.

Bilateral agreements in order to provide assistance in criminal matters are in force with: Canada, China, Colombia, Cuba, France, Honduras, Italy, Panama, Peru, Portugal, Spain, South Korea, Surinam, Switzerland, Turkey, Ukraine, Mexico, Nigeria, United Kingdom and the United States of America.

Agreements were also negotiated and approved by the Congress as regards Angola, Lebanon and, Germany. Agreements with Belgium, Jordan and El Salvador have been signed, but await approval from the Congress.

Agreements are being negotiated with Algeria, Albania, The Bahamas, Belarus, the British Virgin Islands, Cameroon, Costa Rica, Hong Kong, India, Iran, Ireland, South Africa, Israel, Indonesia, Bolivia, Kazakhstan, Morocco, Nicaragua, Philippines, Romania, Syria and Thailand.

Brazil is also a signatory of the United Nations Convention against Transnational Organized Crime and its Protocols, and of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, that serves as a basis for mutual legal assistance in criminal matters. The Protocol on Mutual Legal Assistance in Criminal Matters of the MERCOSUR, the Inter-American Convention on Mutual Assistance in Criminal Matters, the Convention on Legal Assistance in Criminal Matters of the Community of Portuguese Speaking Countries (CPLP) are also applicable.

(b) Observations on the implementation of the article

Brazil is bound by multilateral instruments on mutual legal assistance (or with provisions on MLA), such as the Protocol on Mutual Legal Assistance in Criminal Matters of the MERCOSUR, the Inter-American Convention on Mutual Assistance in Criminal Matters, the Convention on Legal Assistance in Criminal Matters of the Community of Portuguese Speaking Countries (CPLP) and 20 bilateral treaties.

(c) Successes and good practices

The participation of Brazil in three networks of international legal cooperation: the Ibero-American Judicial Cooperation Network (IberRED); the Network of International Legal and Judicial Cooperation of Portuguese Language Countries (CPLP Judicial Network); and the Hemispheric Network for Exchange of Information for Legal Assistance in Criminal Matters and Extradition.

Article 47 Transfer of criminal proceedings

States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

(a) Summary of information relevant to reviewing the implementation of the article

Regarding the transfer of criminal proceedings, there is no specific legal framework in Brazil which allows for such transfer. Nevertheless, whenever such a situation arises, Brazil sends or receives the relevant information to or from its international counterpart, so that local proceedings can be initiated, in order to prosecute the offence accordingly. This can be done through the use of MLA mechanisms and on the basis of treaties or reciprocity.

(b) Observations on the implementation of the article

Regarding the transfer of criminal proceedings, there is no specific legal framework in Brazil which allows for such transfer. Nevertheless, whenever such a situation arises,

Brazil sends or receives the relevant information to or from its international counterpart, so that local proceedings can be initiated, in order to prosecute the offence accordingly. This can be done through the use of MLA mechanisms and on the basis of treaties or reciprocity.

Brazil meets the requirements of this provision.

Article 48 Law enforcement cooperation

Subparagraph 1 (a)

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

(a) Summary of information relevant to reviewing the implementation of the article

Networks of legal cooperation are intended to solve problems in cooperation among States. Accessing information, meeting deadlines and specific legal procedures in each country, searches and solutions are addressed. Some networks are composed of national contact points designated by Prosecuting authorities, the judiciary and other entities involved in legal cooperation, which center themes of cooperation nation-wide and act as intermediaries for closer cooperation between their country and other members of the network. The networks seek to facilitate cooperation through informal contacts, information sharing, mark-up hearings, preliminary examinations over requests for assistance. To that end, they hold periodic meetings. Currently, Brazil takes part of three networks of international legal cooperation: a) Ibero-American Judicial Cooperation Network (IberRED) b) Network of International Legal and Judicial Cooperation of Portuguese Language Countries (CPLP Judicial Network), c) Hemispheric Network for Exchange of Information for Legal Assistance in Criminal Matters and Extradition.

International cooperation actions related to the Federal Police Department are carried out through executive aspect and they are held by the International Criminal Police Coordination General, which represents INTERPOL in Brazil and among its duties we can mention:

- Coordinate, together with congeneric areas abroad, the execution of international criminal police acts demanded by Brazilian authorities;

- Coordinate the execution of formal acts requested by foreign authorities, which include necessary procedures for active and passive extradition and for promoting sharing information with other congeneric entities and multinational organizations recognized by Brazil which participate in police organizations, for the sake of the investigation process.

