



UN CONVENTION
AGAINST CORRUPTION
CIVIL SOCIETY REVIEW:
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Context and purpose

The UN Convention against Corruption (UNCAC) was adopted in 2003 and entered into force in December 2005. It is the first legally binding anti-corruption agreement applicable on a global basis. To date, 160 States have become parties to the convention. States have committed to implement a wide and detailed range of anti-corruption measures that affect their laws, institutions and practices. These measures promote prevention, criminalisation and law enforcement, international cooperation, asset recovery, technical assistance and information exchange.

Concurrent with UNCAC's entry into force in 2005, a Conference of the States Parties to the Convention (CoSP) was established to review and facilitate required activities. In November 2009, the CoSP agreed on a review mechanism that was to be "transparent, efficient, non-intrusive, inclusive and impartial". It also agreed to two five-year review cycles, with the first on chapters III (Criminalisation and Law Enforcement) and IV (International Cooperation), and the second cycle on chapters II (Preventive Measures) and V (Asset Recovery). The mechanism included an Implementation Review Group (IRG), which met for the first time in June-July 2010 in Vienna and selected the order of countries to be reviewed in the first five-year cycle, including the 26 countries (originally 30) in the first year of review.

UNCAC Article 13 requires States Parties to take appropriate measures including "to promote the active participation of individuals and groups outside the public sector in the prevention of and the fight against corruption" and to strengthen that participation by measures such as "enhancing the transparency of and promoting the contribution of the public in decision-making processes and ensuring that the public has effective access to information; [and] respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption." Further articles call on each State Party to develop anti-corruption policies that promote the participation of society (Article 5); and to enhance transparency in their public administration (Article 10). Article 63 (4) (c) requires the CoSP to agree on procedures and methods of work, including cooperation with relevant non-governmental organisations.

In accordance with resolution 3/1 on the review mechanism and the annex on terms of reference for the mechanism, all States Parties provide information to the conference secretariat on their compliance with the convention, based upon a "comprehensive self-assessment checklist". In addition, States Parties participate in a review conducted by two other States Parties on their compliance with the convention. The reviewing States Parties then prepare a country review report, in close cooperation and coordination with the State Party under review, and finalise it upon agreement. The result is a full review report and an executive summary, the latter of which is required to be published. The secretariat, based upon the country review report, is then required to "compile the most common and relevant information on successes, good practices, challenges, observations and technical assistance needs contained in the technical review reports and include them, organised by theme, in a thematic implementation report and regional supplementary agenda for submission to the Implementation Review Group". The terms of reference call for governments to conduct broad consultation with stakeholders during preparation of the self-assessment and to facilitate engagement with stakeholders if a country visit is undertaken by the review team.

The inclusion of civil society in the UNCAC review process is of crucial importance for accountability and transparency, as well as for the credibility and effectiveness of the review process. Thus, civil society organisations around the world are actively seeking to contribute to this process in different ways. As part of a project on enhancing civil society's role in monitoring corruption funded by the UN Democracy Fund (UNDEF), Transparency International (TI) has offered small grants for civil society organisations (CSOs) engaged in monitoring and advocating around the UNCAC review process, aimed at supporting the preparation of UNCAC implementation review reports by CSOs for input into the review process.

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Every effort has been made to verify the accuracy of the information contained in this report. All information was believed to be correct as of May 2012. Nevertheless, Amarribo Brasil and the UNCAC Coalition cannot accept responsibility for the consequences of its use for other purposes or in other contexts.

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Introduction

Brazil signed the United Nations Convention against Corruption (UNCAC) on 9 December 2003 and ratified it on 18 May 2005.

This report reviews Brazil's implementation and enforcement of selected articles in chapters III (Criminalisation and Law Enforcement) and IV (International Cooperation) of the UNCAC. The report is intended as a contribution to the UNCAC implementation review process currently underway covering those two chapters. Brazil was selected by the UNCAC Implementation Review Group in July 2010 by a drawing of lots for review in the first year of the process. A draft of this report has been provided to the government of Brazil.

Scope. The UNCAC articles that receive particular attention in this report are those covering bribery (Article 15), foreign bribery (Article 16), embezzlement (Article 17), trading in influence (Article 18), abuse of functions (Article 19), illicit enrichment (Article 20), bribery in the private sector (Article 21), embezzlement of property in the private sector (Article 22), money laundering (Article 23), obstruction of justice (Article 25), liability of legal persons (Article 26), freezing, seizure and confiscation (Article 31), witness protection (Article 32), protection of reporting persons (Article 33), consequences of acts of corruption (Article 34), compensation for damage (Article 35), specialized authorities (Article 36), cooperation between national authorities (Article 38) and mutual legal assistance (Article 46).

Structure. Section I of the report is an executive summary, with the condensed findings, conclusions and recommendations about the review process and the availability of information; as well as about implementation and enforcement of selected UNCAC articles. Section II covers in more detail the findings about the review process in Brazil, as well as access to information issues. Section III reviews implementation and enforcement of the convention, including key issues related to the legal framework and to the enforcement system, with examples of good and bad practice. Section IV covers recent developments and section V elaborates on recommended priority actions.

Methodology. The report was prepared by Amarrilho Brasil with funding from the UN Democracy Fund (UNDEF). The group made efforts to obtain information for the reports from government offices and to engage in dialogue with government officials. As part of this dialogue, a draft of the report was made available to them.

The report was prepared using a questionnaire and report template designed by Transparency International (TI) for the use of civil society organisations (CSOs). These tools reflected but simplified the United Nations Office on Drugs and Crime (UNODC) checklist and called for relatively short assessments as compared with the detailed official checklist self-assessments. The questionnaire and report template asked a set of questions about the review process and, in the section on implementation and enforcement, asked for examples of good practices and areas in need of improvement, specifically with respect to the UNCAC Articles listed above under 'Scope'.

The report preparation process went through a number of steps, with respondents first filling out the simplified questionnaire and then preparing the draft report.

The draft report was shared with the government¹ with the aim of continuing the dialogue beyond the first-round country review process. No comments were made, but it was indicated that there was no disagreement with the views portrayed in the report.

