



BRAZIL: PHASE 2

REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 7 December 2007.

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EXECUTIVE SUMMARY

The Phase 2 Report on Brazil by the OECD Working Group on Bribery evaluates and makes recommendations on Brazil's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. While the ongoing fight against corruption within Brazil is well publicised and reported, awareness of the foreign bribery offence is insufficient among both the public and private sector. The Report recommends that Brazil work to raise awareness of foreign bribery in both the public administration and the private sector.

Brazil has not taken the necessary measures to establish the liability of legal persons for the bribery of a foreign public official. The Working Group has determined that the current statutory regime for the liability of legal persons is inconsistent with Article 2 of the Convention. As a consequence legal persons are not punishable in Brazil for foreign bribery by effective, proportionate or dissuasive sanctions as required by Article 3 of the Convention. The Group recommends that this serious gap in the law be urgently addressed, and welcomes recent initiatives taken by Brazil in this regard.

There has been considerable focus by Brazilian law enforcement authorities on cases of domestic corruption. As to foreign bribery, authorities reported that there were two potential cases under preliminary investigation and another four investigations related to the UN Oil-For-Food Programme. To date there have been no foreign bribery cases brought before the Brazilian courts. The Working Group has concluded that law enforcement authorities need to adopt a more proactive approach in detecting, investigating and prosecuting such cases. The Report recommends that Brazil ensure that sufficient resources are dedicated to foreign bribery investigations and that appropriate training be provided to law enforcement authorities.

With respect to the non-tax deductibility of bribes, the Group recommends that Brazil clarify the prohibition on the deductibility of bribes by introducing an express denial for foreign bribe payments either in the tax legislation or through another appropriate mechanism that is binding and publicly available. The Report also recommends that Brazil increase efforts to encourage companies to implement strategies for the prevention and detection of foreign bribery, including the development of more effective internal company controls.

The Working Group further highlights positive aspects of Brazil's work to fight foreign bribery, including the law enforcement authorities' use of a range of specialised investigative techniques to uncover complex economic crime and corruption cases in Brazil. Another promising development is the ongoing work of the Brazilian authorities to fine tune the anti-money laundering reporting system which provides a good basis to detect foreign bribery-related money laundering. The Working Group also encouraged legislative efforts to oblige all large Brazilian companies to publish consolidated financial statements (covering foreign subsidiaries) and to conduct independent external audits of their accounts.

The report and the recommendations therein, which reflect findings of experts from Chile and Portugal, were adopted by the OECD Working Group on Bribery. Within one year of the Group's approval of the report, Brazil will make an oral follow-up report on its implementation of the recommendations, and will submit a written report within two years. The report is based on the laws, regulations and other materials supplied by Brazil, and information obtained by the evaluation team during its five-day on-site visit to Brasilia and São Paulo in May-June 2007, during which the team met with representatives of the Brazilian public administration, the private sector, civil society and the media.

A. INTRODUCTION

1. On-Site Visit

1. The Phase 2 on-site visit to Brazil was undertaken by a team from the OECD Working Group on Bribery in International Business Transactions (Working Group) from 28 May 2007 to 1 June 2007 in Brasilia and São Paulo. The purpose of the on-site visit, which was conducted pursuant to the procedure for the Phase 2 self- and mutual evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) and the 1997 Revised Recommendation (Revised Recommendation), was to study the structures in place in Brazil to enforce the laws and rules implementing the Convention and to assess their application in practice as well as monitor Brazil's compliance in practice with the Revised Recommendation.¹

2. The examining team was composed of lead examiners from Chile² and Portugal,³ and representatives of the OECD Secretariat.⁴ During the on-site visit, meetings were held with officials from the Brazilian government (and related bodies) and representatives from civil society, business associations, companies, the legal profession, the judiciary, and the national congress.⁵ The examining team appreciated the high level of co-operation received from the Brazilian authorities at all stages of the Phase 2 process: including the detailed responses to the written questionnaires; the provision of translated legislation and other pertinent documentation; and the organisation and coordination of the on-site visit, which ran very smoothly. In this regard, the hard work of the staff from the Office of the Comptroller General (CGU) and the Ministry of External Relations is to be commended. Finally, the examination team is grateful to all participants met during the on-site visit for their co-operation and openness during the course of discussions.

¹ The Phase 1 Report on Brazil was adopted by the Working Group on Bribery on 31 August 2004. The purpose of the Phase 1 examination is to assess whether a Party's laws comply with the legal standards set by the Convention. The issues raised by the Group in Phase 1 were followed up in the context of the Phase 2 examination.