The National Strategy Against Corruption and Money Laundering (ENCCLA), which is co-ordinated by the Ministry of Justice, is the primary policy-co-ordination mechanism in Brazil with respect to ML, FT and corruption. The Integrated Management Cabinet for Prevention and Combatting against Corruption and Money Laundering (GGI-LD), composed of 60 agencies, meets once a year to identify ML/FT activities and review the effectiveness of the national system in order to determine the main objectives for the ENCCLA for the following year. The document that results from this meeting establishes joint actions for the GGI-LD members. ENCCLA is in charge of delivering this national policy and also seeks to enhance the co-ordination of relevant government institutions and the private sector. The full ENCCLA meets once per year, and a core group of ENCCLA's members meet every three months. Since 2008, the ENCCLA has had three Working Groups: the Legal Working Group which reviews national legislation and proposes legal reforms; the Operational and Strategic Working Group which identifies domestic trends and emerging typologies of ML and corruption; and the Information Technology Working Group which provides technology support to the other working groups and facilitates the integration of national databases. The Working Groups meet in the days before the annual Plenary and on an ad-hoc basis. For example, the Legal Working Group held nine meetings in 2009.

The ENCCLA brings together a broad range of government ministries and agencies.

(b) Observations on the implementation of the article

Law enforcement authorities engage in broad, consistent and effective cooperation with international counterparts to combat transnational crime.

It was reported that the National Strategy Against Corruption and Money Laundering (ENCCLA), which is co-ordinated by the Ministry of Justice, is the primary policy-co-ordination mechanism in Brazil with respect to ML, FT and corruption.

On the strategic level, it was reported that an "Integrated Management Cabinet for Prevention and Combatting against Money Laundering" (GGI-LD) was created for the delineation of public policy and macro-objectives in this area. The GGI-LD is coordinated by the Department of Assets Recovery and International Mutual Legal Assistance of the Ministry of Justice.

Article 48 Law enforcement cooperation

Subparagraphs 1 (b) - (d)

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

(ii) The movement of proceeds of crime or property derived from the commission of such offences;

(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;

(d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;

(a) Summary of information relevant to reviewing the implementation of the article

The cooperation proposed in those Subparagraphs of Article 48 takes place regularly by means of customary mechanisms of international legal cooperation.

There is no specific statutory provision for that purpose, which is generally provided for in international legal cooperation agreements.

In 2005, the National Strategy Against Corruption added to its original functions the fight against corruption. The Federal Prosecutor General (MPF) exchanges information with agencies in other countries for the rapid identification of crimes, both those covered by the UNCAC as well as other offences. Specifically in relation to crimes of corruption of a transnational nature, this exchange occurs on an ongoing basis, in particular by the OECD Working Group on Bribery in International Business Transactions. Decree 2799/98 establishes that COAF may share information with relevant authorities of foreign countries and international organizations based on reciprocity or on bilateral and multilateral agreements. As member of the Egmont Group, COAF is also entitled to exchange information with other financial intelligence units.

(b) Observations on the implementation of the article

Cooperation is done under the customary mechanisms of international cooperation. The Federal Prosecutor General (MPF) exchanges information with agencies in other countries for the rapid identification of crimes, both those covered by the UNCAC as well as other offences.

Brazil fulfills the requirements under this provision.

Article 48 Law enforcement cooperation

Subparagraph 1 (e)

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

(a) Summary of information relevant to reviewing the implementation of the article

At a strategic level, the “Integrated Management Cabinet for Prevention and Combatting against Money Laundering” (GGI-LD) was created, resulting from the 2004 ENCCLA goal No. 1 (* For information on ENCCLA, please refer to previous items on Article 48 of UNCAC), which is responsible for the definition of public policy and macro-objectives in this area. Throughout the year, the GGI-LD keeps track of the proceeding of the objectives and goals defined at the ENCCLA, trying to keep up the constant articulation among the government bodies. The GGI-LD is coordinated by the Department of Asset Recovery and International Mutual Legal Assistance of the Ministry of Justice.

In 2005, the Strategy added to its original functions the fight against corruption. So the current name is National Strategy against Corruption and Money Laundering – ENCCLA (Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro).