In preparing this report, the authors took into account the recent review of Brazil carried out by the Follow-up Mechanism of the Inter-American Convention against Corruption (MESICIC) in a third round report adopted in September 2011,² and the OECD Working Group on Bribery Phase 2 follow

¹ With the Comptroller General of the Union (CGU)

² <http://www.oas.org/juridico/english/bra.htm>

up report of June 2010 on the implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention).³

I. Executive summary

It appears that there are no significant inconsistencies between the Brazilian legal system and the UNCAC. Several articles in the UNCAC are present in two other international anti-corruption conventions, the Inter-American Convention against Corruption (OAS Convention) and the OECD Anti-Bribery Convention, previously ratified by Brazil, respectively on 10 July 2002 and 24 August 2000.

In the last few years, Brazil has set examples of good practice and advances in its legislation against corruption. At the same time, there are some flaws in the enforcement of laws against corruption offences. Among the most notable are delays in prosecuting cases.

Assessment of the review process

Conduct of process

The following table provides an overall assessment of transparency, country visits and civil society participation in the UNCAC review of Brazil.

Table 1: Transparency and CSO participation in the review process

Did the government disclose information about the country focal point?	Indirectly
Was civil society consulted in the preparation of the self-assessment?	No
Was the self-assessment published online or provided to CSOs?	Yes
Did the government agree to a country visit?	Yes
Was a country visit undertaken?	Yes
Was civil society invited to provide inputs to the official reviewers?	Yes
Has the government committed to publishing the full country report?	Yes

Availability of information

The biggest obstacle faced in preparing this report was the inaccessibility of information. Even though there was help from the employees of the Comptroller General of the Union (CGU)⁴, much of the data was scattered throughout several governmental websites and other data was not available.

Findings on Implementation and enforcement

UNCAC implementation and enforcement involves several public administrations, among which the following stand out: Comptroller General of the Union (CGU) and its Secretariats, especially the Secretariat to Prevent Corruption and Strategic Information (SPCI) and the Federal Secretariat of Internal Control (SFC); Ministry of Justice; Federal and State Public Ministries; Federal Police; Audit Courts; and the judicial and legislative systems at the federal, state and municipal levels.

³ Brazil: Phase 2 Follow-up report on the implementation of the phase 3 recommendations, 4 June 2010,

<http://www.oecd.org/dataoecd/50/39/45518279.pdf>

⁴ www.cgu.gov.br.

Amarribo concludes that there are no significant incompatibilities between the Brazilian legislation and UNCAC. Nevertheless, some UNCAC requirements have not yet been sufficiently implemented, such as the liability of corporations, the protection of victims and witnesses, the regulation of lobbying, and the improvement of rules to avoid influence-peddling in the hiring of public employees. These are therefore the main challenges and areas of interest on which the government must focus future actions to achieve full compliance of Brazilian legislation with the UNCAC.

On the enforcement side, the most important problem is delays in prosecuting cases. Considering the high number of corruption cases, very few perpetrators end up being jailed. Elected officials and high-ranking officials, unlike ordinary people, are tried by higher courts when they commit crimes and these courts are not equipped to conduct investigations. As a result, these cases are often pending for long period of time without being prosecuted. Often the cases are dismissed because of expiry of statutes of limitations. This is one of the main reasons for impunity in Brazil. Other problems in practice are lack of enforcement of the law on whistleblower and witness protection and difficulties in confiscation of assets and property derived from corruption.

Recommendations for priority actions

1. Terminate the Special Courts Privilege for elected officials (foro privilegiado).
2. Apply the Law of Administrative Misconduct to all public officials and politicians of the first and second tier of public federal administration, excepting the president of the Republic.
3. Adopt legislation on the right to access to information granted in the constitution.
4. Introduce criminal liability of legal persons.
5. Review the Criminal Code and the Code of Criminal Procedure in order to reduce the opportunity for frivolous appeals to avoid delays in the prosecution of corruption offenses.
6. Strengthen legal cooperation in criminal matters between the signatories of the UNCAC, aimed at increasing investigations into money laundering and recovery of proceeds of corruption.
7. Disseminate information about the stages of implementation of the UNCAC in a website created specifically for that purpose.
8. Create a federal law which makes a witness protection programme mandatory in all the Brazilian states and create legal mechanisms that allow the witness protection programme to be a state programme rather than the current federal government one, thus providing stability and financial resources to the programme.
9. Include a specific mechanism that allows the confiscation of assets and property derived from illicit enrichment and other forms of corruption.

II. Assessment of the review process

A. Conduct of process

The Brazilian government did not publish information about the contact point and did not consult with CSOs in the preparation of its self-assessment, although the contact point sent a copy of the self-assessment to some CSOs a few days before it was finalised. The self-assessment was also published on the UNODC website⁵.

The CSO Contas Abertas contacted the Brazilian government focal point and expressed its desire to participate in the country visit, which included experts from the government of Mexico. When the time came, not only were they invited to meet with the review team, but they were also informed that government officials were “seeking the broadest possible participation of CSOs in the process”.

The meeting between Brazilian government officials, Mexican experts, UNODC staff and five or six CSOs was very productive. Unfortunately the experts from Haiti, the other reviewing country, could not attend. Crucial issues were discussed, many of which had also been covered by the experts and public authorities in previous meetings (without the participation of CSOs). The reviewers were provided with a very clear picture of the current situation in Brazil and, therefore, seemed to be well-equipped to prepare a comprehensive report.

B. Availability of information

Data is scattered on various government websites (Bureau of Legislative affairs of the Ministry of Justice, Federal Police and in the report of the Brazilian government on the page of the Office of the CGU⁶). Despite the assistance of the Comptroller General, it was difficult to obtain access to all relevant data. The perceived secretive nature of the Brazilian Justice System prevented the access to some data, especially statistical information as reflected in Table 2.

III. Implementation and enforcement of UNCAC

The UNCAC has become an integral part of Brazil’s domestic law and, in the hierarchy of norms, ranks below the Federal Constitution and at the same level of other laws. In consequence, since its entry into force, the provisions of the UNCAC override any former contrary provision in domestic law.

A. Key issues related to the legal framework

This section covers Brazil’s compliance with the mandatory provisions of UNCAC chapter III on Criminalization and Law Enforcement, and chapter IV on International Cooperation. It provides a brief description of the criminalisation legislation enacted by Brazil in relation to corruption. The description of the legislation follows the order of the UNCAC articles.