² Chile was represented by: Alejandra Quezada, Specialist in Public International Law, Directorate of Juridical Matters, Ministry of Foreign Affairs; Mirna Olmos, Legal Adviser, Ministry of Justice; and Alejandra Vallejos, Lawyer, Ministry of Finance.

³ Portugal was represented by: Carla Encanação, Legal Adviser, International Relations Department, GRIEC – Ministry of Justice; Mariana Raimundo, Criminal Police, Deputy Director of the Criminal Police School; and Maria de Fátima da Graça Carvalho, Public Prosecutor.

⁴ The OECD Secretariat was represented by: Brian Pontifex, Co-ordinator of the Phase 2 Examination of Brazil, Senior Legal Analyst, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs, OECD; and France Chain, Legal Analyst, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs, OECD. Sébastien Lanthier, Policy Analyst, Anti-Corruption Division, assisted with the finalisation of the report.

⁵ See attached list of institutions encountered in Annex 1 of this report.

2. General Observations

a. Economic system

3. Brazil is the largest country in Latin America, covering some 8.5 million square kilometres of territory, and it ranks fifth among the most populous countries in the world, with approximately 180 million people. In the mid-1960s to the late-1970s, Brazil experienced an extraordinary period of GDP growth, often referred to as the “Brazilian miracle”, with growth rates averaging nearly 7.5% per year. However, over the period 1980 to 2005, GDP Growth slowed to an average of about 2.5% per year.⁶ A series of economic reforms in the 1990s opened up the economy to greater trade and competition. Measures were taken to eliminate all non-tariff barriers and to significantly reduce import tariffs. Efforts in the 1990’s also sought to curb rampant inflation which had risen to almost 3,000% in 1990, but was cut to less than 10% by 1997. In 2005 the average inflation rate was 6.9%. Other major reforms have included the floating of the exchange rate (the Real) in 1999 and the implementation of measures to reduce high levels of government debt.

4. The modern Brazilian economy is not only large and diversified, but it benefits from a wealth of natural resources, including major oil and gas reserves, and large mineral deposits. Brazil is the world’s eighth largest steel producer, and it has developed a large and diverse manufacturing sector that produces an array of products ranging from machine tools and cars, to telecommunications equipment and aircraft. In 2004, Brazil was the world’s fifth-largest agricultural exporter, including exports of coffee, soybeans, sugar, oranges, tobacco, cocoa, meat and poultry. The services sector represents about 56% of GDP.

5. In foreign trade, Brazil is active in more than one hundred countries: in 2006, Brazil reached the record figure of USD 228.9 billion in business transactions with other countries, consisting of exports to the value of USD 137.5 billion and imports of USD 91.4 billion. The main export commodity groupings are manufactured goods, 52.5%; agricultural products, 29.6%; and fuels and mining products, 16%. Brazil has experienced strong growth in export earnings in recent years. The principle destination of Brazil’s exports is the European Union, 22.8%; the United States, 19.6%; Argentina, 8.5%; China, 5.9% and Mexico 3.5%. The most rapidly expanding export markets have been in Asia, Africa, the Middle East and Eastern Europe which accounted for 27.6% of exports in 2005.⁷ As to imports, these principally originate from the European Union, 23.5%; United States, 17.5%; Argentina, 8.6%; China, 7.6%; and Japan, 4.7%. The main import commodity groupings are manufactured goods, 70.1%; fuels and mining products, 22.3%, and agricultural products, 6.1%.⁸

6. It is a feature of the Brazilian economy that many domestic companies have traditionally had highly concentrated ownership structures which are still often directly or indirectly controlled by particular families in Brazil or the State. Following the appreciation of the currency (Real) in 2004, a number of Brazilian companies expanded abroad, with outward FDI directed mainly towards Argentina and the United States.⁹ The FDI outflow peaked at USD 9.8 billion in 2004, although this had declined to USD 2.5 billion by 2005.¹⁰ The stock market in Brazil (Bovespa) has also proven to be an important and emerging source of corporate finance for companies in Brazil. Among its listed companies are many high performing

⁶ OECD Economic Surveys: Brazil, Volume 2006/18 – November 2006, p. 22.

⁷ The Economist Intelligence Unit, *Country Profile 2006: Brazil*, August 2006, pp. 24 and 41.

⁸ Export statistics are from 2005. See country profile of Brazil, World Trade Organisation: www.wto.org.

⁹ The Economist Intelligence Unit, *Country Profile 2006: Brazil*, August 2006, p 42.