Each year, authorities from more than 60 institutions and bodies from the Executive, Legislative and Judicial branches gather to establish goals and actions for the next year’s strategy. The accomplishment of those goals and actions is monitored by the GGI-LD. The policies derived from ENCCLA involve not only money laundering offences but all predicate offences, including corruption.

Since the 2008 edition, three Working Groups meet on the days preceding GGI-LD Plenary meeting. The Operational and Strategic Working Group is responsible for identifying new trends and threats of money laundering which will receive primary concern on the ENCCLA activities.

Some of the results of goals and actions of ENCCLA are:

- The creation of the National Training Program on Anti-Corruption and AML techniques - PNLD - a training program for public officials and private sector;
- The creation of the National Data Base on Clients of Financial Institutions;
- The creation of the National System of Seized Assets - a database which contains information of seized assets on criminal procedures of Federal and State Courts;
- The design of a Laboratory against Money Laundering - which uses Information Technology and scientific methodology to optimize judicial proceeding on money laundering cases.

(b) Observations on the implementation of the article

Brazil meets the requirements of this provision.

Article 48 Law enforcement cooperation

Subparagraph 1 (f)

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

The Federal Prosecutor General (MPF) exchanges information with agencies in other countries for the rapid identification of crime, both those covered by the UNCAC as of any other nature. Specifically in relation to international crimes of corruption, this exchange occurs on an ongoing basis, in particular by the OECD Working Group on Bribery in International Business Transactions.

Decree No. 2799/1998 establishes that the Council for the Control of Financial Activities (COAF), the Brazilian Financial Intelligence Unit - FIU, may share information with relevant authorities of foreign countries and international organizations based on reciprocity or on bilateral and multilateral agreements. As member of the Egmont Group, COAF is also entitled to exchange information with other financial intelligence units.

Decree No. 2799/1998 establishes that the Council for the Control of Financial Activities (COAF), the Brazilian Financial Intelligence Unit - FIU, may share information with relevant authorities of foreign countries and international organizations based on reciprocity or on bilateral and multilateral agreements. As member of the Egmont Group, COAF is also entitled to exchange information with other financial intelligence units.

Moreover, Brazil is a member of the International Criminal Police Organization (INTERPOL).

Brazil takes part in three networks of international legal cooperation: the Ibero-American Judicial Cooperation Network (IberRED); the Network of International Legal and Judicial Cooperation of Portuguese Language Countries (CPLP Judicial Network); and the Hemispheric Network for Exchange of Information for Legal Assistance in Criminal Matters and Extradition, the Asset Recovery Network of the Financial Action Task Force of South America against Money-Laundering (RRAG).

(b) Observations on the implementation of the article

The governmental experts were satisfied by the answer provided and consider that Brazil meets the requirements of this provision.

Article 48 Law enforcement cooperation

Paragraph 2

2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

(a) Summary of information relevant to reviewing the implementation of the article

As described above, Brazil maintains several bilateral treaties on mutual legal assistance (MLA), with a broadly shaped scope.

Some examples are the treaty-based cooperation with Portugal, Canada, Peru, China, South Korea, France, Italy, United States, Cuba, Spain and Colombia. If there are no treaties applicable, reciprocity should make assistance possible.

Brazil also ratified the Protocol of San Luis, which facilitates mutual legal assistance in Mercosur, the Convention on Legal Assistance in Criminal Matters of the Community of Portuguese Speaking Countries (CPLP) and the OAS Convention on MLA (Nassau Convention). Brazil is a full member of several networks for international legal cooperation. It is also a member of the International Criminal Police Organization (INTERPOL).

Information on law enforcement cooperation provided or received making use of bilateral or multilateral agreements or arrangements, including international or regional organizations, was provided in response to paragraphs 46 (30).

Brazil considers this Convention as the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention.

(b) Observations on the implementation of the article

Brazil has concluded several bilateral treaties on mutual legal assistance (MLA), with a broadly shaped scope, including the Convention on Legal Assistance in Criminal Matters of the Community of Portuguese Speaking Countries (CPLP). Also, it ratified the Protocol of San Luis, which facilitates mutual legal assistance in Mercosur, and the OAS Convention on MLA (Nassau Convention).

Brazil is a full member of several networks for international legal cooperation, the most active and technologically advanced of those being the secure communication system of the Organization of the American States for Mutual Legal Assistance and Extradition Matters, also known as "Groove". Brazil is also a member of the International Criminal Police Organization (INTERPOL).