Brazil has two main legal mechanisms of control over corruption acts: under administrative and under criminal law. Administrative law tends to be more flexible and efficient, because it is free of the difficult burden of proof under criminal law. It creates strict liability with the burden of proof effectively on the public officials. Under criminal law, the authorities have to prove that the

⁵ www.unodc.org/unodc/en/treaties/CAC/country-pairings-year-1-of-the-review-cycle.html

⁶ <http://www.cgu.gov.br/onu/index.asp>

defendant had the intent to commit an act of corruption, which makes it difficult to obtain a conviction.

UNCAC Articles 15 and 16: Bribery of national public officials and bribery of foreign public officials and officials of public international organisations. The following articles criminalise graft, passive corruption and active corruption (bribery), respectively: articles 316, 317 and 333 of the Criminal Code and Article 9 of the Administrative Misconduct Law⁷.

UNCAC Article 16 is covered by articles 337-B (bribery in international business transaction), 337-C (trafficking in influence in international business transactions) and 337-D (foreign public officials) of the Criminal Code⁸. The definition of “foreign public official” contained in UNCAC Article 2 is included in article 337-D, according to which a foreign public official is deemed to be, for the purposes of the criminal law, anyone who holds a position, a job or a public function in State bodies or in diplomatic representations of a foreign country, even if temporarily or in an unpaid capacity. However, passive corruption committed by a foreign public official or public employee of a public international organization has not yet been criminalised.

UNCAC Article 17: Embezzlement. This is provided for in the Brazilian Criminal Code in the following articles: 312 (embezzlement), 313 (embezzlement through error by third party) and 315 (irregular employment of public funds or revenues). Those crimes are punished respectively with imprisonment from two to twelve years and a fine; imprisonment from one to four years and a fine; and detention from one to three months or a fine.

There are also provisions in Law 1079/50, which defines the “crimes of responsibility” of the president of the Republic, ministers, judges of the Supreme Federal Tribunal, the prosecutor general of the Union and governors and secretaries of States; and regulates the respective trial procedures.⁹

Additionally, articles 9 and 10 of the Administrative Misconduct Law deal with acts of administrative misconduct related to embezzlement. Article 9 prescribes the following sanctions: loss of property or values illegally added to the property; full indemnification of the damage; loss of public function; suspension of political rights from eight to ten years; payment of a civil fine of up to three times the value of the equity increase; and prohibition of contracts with the government for a period of ten years, or receipt of benefits or fiscal or credit incentives directly or indirectly, even through a legal entity in which he/she is a majority shareholder. Article 10 provides for the following penalties: reimbursement of the full value of damage; confiscation of any property or values illicitly added to the assets; loss of public function; suspension of political rights from five to eight years; payment of a civil fine of up to two times the value of the equity increase; and prohibition for a period of five years from engaging with the government, or receiving benefits or fiscal or credit incentives directly or indirectly, even through a legal in entity which he/she is a majority shareholder.

UNCAC Article 18: Trading in influence. The Criminal Code criminalises this practice in articles 332 (trading in influence) and 337-C (trading in influence in international business transactions). Trading in influence is also covered under the Administrative Misconduct Law in article 9 (acts of administrative misconduct involving illicit enrichment) and article 11 (acts of administrative misconduct that violate the principles of administration).

UNCAC Article 20: Illicit enrichment. Brazil has not criminalised illicit enrichment. However, it has legislative provisions to punish such conduct in the civil and administrative spheres.

Article 9 of the Administrative Misconduct Law sanctions the acquisition by any person, for himself or for others, in the exercise of office, position, employment or public office, of assets of any nature whose value is disproportionate to the evolution of wealth or income of the public official.

UNCAC Article 21 and 22: Bribery in the private sector and embezzlement of property in the private sector. The Criminal Code does not contain the offenses of bribery and embezzlement of property in the private sector.

⁷ Law 8429/92

⁸ as amended by Law 10467 (2002)

⁹ See especially article 9 (crimes against the probity in the administration)

UNCAC Article 23: Laundering of proceeds of crime. This is addressed by Law 9613 of 3 March 1998, which provides for the crimes of laundering or concealment of assets, rights and values, and the prevention of the use of the financial system for illicit actions foreseen in this Law. The crime of money laundering and its modalities are provided for in the extensive roster of article 1 of this Law. These crimes are sanctioned by imprisonment for between three to ten years or a fine.

UNCAC Article 25: Obstruction of justice. UNCAC Article 25 is implemented in articles 342, 343 (perjury or false expertise) and 344 (coercion during the process) of the Criminal Code.

UNCAC Article 26: Liability of legal persons. Relevant provisions are scattered in various laws. Chapter II of Law 8884/94 (violations against the economic order) establishes the offenses for which legal persons can be civilly and administratively punishable. In addition, chapter III of that law establishes the penalties, which include the payment of fines, and prohibition from engaging and participating in public bids with the government (Law 8666/93 on procurement and administrative contracts). The Administrative Misconduct Law, also in chapter III, foresees civil and administrative measures for the offenses of fraud and malpractice, such as fines, compensation and suspension of contracting with the Public Administration.

The CGU has prepared a draft law on the responsibility of legal persons in conjunction with the Ministry of Justice to establish the direct responsibility of the legal entity for the acts of corruption committed against the government and foreign administrations. This bill was submitted to Congress by the then President Luis Inacio Lula da Silva on 8 February 2010.

Legal persons are not criminally liable under Brazilian legislation. They can only receive administrative sanctions. The sanctions provided by law can be very effective, and are proportionate and dissuasive. Besides fines, legal persons can be prohibited from doing business with the public sector, which for some companies may mean insolvency and bankruptcy.

The approval by Congress of the Law on Legal Accountability for Corruption, and the creation of a National Registry of Disreputable Enterprises, listing companies which have been convicted for acts against public administration, is of crucial importance in this context. The register would prevent non-reputable companies from participating in public bids or tenders. Currently, the “Company Pro-Ethics” registration exists, which highlights firms that have invested in ethics and integrity, implementing measures of corporate governance and corruption prevention. One of the requirements the company must meet to join the register, is to provide transparency around donations for political campaigns. However, the registration is voluntary. Another way to obtain information on legal entities is the National Register of Administrative Misconduct Convictions. The system contains information on tried cases, which identify legal entities or individuals who have been convicted of misconduct, pursuant to the Administrative Misconduct Law. This register is difficult to locate a company or convicted persons because Federal identification number (CNPJ), and/or the case number, and/or the name of the parties involved is required.¹⁰

UNCAC Article 31: Freezing, seizure and confiscation. These are covered in articles 91, paragraph II of the Criminal Code; articles 125 to 143 of the Criminal Procedure Code and article 4 of Law 9613/98.