¹⁰ OECD, “Trends and Recent Developments in Foreign Direct Investment”, *International Investment Perspectives*, 2006, p. 23.

export companies, some of whom have also listed on the New York Stock Exchange. As to Foreign Direct Investment (FDI) inflows, these amounted to about USD 15.1 billion in 2005, confirming Brazil's position as one of the world's leading destinations for direct investment to developing and emerging economies outside Asia.

b. Political and legal framework

7. Brazil is a federative republic, formed by the indissoluble union of the Federal District, 26 states and 5,563 municipalities. The current Federal Constitution has been in force since 5 October 1988. The directly elected president is also the head of government. The president is elected for a term of four years, and a maximum of two terms. The president has extensive powers including: the appointment of the cabinet; the appointment of other key office holders in the administration; and the appointment of Supreme Court judges, subject to Senate approval. The body vested with national legislative authority in Brazil is the bicameral Congress, consisting of a 513 member Chamber of Deputies (the lower house) and an 81 member Senate (upper house). The 26 states have powers to adopt their own Constitutions and laws; although their autonomy is limited by the principles established in the Federal Constitution.

8. The Brazilian legal system is based on civil law tradition. The judicial powers are vested in 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, labour and military disputes. The apex of the court system is the Federal Supreme Court which has exclusive jurisdiction to: (i) declare federal or state laws unconstitutional; (ii) order extradition requests from foreign States; and (iii) rule over appeals from lower courts, where the challenged decision may violate the Constitution. 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 from the decisions of federal judges, and are also responsible for cases of national interest and crimes pursuant to international treaties. The jurisdiction of the federal judges includes: hearing disputes involving states within the Union; 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.

9. The OECD Anti-Bribery Convention has the force of ordinary law in Brazil. However, Article 1 of the Convention cannot be directly applied under Brazilian law because the Constitution of the Federative Republic of Brazil provides that "there is no crime without a previous law which defines it, nor is there any punishment without a previous legal imposition".¹¹ Accordingly, Article 1 of the Convention was not self-executing upon its ratification by Brazil, thereby requiring the enactment of a new criminal offence by the Congress. Although the courts are not bound to interpret the implementing legislation in accordance with Article 1, the Brazilian authorities have stated that the Convention is "an important source" for judicial interpretation and that the Commentaries to the Convention "must be taken into account".

c. Implementation of the Convention and Revised Recommendation

10. Brazil is one of seven non-OECD member countries that are a Party to the Convention. It deposited its instrument of ratification on 24 August 2000. The implementing legislation came into force on 11 June 2002. The implementing legislation introduced amendments to the Brazilian Penal Code that incorporated the foreign bribery offence and a definition of "foreign public official"; and it also amended anti-money laundering legislation to include the foreign bribery offence as a predicate offence for the crime of money laundering.

¹¹ Article 5, paragraph XXXIX of the Brazilian Constitution.

11. Following discussions with representatives of the Ministry of Justice, prosecutors, and legal academics in Brazil, the lead examiners have concluded that the foreign bribery offence in the Penal Code is broadly in accordance with the standards established under Article 1 of the Convention. This assessment, however, will require further consideration by the Working Group on Bribery once the Brazilian courts have had an opportunity to apply and interpret the Penal Code offence. This Report does identify a number of other areas related to the implementation of the Convention and Revised Recommendation that require further attention by Brazilian authorities, including concerns about: the poor level of awareness about the Convention across the private sector and, despite recent government efforts, the public sector; the readiness and capacity of law enforcement authorities to investigate and prosecute the foreign bribery offence; deficiencies in the legal regime applicable to the liability of legal persons for the foreign bribery offence; the effectiveness of existing tax laws to ensure the non-tax deductibility of bribes; and the low number of Brazilian companies required under law to submit to an external audit. Addressing these issues forms a major component of this Report.

d. Corruption overview

12. Brazil has experienced a number of high profile corruption scandals within public sector agencies, municipalities and, more recently, serious allegations that have been linked to the federal government and national congress. At the national level, there have been a number of congressional inquiries into various separate corruption allegations that have implicated legislators and political parties in Brazil.¹² Whilst these public scandals have not resulted in any convictions to date, they have produced considerable publicity, debate, and political upheaval. As a result, the awareness about the scourge of domestic corruption in Brazil is generally high. Moreover, the lead examiners detected a determination and resolve on the part of law enforcement authorities and the public administration to stamp out corruption within the public sector in Brazil. It was also evident to the lead examiners that the public reputation of the Federal Police to combat domestic corruption has been enhanced by recent successes in detecting and investigating a number of high profile corruption cases, including a major scandal that erupted in the week before the on-site visit.