Article 48 Law enforcement cooperation

Paragraph 3

3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil is part of several networks for international legal cooperation, the most active and technologically advanced of those being the secure communication system of the Organization of the American States for Mutual Legal Assistance and Extradition Matters, also known as "Groove". Also, the Brazilian Central Authority for international legal cooperation in criminal matters, the Department for Asset Recovery and International Legal Cooperation - DRCI, counts on modern resources to cooperate with its international counterparts. Those include massive use of e-mails and other communication systems, like the above mentioned "Groove", as well as state-of-the-art videoconference facilities.

It should be mentioned that Brazil is a part of the Egmont Group of Financial Intelligence Units - FIUs, through which the Brazilian FIU, the Council for the Control of Financial Activities - COAF exchanges information with its international counterparts.

Also, Brazilian bodies have used special investigative techniques such as interception (Object of Law No. 9296 of July 24, 1996), the environmental listening (authorized by Act No. 9034 of May 3, 1995), the controlled delivery (idem) etc.. The Federal Prosecutor has a center for automatic processing of data obtained from investigations with breach of bank secrecy. In the case of money laundering, Brazil has invested in creating data-processing laboratories in several investigative bodies, police and public prosecutors. All these mechanisms can be used in cases arising from international legal cooperation.

(b) Observations on the implementation of the article

Brazil meets the requirements of this provision.

Article 49 Joint investigations

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations,

prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

(a) Summary of information relevant to reviewing the implementation of the article

The investigating authorities in Brazil make use of the mechanism of joint investigation teams (JITs) which through two multilateral instruments: the UN Convention against Transnational Organized Crime (Palermo Convention, promulgated by Decree No. 5015 of March 12, 2004) and by UNCAC itself (promulgated by Decree No. 5687 of January 31, 2006).

In addition, there have been specific situations of joint investigations, as in so-called cases "Farol da Colina" ("Beacon Hill") and "Absolute Zero" in which prosecutors and police of the Federal Department of Federal Police worked jointly with members of the New York County District Attorney's Office.

Interpol have an important part to play in JIT operations, indeed INTERPOL-BRAZIL authorities are organized and deployed throughout the country. These authorities have conducted joint operations and implemented special investigation techniques, such as wiretap with Spain and Portugal in order to fight transnational organized crime. Brazil has not been involved in fighting international corruption, but it has exchanged financial information.

(b) Observations on the implementation of the article

Investigating authorities in Brazil make use of joint investigation teams on the basis of the Convention and the United Nations Convention against Transnational Organized Crime.

Article 50 Special investigative techniques

Paragraphs 1-4

1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.

2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded

and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.

3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.

(a) Summary of information relevant to reviewing the implementation of the article

Brazil has the following legal framework in relation to special investigative techniques:

- Law No. 9.296/96 allows for the interception of telephone communications of any kind, in order to build up a criminal investigation and criminal procedure instructions; However its use depends on the order of a competent judge.
- Law No. 9.034/95 regulates proof, means and investigative procedures on illicit acts derived from actions performed by gangs or organized crime of any type. It also provides for the following investigative procedures: controlled action; access to data, documents and fiscal, bank, finance and electoral information; infiltration of undercover policemen in criminal organizations, among others. It also provides for plea bargaining.
- Complementary Law No. 105/01 regulates the secrecy breach of financial institutions, before legal decision. In the Scope of the Federal Prosecutor's Office, Resolution 36 of April 6, 2009 provides for the application and the use of telephone intercepts within the scope of the Public Prosecutor's Office, pursuant to Law 9296 of 24 July 1996.

Whereas such techniques are widely used regarding organised crime and drug-trafficking, no cases have been recorded for the investigation of corruption-related offences. Rather, in order to track values that may be the proceeds of corruption offences, the INTERPOL channel is resorted to.

(b) Observations on the implementation of the article

A large number of special investigative techniques have been regulated domestically. Law No. 9296/1996 allows, subject to the order of a competent judge, for the interception of telephone communications of any kind for purposes of criminal investigation. Law No. 12850/ 2013 defines "criminal organizations" and provides for the methods of criminal investigation, the means for obtaining evidence, the related criminal offences, and the criminal trial procedure. However, these provisions only apply to corruption offences when committed by criminal organisations or if transnational in nature.

Whereas such techniques are widely used regarding organized crime and drug-trafficking, no cases have been recorded in which the Brazilian authorities have used them for the investigation of corruption-related offences.

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