UNCAC Article 32: Protection of witnesses, experts and victims. Brazil has a law protecting witnesses. Law 9807/99 extends the protection to spouses, descendants, ancestors and relatives who have some relationship with the victim or witness. However, enforcement of the law has been poor.

UNCAC Article 33: Protection of reporting persons. It is possible for citizens to make anonymous complaints online to the CGU on matters related to the protection of public property, the control over the use of federal public funds, the correction, prevention and combating of corruption, ombudsman activities and increasing the transparency of management within the federal public administration. The complaint and any evidence may be submitted by submitting a form online, by mail or in person.

¹⁰ www.cni.jus.br/improbidade_adm/consultar_processo.php

UNCAC Article 34: Consequences of acts of corruption. These are addressed in the following legal provisions: article 37 of the Federal Constitution, articles 317 to 333 of the Criminal Code, article 9 of the Administrative Misconduct Law, and articles 77 and 78 (termination of contracts with the public administration) of Law 8666/93.

UNCAC Article 35: Compensation for damage. This is provided for in the following articles: article 5, of the Federal Constitution, article 186 of the Civil Code, article 91, paragraph I of the Criminal Code, and article 12 of the Administrative Misconduct Law.

UNCAC Article 36: Specialized authorities. UNCAC Article 36 was implemented in the following articles: article 73 paragraph 3, article 95, article 127 paragraph 1, and article 144 paragraph 1 of the Federal Constitution of Brazil.

UNCAC Article 38: Cooperation between national authorities. One of the basic guidelines of the CGU action, adopted in 2003, was to focus on cooperation and partnership with other enforcement agencies of the State and on improving public management, respecting the differences between each others' responsibilities and powers. CGU has established partnerships with the Federal Police, the Federal Prosecutor, the State Public Ministries, the Council of Control of Financial Activities (COAF)¹¹, the Treasury, the Ministry of Justice, the Attorney General's Office, the Public Ethics Commission, the Central Bank, the Federal Revenue in Brazil, the Court of Union Accounts, the Ministry of Planning, Official Banks (Bank of Brazil and Caixa Economica Federal), Serpro, National Council of Justice and State control agencies. As a result of a partnership between CGU and the Federal Public Ministry (MPF) 1,613 control shares were made, 1,461 audit reports were done randomly and 1,603 administrative proceedings were initiated by the Federal Prosecutor's Office.

UNCAC Article 46: Mutual legal assistance. Brazil is able to provide cooperation for the investigation, prosecution and legal proceedings related to the offenses covered by the UNCAC. UNCAC Article 49 has been implemented by means of mutual cooperation agreements on a bilateral basis. Furthermore, the country is also part of the UN Convention against Transnational Organized Crime, which serves as a basis for mutual legal assistance in criminal matters. The demonstration of dual criminality to provide international legal cooperation is an optional requirement in most bilateral treaties. To verify this requirement, the Brazilian authorities are governed by interpretations in case law, so that subpoenas and the gathering of evidence do not require double jeopardy, and only the essential elements of description and circumstances of the crime in the foreign legal system must be taken into account.

Obtaining data on cases involving mutual legal assistance is difficult, since they are usually in the investigative phase, and the cases are handled confidentially so as not to hinder the investigations. It is known, however, that there are many successful and unsuccessful instances of mutual legal assistance although cases are always referred to without identifying the country in question.

Two successful cases are worth mentioning as they demonstrate the strength of the UNCAC, which appears to be still unknown by most legal professionals. The first case concerns a request for legal assistance from Brazil to the UK, based on UNCAC Article 43 in the case of the civil action for acts of administrative misconduct in an alleged bidding fraud of the former mayor of the city of Sao Paulo.¹² The request for criminal assistance was accepted by the British Home Office. Another success story concerns a lawsuit against a member of the Court of Accounts of the State of Sao Paulo (TCE-SP) on suspicion of embezzlement and money laundering. Based on the UNCAC, Brazil asked the US for cooperation in overcoming bank secrecy in relation to two accounts of the SP-TCE president in the US. The decision by the US Department of Justice was favourable to the Brazilian request.

AMARIBBO suggests adopting procedures for international judicial cooperation similar to EU regulations under the Lisbon Treaty.

¹¹ Conselho de Controle de Atividades Financeiras: (www.coaf.fazenda.gov.br/)

¹² It is estimated that the amount diverted from public works contracts in the last administration of the former city mayor reaches millions of US dollars, according to the request for legal assistance in criminal matters.

B. Key issues related to enforcement

This section attempts to evaluate the enforcement of UNCAC-related offences in Brazil. It provides an overview of the enforcement mechanisms in place and analyses the statistical data provided by governmental institutions.

The COAF and the CGU are bodies specialised in combating corruption through the coercive application of the law. The CGU is a public body linked directly to the president, and its mandate is to audit bodies of the federal administration, defend public assets, increase public transparency in government, adopt control procedures, and investigate misconduct in the public service. It is the central body in the Federal Administration Control System. The CGU is responsible for complaints regarding public property in the Federal Public Administration, while the COAF, created by Law 9613 of 3 March 1998, oversees financial transactions and identify those suspected of money laundering to send to Federal Policy and District Attorney for investigation.

The recovery of assets is the responsibility of the Department of Recovery of Assets and International Judicial Cooperation (DRCI)¹³ under the National Secretariat of Justice of the Justice Ministry. In 2003, the year of the DRCI's creation, the National Strategy to Combat Corruption and Money Laundering (ENCCLA) was developed to contribute to the combat of money laundering. The ENCCLA describes the mandates of the various bodies (including law enforcement authorities, the judiciary, relevant ministries and agencies, as well as civil society) involved in preventing and combating corruption and money laundering. Its goal is to identify and propose adjustments to remedy flaws in the anti-money laundering and anticorruption system. About 60 agencies and entities are part of the ENCCLA, including government ministries, the Federal Police, the judiciary, the CGU, the Federal Auditing Office (TCU), the Securities and Exchange Commission (CVM), the COAF, the Private Retirement Plan Authority (PREVIC), the Reinsurance Board (SUSEP), the Central Bank, the Brazilian Agency of Intelligence, the Attorney's General Office, and the Brazilian Federation of Banks.