13. Despite the growing strength of awareness and commitment to combating domestic corruption in Brazil, this has not so far extended to foreign bribery where further efforts were still required to strengthen the awareness, detection, and prevention of the offence and other obligations under the Convention and Revised Recommendation. Indeed, the 2006 Transparency International Bribe Payers Index, which measures perceptions of the propensity of countries' companies to bribe when operating abroad, has ranked the perception of the propensity for such bribery by Brazilian companies as very high: Brazil was ranked 23rd out of the 30 countries included in the survey.¹³ Accordingly, with the growth in Brazilian exports, and increased trade by Brazilian citizens and companies in markets where bribery is an acknowledged risk, the need to address issues of foreign bribery has become more urgent. This challenge is a focal point of this report.

¹² These have been widely reported in the media. In one major case, a congressional inquiry in 2005 investigated allegations that a political party had paid bribes to certain legislators to entice them to join the governing coalition. In 2006 another high profile congressional inquiry examined the so-called "Sanguessugas" case, into bribe payments allegedly made by a company to a number of legislators with the view to influencing the Federal Budget.

¹³ Brazil obtained a score of 5.65 out of a possible 10 in the 2006 survey, indicating a strong perception that Brazil had a propensity for foreign bribe paying. A perfect score in the ranking is 10, which would indicate that propensity to pay bribes is perceived as zero. The TI 2006 Bribe Payers Index is based on the responses of 11 232 business executives from companies in 125 countries. The executives were asked about the propensity of foreign firms that do business in their country to pay bribes or to make undocumented extra payments. The survey was anonymous.

e. Cases involving the bribery of foreign public officials

(i) Investigations, prosecutions and convictions

14. Brazil, at the time of the on-site visit, had not recorded any convictions for the offence of bribery of foreign public officials in the context of international business transactions. The Brazilian Authorities informed the lead examiners that there were two cases, potentially involving foreign bribery, which were under preliminary investigation. The first was initiated following the publication of bribery allegations against a Brazilian company in a foreign newspaper. The Federal Police indicated that they had liaised with their law enforcement counterparts in the country concerned but, at the time of the on-site visit, they had not received any information that would give grounds to broaden or even continue the investigation. The second case is at a very preliminary stage and involves the investigation of particular fund transfers, allegedly by Brazilian business interests, to accounts controlled by public officials in a foreign country. The information in this case arose in the context of another criminal investigation.

15. The lead examiners also asked law enforcement authorities about two other separate foreign bribery allegations reported in the media involving Brazilian companies. Again, the Federal Police stated that they had conducted only preliminary inquiries (and not a formal police investigation) into both matters, but these had been concluded due to insufficient evidence to investigate the allegations further. Moreover, it was indicated that the grounds did not exist to provide an adequate basis for initiating a request for mutual legal assistance from the countries concerned. It was also clear from remarks made by the Federal Police and Federal Prosecutors present at the on-site visit that prosecutors had not made use of their prerogative to request opening of investigations by the police into any of the four abovementioned matters.

16. The lead examiners were encouraged to learn that all of the reported allegations of foreign bribery had been the subject of initial inquiries conducted by the Federal Police. Nevertheless, the fact that these inquiries had not advanced beyond the preliminary stage did give rise to other concerns, including: (1) whether a more proactive and comprehensive approach in initiating investigations of potential foreign bribery allegations is required by law enforcement authorities; and (2) whether the resources dedicated to foreign bribery investigations and training within the Federal Police, State Police and Ministério Público Federal are sufficient for the detection, investigation and successful prosecution of foreign bribery offences. These issues are considered further in this Report, principally in section C.a and section C.b of this report.

(ii) Independent Inquiry Committee into the UN Oil-For-Food Programme

17. The Independent Inquiry Committee into the United Nations Oil-for-Food Programme (IIC) was established in April 2004 through the appointment by the United Nations (UN) Secretary-General of an independent, high-level inquiry to investigate and report on the administration and management of the UN Oil-for-food Programme. On 27 October 2005, the IIC published its fifth and final substantive report (“IIC Report”). The IIC Report focused on the transactions between the former Iraqi government and companies and individuals to whom it chose to sell oil and from whom it bought humanitarian goods. The IIC Report documented a complicated and vast network of alleged illicit surcharges paid to the Iraqi government in connection with oil contracts. It also documented the payment of alleged kickbacks in the form of after-sales-service fees and inland transportation fees in relation to contracts for the sale of humanitarian goods to the Iraqi government. Companies from many countries, including Brazil, are referred to in the IIC Report, although it is not alleged that all the companies mentioned have been involved or implicated in corrupt transactions. Following the publication of the IIC Report, the UN Secretary-General issued a statement calling on national authorities to take steps to prevent the recurrence of the companies’ alleged activities documented in the Report, and take action, where appropriate, against companies falling within

their jurisdiction. The IIC Report only describes the alleged activities, and does not presuppose how national laws would apply to them.