The State's action in preventing and combating money laundering, and in the recovery of assets, requires cooperation and interaction among the various bodies and institutions. The Office of Integrated Management of Prevention and Combating Money Laundering (GGI-LD) is responsible for actions against money laundering in Brazil.

Following the creation of a national education programme, more than 2400 public officials have been trained to combat corruption and money laundering.

On the prevention side, the Secretary of Corruption Prevention and Strategic Information (SPCI) is the body responsible for monitoring the implementation within Brazil of the three international treaties which the country ratified in the area of prevention of corruption: the UNCAC, the OAS and the OECD conventions. Its mandate in this area includes, among other things, publishing the terms of these conventions, internal coordination to enable the country's adherence to the international recommendations, as well as monitoring the evolution of the international community's approach to mutual cooperation and integration to fight corruption. In 2009, Brazil took on the presidency of MESICIC, a follow-up mechanism which aims to promote the implementation of the OAS Inter-American Convention against Corruption by monitoring compliance with its commitments, undertaken by the States Parties. Brazil's proactive participation in the definition and approval of the UNCAC mechanism for review implementation during this period still stands out.

¹³ <http://portal.mj.gov.br/data/Pages/MJ7A4BFC59ITEMID401B422470464DA481D21D6F2BBD1217PTBRNN.htm>

1. Statistics

Table 2: Cases statistics¹⁴

UNCAC Article	Trials (ongoing and finalized)	Convictions
Bribery of foreign public officials (Article 16)	Information not available	Information not available
Bribery of national public officials (passive) (Article 15(b))	409 (2010)	Information not available
Bribery of national public officials (active) (Article 15(a))	286 (2010)	Information not available
Embezzlement, misappropriation or other diversion of property by a public official (Article 17)	1,114 (2010)	Information not available
Illicit enrichment (Article 20)	N/A ¹⁵	N/A
Money laundering linked to corruption (Article 23)	1,289 (2008) ¹⁶	1,049

Note: No statistics were provided on settlements, acquittals, dismissals and pending cases.

According to the statistical data gathered, there are fewer cases of active than passive bribery, and it would be interesting to know the reason for this. There also appears to be a quite high number of embezzlement cases and a high level of conviction in money laundering cases (over 80 per cent).

It is puzzling that the only information available on convictions relates to money laundering cases. It is very difficult to develop a good policy response to corruption without adequate data collection.

2. Cases and investigations

In 2009, the Federal Secretariat of Internal Control (SFC) developed an important programme of work in coordination with other defense agencies of the State, especially the Department of Federal Police, from which the following cases may be highlighted.

1.1 Investigations

The following cases are pending or in the investigation phase.¹⁷

Smoke (Fumaça) Operation¹⁸ – The case relates to alleged crimes of conspiracy, falsification of public documents, embezzlement and bidding fraud. It began at the request of the Federal Public Ministry for Supervision of Sanitation Projects from the Ministry of Health. Investigations involving the municipalities of Caucaia, Iguatu, Brejo Santo, Nova Russas, Reriutaba and Morrinhos, indicated that the potential harm to the public treasury could reach R\$ 25.9 million, of a total

¹⁴ Brazil self-assessment checklist (www.unodc.org/unodc/en/treaties/CAC/country-pairings-year-1-of-the-review-cycle.html)

¹⁵ Illicit enrichment is not criminalised by Brazilian law

¹⁶ 2008 Annual report of the Federal Police (<http://www.dpf.gov.br/institucional/relatorio-anual-pf/RA%20%202008.ppt/view>)

¹⁷ Annual reports of the Federal Police (<http://www.dpf.gov.br/institucional/relatorio-anual-pf>)

¹⁸ Iguatu.org, 17 June 2009, "Polícia Federal concede coletiva sobre Operação Fumaça" (<http://www.iguatu.org/portal/policia-federal-dar-coletiva-sobre-operacao-fumaca/>); Antena Sul, "Operação Fumaça repercute no Ceará" (http://www.antenasul.fm.br/antena/index.php?option=com_content&view=article&id=278:operacao-fumaca-repercute-no-ceara-&catid=1:latest-news); Blog Tv Web Sertao, 24 April 2012, "Operação Fumaça Fria prende quadrilha de assaltantes no Sertão" (<http://www.blogtvwebsertao.com.br/2012/04/operacao-fumaca-fria-prende-quadrilha.html>); O Povo online, 17 June 2009, "PF dará coletiva sobre Operação Fumaça. Mas em Juazeiro do Norte" (<http://blog.opovo.com.br/blogdoeliomar/pf-dara-coletiva-sobre-operacao-fumaca-mas-em-juazeiro-do-norte/>).

resource of R\$ 86.6 million. The operation began on 17 June 2009, involving a team of 160 federal police agents and 21 analysts from the CGU. Nobody was arrested.

Orthoptera Operation – The case was initiated through the monitoring of financial transactions in the account of the Fund for Basic Education (FEB/FUNDEB) in the municipality of Alcantara. The fraud consisted in the omission of and/or changes to the amounts drawn from the fund's account. An operation was initiated on 17 July 2009, involving approximately 100 Federal Police agents and 11 CGU analysts, with the support of the Maranhao Attorney's Office and District Attorney. The suspects will be questioned about the crimes of falsification of public documents, falsification of private documents, forgery, conspiracy or gang as enshrined in the Criminal Code, in addition to the bidding fraud under Law 8666/93 and the crime of the mayor contained in Decree 201/67. A total of ten arrests have taken place, however, no government official has been arrested.

Transparency (Transparencia) Operation – This operation was undertaken to dismantle a criminal organisation specialised in circumventing the competitive bidding in the field of civil construction, which focused on obtaining funds from agreements signed with the Federal Ministry of Health, through the National Health Foundation (FUNASA/PB). The investigation involved the municipalities of Caapora, Sao Miguel de Taipu, Juripiranga, Diamante and Casserengue. The operation was initiated on 10 November 2009, involving 150 Federal Police officers, 26 auditors from the Internal Revenue Service and 11 CGU staff. The investigated persons will answer for crimes against the tax system, corruption, money laundering, fraud in bidding and conspiracy. A total of 20 people, but no government officials, were arrested.