18. With respect to the allegations in the IIC Report concerning Brazilian interests, the lead examiners were informed that the Federal Police had considered the IIC Report and that Brazilian authorities had made initial contact with the IIC. However, it emerged during the on-site visit that law enforcement authorities had not yet formally approached the United Nations to fully avail themselves of the relevant information gathered by the IIC. Moreover, the prosecution authorities had not actively sought to initiate and assist the Federal Police with its inquiries. Nevertheless, the Federal Police did inform the lead examiners that investigations are being conducted and a further formal approach to the United Nations was imminent. After the on-site visit, the Brazilian authorities confirmed that there are in fact four cases under investigation by the Federal Police (related to the IIC Report) and these are being monitored by the Public Prosecutor's Office. The Working Group on Bribery was further informed that the Brazilian Government had formally requested access to the IIC files and documents regarding the four Brazilian companies mentioned in the report. The IIC presented a questionnaire and a document with rules of access, which, as of December 2007, were in the process of being analysed by the Brazilian authorities. The factual circumstances and details of the cases being investigated remain confidential.

3. Outline of Report

19. This Report is structured in four parts. Part A provides background information on the Brazilian economic, legal, and political systems. Part B examines prevention, detection and awareness of foreign bribery in Brazil. Part C develops issues related to the investigation, prosecution and sanctioning of foreign bribery and related offences. Part D sets out the recommendations of the Working Group and identifies issues for follow-up.

B. PREVENTION, DETECTION AND AWARENESS OF FOREIGN BRIBERY

1. General Efforts to Raise Awareness

a. Government initiatives

(i) Within the government and public agencies

20. Brazilian public officials participating in the on-site visit all appeared broadly aware of the OECD Anti-Bribery Convention and the criminalisation by Brazilian law of the foreign bribery offence. As explained by several of these participants, a coordinating role has been taken by the Office of the Comptroller General (*Controladoria-Geral da União*, hereinafter the CGU) in raising awareness on this matter.

21. The CGU was created by Law 10 683 of 28 May 2003 as the central agency for internal control and audit of public bodies. More recently, the Secretariat for the Prevention of Corruption and Strategic Information was appointed in January 2006 as the unit responsible within the CGU for developing actions to promote transparency and prevent corruption, and for coordinating specific activities relating to the implementation of international conventions on bribery, notably the OAS, OECD and UN instruments. In 2007, the CGU developed a website specifically focused on the Convention and the responsibilities of

different stakeholders in this regard, including Brazilian public servants, and states and municipalities. The CGU's website outlines the role of Brazilian officials in promoting the Convention among the public and private sectors, reinforcing administrative measures to fight foreign bribery, and preventing and identifying illicit acts of foreign bribery. Because of the federal system of government in place in Brazil, states and municipalities are also informed, via this website, of their responsibilities in promoting the fight against foreign bribery and ensuring compliance with the Convention. In this respect, attention is drawn to the state and municipal governments' role in, *inter alia*, raising awareness of the Convention in the state and municipal spheres, collaborating with the federal government to implement the Convention standards, and including such themes as transparency, ethics and the fight against bribery in training provided to state and municipal public officials.¹⁴ In 2007, the CGU also produced a leaflet¹⁵ and a booklet¹⁶ on the Convention, defining foreign bribery and the legal consequences for Brazilian nationals engaging in such illicit conduct. Following the on-site visit the CGU, in cooperation with the Ministry of Planning and the European Union organised the Brazil-Europe Seminar for Corruption Prevention for the benefit of Brazilian public officials involved in the fight against corruption, including state and municipal officials. The lead examiners have been informed that the Convention formed part of the discussion at the Seminar.

22. In their Phase 2 Responses and during the on-site visit, the Brazilian authorities referred repeatedly to the development of a National Strategy to Fight Corruption and Money Laundering (*Estratégia Nacional de Combate à Corrupção e a Lavagem de Dinheiro*, hereinafter ENCCLA) as a tool for raising awareness on corruption issues. ENCCLA was first set up in December 2003 with the objective of coordinating the different bodies involved in developing policies to fight money laundering. In 2006, combating corruption was added to the ENCCLA goals. ENCCLA now brings together 57 bodies, including law enforcement authorities, the judiciary, and relevant Ministries and agencies, and coordinates action to fight corruption and money laundering. This includes the development of goals each year, and the designation of relevant bodies responsible for coordinating action in order to meet these goals. Numerous references were made to ENCCLA and its success in elaborating coordinated responses to challenges posed by the fight against money laundering and bribery. In addition, Phase 2 Responses as well as participants in the on-site visit explained that, in the context of ENCCLA, the National Programme of Capacity Building and Training for the Combating of Money Laundering (*Programa Nacional de Capacitação e Treinamento para o Combate à Lavagem de Dinheiro*, hereinafter PNLD) has been developed to provide training to public officials and other entities involved in combating money laundering. Brazilian authorities explained that, as of 2007, the PNLD also aims to address issues of corruption. Although both ENCCLA and the PNLD appear as efficient initiatives to raise awareness and provide training on money laundering and corruption issues, on closer scrutiny, there is little if any focus on foreign bribery. For instance, none of the 2007 ENCCLA goals concern the fight against foreign bribery, whether in the context of the OECD Convention or other international instruments to fight corruption, and the PNLD has yet to address corruption issues. Hence, the resources and coordinated efforts of such bodies and programmes could usefully be further developed to also include foreign bribery issues. After the on-site visit, the Brazilian authorities sought to explain that although ENCCLA had not yet developed specific goals related to the fight against foreign bribery, ENCCLA was nonetheless an important forum to promote the strengthening of instruments and for the coordination of action to combat corruption in all its forms. Furthermore, in a new development affecting the PNLD, the CGU is preparing new subjects for courses in 2008 that will cover domestic and foreign bribery, including the Convention.

¹⁴ See the CGU website on the OECD Convention at www.cgu.gov.br/ocde.

¹⁵ The leaflet is available at www.cgu.gov.br/ocde/publicacoes/arquivos/folderConvencaoOCDE.pdf.

¹⁶ The booklet is available at www.cgu.gov.br/ocde/publicacoes/arquivos/Cartilha.pdf.

(ii) *Within the private sector*

23. There has been few awareness raising activities targeted at the private sector. Among government agencies, the CGU has been the most active in disseminating information on the foreign bribery offence, through its website and distribution of its leaflet and booklet. As mentioned above, the website developed by the CGU is also addressed to private sector stakeholders concerned by the entry into force of the law criminalising foreign bribery. On these pages, the CGU recommends to Brazilian companies that they (i) adhere to codes of best corporate practices; (ii) promote the development of internal company controls; (iii) offer training on issues related to corruption; (iv) develop integrity programmes and codes of conduct for employees; and (v) ensure that all employees, as well as representatives, agents or other companies active on their behalf do not engage in foreign bribery.¹⁷ Recommendations are also formulated for accountants and lawyers, notably regarding bookkeeping obligations of companies, sanctioning of false accounting offences, auditor independence, and, more generally, awareness raising and dissemination of information on the foreign bribery offence. In addition to its website, the CGU reported in the Phase 2 Responses that it had been liaising with the Ethos Institute – Institute of Companies and Social Responsibility¹⁸ to support a “Clean Company” campaign and a Corporate Pact for Integrity against Corruption, as well as with the non-governmental organisation, Transparencia Brasil, to develop a methodology to map corruption risk. Discussions with participants from these organisations during the on-site visit indicated that these initiatives were targeted at issues of domestic bribery in Brazil.

24. The Ministry of External Relations, through its website portal, BrazilTradeNet, aims to provide “the biggest and most complete trade information network of Latin America”. BrazilTradeNet provides a range of publications, including country studies designed to help Brazilian exporters and investors in their operations abroad, and guides to exporters. These publications, while they include reference to relevant legislation for exporters, fail to refer to the entry into force of the foreign bribery offence in the Brazilian legislation.¹⁹ (See also below section 3(b) on actions taken by foreign diplomatic representations to prevent foreign bribery.)

25. The Ministry of Development, Industry and Trade has also developed a Portal of Brazilian Exporters on the web, with the aim of providing to Brazilian entrepreneurs and exporters, in a clear, simple and direct way, basic information on the subject of exportation. The objective is to inform entrepreneurs and exporters of the main terms, mechanisms, legislation, events and activities that can help them in the process of developing new markets abroad. On this Portal, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions appears on the list of legislation available on the website, but there does not appear to be any reference or more practical illustrations of the obligations this entails for Brazilian companies operating abroad. The Ministry has not undertaken other awareness raising or training efforts targeted at Brazilian companies operating abroad.

26. Overall, as indicated by the numerous initiatives to prevent and deter domestic corruption, and as expressed by several representatives of civil society, priorities in combating corruption in Brazil are directed to the internal environment rather than the external. This is due to the fact that Brazil considers

¹⁷ For the detailed list of the seven recommendations put to companies, see the CGU webpage at <http://www.cgu.gov.br/ocde/obrigacoes/empresarios/index.asp>.