Gargoyle (Gargula) Operation – Work developed by the SFC together with the Federal Police allowed the identification of misuse of federal resources in the municipality of Eusebio, Ceara State, coming from partnerships and pass-through contracts signed with the Ministries of Cities, Health and Education. The investigation detected potential frauds in bids, unfinished projects, services paid for and not performed, overpricing and overinvoicing, involving an estimated loss of R\$ 6 million of a total inspected R\$ 15 million. The operation initiated on 8 December 2009 involved a team of 210 Federal Police officers, 26 CGU staff and six staff from the Federal Income Service (Receita Federal). The investigated persons will be questioned on diversion of public funds, active and passive corruption, and money laundering. A total of 15 arrests took place, including one of a public servant.

Lair (Covil) Operation¹⁹ – This operation identified many alleged irregularities in money transfers carried out by FUNASA/TO (Fundação Nacional de Saúde no Tocantins, an agency of the Ministry of Health responsible for promoting sanitation to the population), including payment for non-executed services; signature forgery, documents and technical opinions forgery, unauthorised changes to the original project; and irregularities in the bidding process. The operation initiated on 26 May 2009 involved a team of 160 Federal Police officers and 22 CGU analysts. The investigated persons will be questioned on crimes of conspiracy (article 288 of the Criminal Code), concealment (article 312), corruption (articles 317 and 333), fraud in bidding (Law 8666/93), in addition to actions of administrative misconduct. The total maximum penalties of the crimes could reach 31 years' imprisonment. Two public employees were arrested.

Rapine III (Rapina) Operation – This operation relates to the deviation of public money through fraud in biddings and in the Accounting Offices. The operation started on 5 March 2009, involving a team of 200 Federal Policemen and 30 analysts from the CGU, with the support of the Attorney General's Office in Imperatriz, State of Maranhão and the Regional Prosecutor. The suspects will be investigated for crimes of counterfeiting of public document, forgery, falsehood, using spurious documents, embezzlement, illegal employment of public funding, and conspiracy (all from the Criminal Code) as well as the bidding fraud of Law 8666/93, and money laundering as prescribed in Law 9613/98. A total of 27 arrests took place, including eight of public employees.

¹⁹ CGU website (<http://www.cgu.gov.br/AuditoriaeFiscalizacao/AuditoriasEspeciais/2009.asp#1>); Portal CT, 26 May 2009. "Confira a lista dos denunciados pela Procuradoria na Operação Covil" (<http://www.portalct.com.br/noticia.php?editoria=98defd6ee70dfb1dea416cecdf391f58¬icia=2ec1cb3103b9ae3c582bc225cf68828e>); Quid Novi, 26 May 2009, "Operação Covil da PF estoura esquema de fraude em Funasa do Tocantins" (<http://www.quidnovi.com.br/novo/noticia/detalhe.asp?t=P&c=382>)

Rapine IV (Rapina) Operation – Operations Rapine I, II and III involved the deviation public funds through fraud in biddings and in the Accounting Offices in the municipalities of Maranhao, Imperatriz, Sao Luís, Governador Edson Lobao, Montes Altos and Sao Pedro de Água Branca. The operation started on 28 April 2009, involving a team of 170 Federal Police officers and 25 CGU analysts. The investigated persons will answer for crimes of falsification of public document, forgery, embezzlement, illegal employment of public funds and conspiracy as reflected in the Criminal Code, in addition to bidding fraud as prescribed in Law 8666/93 and money laundering as prescribed in Law 9613/98. A total of 28 arrests took place, including 15 of public employees.

Luxury (Luxo) Operation²⁰ – This operation was conducted with the support of SFC and the Secretary of Finance of the State of Ceara. Its goal was to combat crimes involving companies in the States of Ceara and Rio de Janeiro, including smuggling/embezzlement, fraud in the bidding process for the construction of vessels for the Brazilian Navy and to provide services to Petrobras (State oil company), fiscal tax evasion, and evasion of foreign exchange. The operation started on 30th June 2009, involving 60 Federal Police officers. A total of five people were arrested. No public official was arrested.

High Sierra (Alto da Serra) Operation – A joint operation by the Federal Police Department in cooperation with the Search and Seizure Warrant at City Hall of Tenente Laurentino Cruz, State of Rio Grande do Norte, which aimed to disrupt a alleged scheme of frauds in public biddings for school meals and medicine supply to children, as well as payment of doctors without services being rendered. The operation started on 2nd July 2, involving 18 Federal Police officers and three auditors from the CGU. No-one has been arrested.

White Lab Coat (Jaleco Branco) Operation – A joint operation with the Federal Public Ministry and the Federal Police Department, held in the State of Bahia. The operation aimed to dismantle an alleged social security system scheme involving the alleged alteration of computer data to enable the issuing of tax compliance certification, in spite of existing debts. The operation was initiated on 22 November 2007. A total of 17 arrests were made, including three of public officials.

Owari Operation²¹ – A criminal organisation was reportedly involved in conspiracy, illegal financial activities, loan sharking, crimes against the economic order and the financial system, bidding fraud and corruption in the municipalities of Dourados, Campo Grande, Naviraí and Ponta Pora, in Mato Grosso do Sul, Guairá, and Umuarama in Paraná. The criminal organisation was composed of politicians, public officials, entrepreneurs and other professionals, in order to commit frauds in their municipalities, forging public services of several natures. The operation initiated on 7th July 2009, and 42 people were arrested.

Pandora's Box Operation²² – This operation was initiated in response to alleged fraud in bidding processes in the Federal District, including payments to senior civil employees of the Federal District Government by enterprises that maintained contracts with the institution. The operation started on 27 November 2009, and involved a team of 150 Federal Police officers. No-one has been arrested.

All the operations mentioned above are in the procedural stage. Other cases of special operations with the Federal Police are: Gafanhoto, Mamoré, Guabiru, Pororoca, Campus Limpos, Confraria, Galiléia, Sanguessugas, Navalha, Vampiro, Alcaldes, Rêmora, Metástase, Coari/AM, Carranca,

²⁰ Police Federal website (http://www7.pf.gov.br/DCS/Resumo_OP_2009.html#Luxuria); ECRIM, 19 May 2009, "Operação Luxúria Prende Duas Pessoas Que Enviavam Mulheres Para Itália E Portugal" (<http://www.ecrim.com.br/operacao-luxuria/>)

²¹ Police Federal website (http://www7.pf.gov.br/DCS/Resumo_OP_2009.html#owari); O Progresso, "justica bloqueia bens de envolvidos na operacao Owari" (<http://www.progresso.com.br/politica/justica-bloqueia-bens-de-envolvidos-na-operacao-owari>); MS JÁ, 4 August 2010, "TJMS recebe denúncia contra acusados da Operação Owari" (<http://www.msja.com.br/noticias/politica/por-unanimidade-tjms-acata-denuncia-contra-acusados-da-operacao-owari>).