¹⁸ The Ethos Institute defines itself as a non-governmental organisation created with the mission of mobilising, sensitising and helping companies to manage their businesses in a socially responsible manner. Its 907 members comprise companies of different segments and sizes, which account for annual revenues of approximately 30% of the Brazilian GDP and employ roughly 1.2 million people. Source: www.ethos.org.br.

¹⁹ See www.braziltradenet.gov.br.

that the problems it faces concerning its internal corruption are incomparably weightier than the possible payment by Brazilian firms of bribes to foreign public officials.

27. Evidently, some efforts have been made, notably by the CGU, to develop websites and publications on the issue of foreign bribery. However a more proactive approach needs to be taken by the Brazilian authorities, including those Ministries and agencies directly involved with Brazilian companies operating abroad, and in coordination with relevant business organisations. More active dissemination of information, through the organisation of seminars or conferences and the provision of practical training, could usefully contribute to raising awareness of the foreign bribery offence among Brazilian companies, including small and medium size enterprises (SMEs). Indeed, and despite the existence of the above mentioned websites, representatives of companies interviewed during the on-site visit were not aware of any public initiative to circulate information on the foreign bribery offence and its implications for companies. Representatives of business organisations as well as lawyers expressed the view that there was little awareness of the foreign bribery offence among Brazilian SMEs. Representatives of non-governmental organisations felt that it would not be difficult for the government to promote initiatives aimed at informing exporters. According to the Ministry of Development, Industry and Trade, in 2005, there were about 17 500 Brazilian exporting companies. Of these, approximately 3 600 were large firms, answering for 89% of the total value of exports. Considering that 73% of all exports originate from corporations from only six states (São Paulo, Minas Gerais, Rio Grande Sul, Paraná, Rio de Janeiro and Bahia), a targeted approach to companies and business organisations in these states would be fairly easy and efficient to ensure broad awareness of the issue among a majority of Brazilian businesses concerned. In an initiative following the on-site visit, the CGU has sought to identify the main export enterprises, in consultation with the Ministry of Development, Industry and Trade, with the view to raising awareness about the Convention amongst exporting companies.

b. Private sector initiatives

(i) Corporations

28. Although the Brazilian on-site visit was characterised overall by a high level of attendance, there were only two Brazilian large multinational companies, and no SMEs attending the panel devoted to discussions with the private sector. Hence, it was difficult to obtain a comprehensive view of how foreign bribery is viewed and dealt with by Brazilian companies in general.

29. Nevertheless, research into the codes of conduct of Brazilian companies, as well as the views of those corporations present provide a picture of the Brazilian corporate approach to issues of foreign bribery. As is the case in many countries party to the Anti-Bribery Convention, an increasing number of Brazilian companies (large corporations essentially) are adopting corporate codes of conduct. These codes or principles of conduct cover various ethical issues ranging from social to environmental issues, as well as conduct of business. A preliminary review of codes available to the examining team indicates that the issue of corruption is covered in most codes, through a general statement emphasising fairness and honesty with regard to competition practices, and most codes explicitly prohibit the offering or receiving of gifts of over a certain value. Several codes also explicitly prohibit bribery of public officials. Although, the geographical scope of application of these ethical principles is not always specified, most of the codes under review indicate in general terms that the principles are intended to apply to international business, and to anyone representing the company, including suppliers, service providers, customers and partners. The issue of bribes paid through intermediaries is not expressly identified, nor are bribes paid to third parties referred to. The codes do not generally address either the behaviour of foreign agents, representatives and subsidiaries.

30. Beyond the good image that the enterprise may gain from adopting codes of ethics, the question arises of the real value given to these principles inside the company. Both companies present at the on-site visit outlined the importance of accompanying such codes with auditing and training measures. Indeed, the existence of efficient control mechanisms (internal and/or external) is usually an indication of the importance given to the code in the company. Most codes reviewed provide for a “controlling body” charged with the implementation of the code of conduct. However, the procedures involved in implementing and updating codes are generally stated in broad terms and are not always clear. Those Brazilian companies listed on the New-York Stock Exchange also provide for a “Fiscal Committee” as an independent body performing the role of the audit committee. Some codes also provide for the prevention of prohibited conduct by stating that in case of doubt the appropriate “controlling body” must be contacted. However, encouraging employees to report violations of the code may be thwarted if appropriate protection for whistleblowers does not exist (see section 2(b) below on whistleblower protection).

(ii) *Business organisations*

31. As noted earlier, responses in the Phase 2 questionnaires indicated that awareness raising activities had been undertaken by the Ethos Institute. The Ethos Institute is involved, along with other international and government organisations, in the “Clean Company” campaign. In addition, the Ethos Institute published in June 2006 the “Essential Criteria for Corporate Social Responsibility and its Mechanisms of Induction in Brazil”, which incorporate criteria for combating corruption. Although the Anti-Bribery Convention is included as reference legislation, and the OECD Guidelines for Multinational Enterprises are also part of the package of material circulated, both of these initiatives are essentially focused on issues of domestic bribery.