²² Correio Braziliense, 3 December 2009, "Entenda a Operação Caixa de Pandora" (http://www.correio braziliense.com.br/app/noticia/cidades/2009/11/30/interna_cidadesdf.158092/index.shtml); Correio Braziliense, 12 December 2009, "DEM-DF abre processo contra Prudente" (http://www.correio braziliense.com.br/app/noticia/cidades/2009/12/12/interna_cidadesdf.160504/index.shtml); Correio Braziliense, 19 December 2009, "Paulo Octávio recebeu R\$ 200 mil em propina, afirma Durval" (http://www.correio braziliense.com.br/app/noticia/cidades/2009/12/19/interna_cidadesdf.162024/index.shtml).

Mecenas, Rapina I, II, III, IV, João de Barro, Higia/RN, Telhado de Vidro, Passárgada, Toque de Midas, Vassoura de Bruxa, Dupla face, Anopheles.

2.2 Prosecutions

The following provides an overview of a number of relevant cases tried.²³

- **Active corruption:**

- ✓ A habeas corpus motion was denied following proceedings before the Superior Tribunal de Justiça. The perpetrator was arrested in flagrante delicto when delivering R\$ 3.000 to a military policeman to avoid prison, and sentenced to four years' imprisonment, in closed regime, for active corruption (article 333 of the Criminal Code) following a trial in 2010.²⁴
- ✓ A habeas corpus motion was denied following proceedings before the Superior Tribunal de Justiça. The perpetrator was sentenced in May 2010, and the trial also resulted in the denunciation of 18 co-defendants on allegations of conspiracy or armed gang, qualified bribery (several times), and crimes against the public economy (articles 288 paragraph 1 and article 333 paragraph 1, of the Criminal Code, and article 2 of Law 1521/51).²⁵

- **Passive corruption:**

- ✓ A habeas corpus motion was denied following proceedings before the Superior Court. The proceedings involved a gang specialised in defrauding the social security system. The persons involved were tried in 2010 for fraud against the Social Security Office, passive corruption and conspiracy (articles 171, paragraph 3, 317, paragraph 1, 313-a, and 288, all from the Criminal Code).²⁶
- ✓ A habeas corpus motion was denied following proceedings before the Superior Court. The defendant was convicted in October 2010 for passive corruption, i.e. for receiving improper advantage in exchange of malpractice related to his function, besides having received an undue advantage of another server to expedite the processing of the lawsuit.²⁷

- **Embezzlement:**

- ✓ This case was tried before the Special Court Porto Velho, Rondonia in 2010, and involved embezzlement – the appropriation in a public contest (article 312, caput, first part, I in the form of article 29, caput, of the Criminal Code). Public funds had been diverted for the personal interests of the accused. The Special Court unanimously upheld the complaint against Evanildo Abreu de Melo, pursuant to article 305 of the Criminal Code, condemning him to imprisonment for two years and six months in open regime and the payment of 20 days' fine in the amount of a minimum wage each. The custodial sentence has been replaced for penalties of restricting rights, namely: provision of community services to be performed in a public service establishment, and weekends to serve in the Fire Department located in the city of Porto Velho, Rondonia. An adviser of the Audit Office also implicated was exonerated.²⁸

- **Trading in influence:**

- ✓ A habeas corpus motion was denied following proceedings before the Superior Court. The defendant was charged with trading of influence (article 332). The trial took place in 2010.²⁹

²³Brazil self-assessment checklist (www.unodc.org/unodc/en/treaties/CAC/country-pairings-year-1-of-the-review-cycle.html) and website of the Supreme Court of Brazil (www.stf.jus.br)

²⁴ 131485/Sao Paulo

²⁵ 150315/Sao Paulo

²⁶ 163761/Mato Grosso

²⁷ 135142/Mato Grosso do Sul

²⁸ 266/Rondonia

²⁹ 146038/Sao Paulo

- **Abuse of office:**
 - ✓ A habeas corpus motion was denied following proceedings before the Superior Court. The perpetrator was charged and tried in 2008 (“Operation Anaconda” for abuse of power/misfeasance (article 350, paragraph one, IV, of the Criminal Code) and embezzlement, tax evasion or destruction of a book or document (article 314 of the Criminal Code).³⁰
- **Dismissal for administrative misconduct (illicit enrichment):**
 - ✓ A government employee, an Internal Revenue Tax Auditor, was dismissed from office for illicit enrichment in 2008. Following a warrant of security/injunction (12.536/Distrito) the dismissal was maintained.

3. Examples of good practices or progress in the enforcement

It is noteworthy that the country has given continuity to the Monitoring Programme in small and medium-sized municipalities, an innovative and successful system. The programme is in its 27th edition, with 1,461 (26.5 per cent of the total number) monitored, involving a commitment of federal resources in the order of R\$ 10.3 billion. This programme was extended to inspection of the states resulting in 77 supervisions by the CGU, with resources in the order of R\$ 8.2 billion. Since 2007, the capitals and major cities (i.e. those with more than 500,000 inhabitants) became the object of an ongoing programme of inspections. As to the punitive measures, within the last six years, more than 25,000 investigations and administrative disciplinary processes were undertaken and completed, leading to the application of 1,969 administrative punishments against public servants, including 1,705 layoffs, 143 dismissals and 121 compulsory retirements.³¹

4. Significant inadequacies in the enforcement system for UNCAC-related offences

There are some flaws in enforcement of UNCAC-related offences. Among these, the most important is the problem of delays in prosecuting cases. The lack of coordination between the investigation forces and the Judiciary System has been addressed with training courses for personnel involved in the control of public resources, especially through cooperation with other countries and international organisations. But considering the high number of corruption cases, very few cases end up with the perpetrators being jailed.

Elected officials and high-ranking government employees, such as ministers, are judged by higher courts when they commit crimes. The ordinary citizen is judged initially by the lower courts and then the appeals go to higher courts. The higher courts are appeals courts, and they are not equipped to conduct investigations. Therefore these cases are often pending for very long periods of time, without being properly investigated. Often these cases are dismissed because of statutes of limitation, and the criminals go unpunished. This privileged forum, which was established in 2001, creates two categories of citizen, the privileged and the ordinary. It is one of the main causes of impunity in Brazil.

In spite of the law allowing the confiscation of assets and property derived from illicit enrichment and corruption, in practice this is difficult to apply. The procedures should be carried out by the judiciary system and it's well known that the judiciary system doesn't work well in Brazil. A expedite mechanism should be developed to made confiscation of assets more effective.

³⁰ 65499/Sao Paulo

³¹ www.cgu.gov.br/Publicacoes/BalancoAcoes2008/Arquivos/balanco2008_portugues.pdf

IV. Other developments

Lobbying

The regulation of interest mediation (lobbying) in Brazil is being studied. Currently, the following legislative drafts are pending: draft law 6132/1990 providing for registration of individuals or companies in the Houses of Congress. There is a draft law 1202/2007 to regulate the activity of lobbying and the role of pressure groups. The draft is under debate, but no priority has been established to put it to vote in Congress.

Nepotism

The influence of family ties in the recruitment of public employees, known as “nepotism” has been a problem in Brazil. The possibility of free hiring of servants into commissioned positions facilitates this practice. It is understood that family ties in the recruitment of public servants offends the principle of administrative morality and undermines management ethics. To curb these practices, the Federal Supreme Court issued the following decision: “The appointment of a spouse, partner or relative in the collateral line, or by affinity within the third degree, by any person holding a leadership position in the public administration directly and indirectly in any branch of public administration violates the Federal Constitution.”³²

Law 8112/90 provides for the regulation of nepotism within the federal executive branch and is supported by guidelines issued by the Public Ethics Commission of the presidency. Decree 6906/2009 also regulates the matter.

The existence of so-called “commissioned positions” is a matter for serious concern. An elected officer can appoint his friends, party members etc. into such commissioned positions. It is estimated that in the Executive Branch, around 25,000 such positions exist. Presumably around 58,000 people are recruited in this way in all three powers in the public administration.

Civil society participation

Some good practices stand out in relation to UNCAC Article 13. First, the creation by the CGU of the Transparency Portal website of the Federal Government in 2004, which reached an access record with 841,043 entries registered in 2009. This portal exposes the social control of R\$ 5.7 trillion in federal public budget. The portal displays the allocation of all expenditures by all federal government agencies and demonstrates who received them, whether businesses or individuals. The tool allows any citizen, without the need for a password, to access information on the execution of budget of programmes and actions of the federal government, in plain language and easy to understand. This portal has received national and international awards, including from the UN, becoming the global benchmark.³³ Similar transparency portals have been set up in the states, and are now operational in Bahia, Mato Grosso, Pará, Parana, Pernambuco and Santa Catarina, and under development in Alagoas, Espirito Santo, Rio Grande do Sul and Sergipe.

Another measure aimed at expanding the participation of civil society in public administration concerns the establishment in 2004 of the “Open Eye in the Public Money” initiative to raise awareness among municipal councillors, community leaders, public officials, teachers and students about the importance of social control over public management. Since its inception, the programme has benefited 1,353 Brazilian municipalities, empowering more than 30,000 citizens. In 2009, more than 7,000 people in 342 municipalities were trained by the programme. The SPCI also developed in 2009 actions to promote ethics and social consciousness with young people. This included the third design and writing contest on the theme “How can I contribute to a better society?” on Youngsters’ Citizenship Programme, held in Brasilia, and a project in partnership with the Cultural Institute Maurício de Sousa, called “One for all and all for one! Citizenship and ethics”, which involved more than 180,000 students and 6,000 teachers in Brazil.³⁴

³² Binding Note No. 13

³³ Report CGU-Brazil, Sept/Oct. 2009. 1st Edition, Year 1

(www.cgu.gov.br/Publicacoes/BoletimInternacional/Arquivos/ano1_edicao1.pdf)

³⁴ www.cgu.gov.br/Publicacoes/RelatGestao/Arquivos/relatorio_gestao_cgu_2009.pdf

Access to information

The draft Access to Information Law was sent to the National Congress on 13 May 2009, proceeding under the number PL 5228/2009. This draft law establishes, among others, an obligation of agencies and organisations of all entities of government to provide easy access to civil society to information of collective interest produced by them, or other custodians. In addition, the draft law on Civil and Administrative Liability of Legal Entities is in its final preparation in the Executive.

Technical cooperation and information exchange

Brazil signed an Agreement on Cooperation with India, Brazil and South Africa (IBAS), with the aim of improving inter-country cooperation in the areas of public administration and governance in 2007. The following areas are relevant to the UNCAC: ethics, fighting corruption, social responsibility and transparency. The following forms of cooperation are envisaged: seminars, workshops and video conferences, exchange of experts, qualification courses, joint comparative research, exchange of materials, information and systems, skills transfer; training of public officials of one country by cooperation between training institutions, and the creation of institutions, projects and other joint initiatives at the discretion of the competent authorities.

Furthermore, the project "Combating Corruption in Brazil" stands out, arising from a covenant established by the CGU and the British Embassy in Brazil to improve and expand the tools and techniques for preventing and combating corruption, and expanding the cooperation between the UK and Brazil in fighting corruption.

V. Recommendations for priority actions

1. Terminate the Special Courts Privilege of elected officials (foro privilegiado).
2. Apply the Law of Administrative Misconduct to all public officials and politicians of the first and second tier of public federal administration, excepting the president of the Republic.
3. Adopt regulatory legislation on the right to access to information granted in the constitution.
4. Introduce criminal liability of legal persons.
5. Review the Criminal Code and the Code of Criminal Procedure in order to reduce opportunity for frivolous appeals to avoid delays in the prosecution of corruption offenses.
6. Strengthen legal cooperation in criminal matters between the signatories of the UNCAC aimed at increasing the investigations into money laundering and extradition of proceeds of corruption.
7. Disseminate information about the stages of implementation of the UNCAC in a website created specifically for that purpose.
8. Create a federal law which makes a witness protection programme mandatory in all the Brazilian states; create legal mechanisms that allow the witness protection programme to be a state programme rather than the current federal government one and thus providing stability and financial resources to the programme.
9. Include a specific mechanism that allows the confiscation of assets and property derived from illicit enrichment and other forms of corruption.

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