32. Representatives of business organisations present at the on-site visit acknowledged that the issue of foreign bribery is becoming increasingly relevant for Brazilian companies, as Brazilian exports and investments abroad increase, but explained that demands for training and information from stakeholder companies still relate essentially to issues of domestic corruption. They also expressed the view that awareness of foreign bribery and its criminalisation in Brazilian law varied widely between large companies and SMEs, but also pointed out that, within large corporations, while the legal departments and senior management may have knowledge of the foreign bribery offence and its legal consequences, it is unlikely that other employees are equally aware. Brazil has informed the lead examiners of some additional awareness raising activities (covering the Convention) organised for the benefit of the private sector since the on-site visit, these have included: a seminar organised by the Ethos Institute in São Paulo attended by members of the local Confederation of Industry (FIESP); a seminar promoted by the Federation of Industries of the State of Rio de Janeiro; a major conference promoted by the Federation of Industries of the State of Paraná (FIEP) and the Ministry of Development, Industry and Trade; and an initiative by the CGU to seek to establish partnerships with other Federations of Industries within Brazil.

Commentary:

The lead examiners welcome recent efforts, particularly by the CGU, to improve awareness of the foreign bribery offence, including through the development of the CGU website and publications. However, they consider that significant additional efforts are still required in terms of awareness raising and prevention activities for the public and private sectors.

With respect to government agencies and other public institutions, the lead examiners recommend that Brazil pursue its efforts to raise awareness of and provide training on the foreign bribery offence, particularly among staff of agencies involved with Brazilian companies operating abroad. These agencies and institutions should be made fully aware of all important aspects of the foreign bribery offence under Brazilian law, including its

extraterritorial application, so as to be able to detect and report instances of foreign bribery they may come across in the course of their work, and to provide advice and assistance to Brazilian companies.

With respect to awareness raising in the private sector, the lead examiners recommend that Brazil significantly step up its efforts to raise awareness among corporations, including small and medium size enterprises, in cooperation with the professional organisations concerned. In particular, given the important role played by the Ministry of Development, Industry and Trade and the Ministry of External Affairs in promoting foreign trade and advising Brazilian companies active in foreign markets, appropriate measures should be taken to improve their capacity to provide advice and assistance to companies concerning the prevention of foreign bribery.

2. Reporting Foreign Bribery Offences and Whistleblower Protection

a. Reporting crimes

33. 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. As regards foreign bribery offences, these would be reported most probably to law enforcement authorities directly, whether referred by private citizens or by public 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. (See also section C(1)(b)(i) on commencement of proceedings and potential sources of detection of foreign bribery.)

34. As explained in the Phase 2 Responses, corruption in the federal government 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.

b. Whistleblower protection

35. As indicated in Responses to the Phase 2 questionnaires and confirmed during the on-site visit, there is no whistleblower protection legislation in Brazil which would cover reporting of instances of foreign bribery by Brazilian nationals, beyond the usual labour law protections in place.²⁰ This may be unfortunate considering that several law enforcement officials confirmed during the on-site visit that employees could be a very useful source for reporting illegal practices within corporations, but would rarely be willing to do so if they were still employed by the company, given the risks of retaliation. This view was confirmed by representatives of non-governmental organisations who expressed the view that whistleblowing had little chance of prospering in Brazil, since whistleblowers would not trust the law to protect them.

36. The only text which concerns whistleblowers to some extent is article 55 of Law 8 443 of 16 July 1992, which establishes that reports made to the Brazilian Court of Audit (TCU) will be treated as confidential, until final decision on the matter. However, the scope of this article is very narrow and would rarely if ever cover reporting of foreign bribery instances: it applies only to reports made to the TCU (or

²⁰ If whistleblowers become witnesses in criminal proceedings, and provided certain other criteria are met, they can then be protected by witness protection measures (see section C(1)(b)(ii) on investigative techniques).

Federal Court of Accounts) and not to law enforcement authorities, and concerns reports regarding a limited number of offences involving defrauding of the Brazilian state. At the time of the on-site visit, a Bill was also being presented to Parliament with a view to protecting anyone reporting irregular or illegal acts to the Federal Court of Accounts. However, it would appear that, like Law 8 443 of 1992, it would not cover reporting of foreign bribery instances, as it concerns only irregularities committed by an authority managing Brazilian public funds. Separately, arising from discussions pursuant to ENCCLA, the Brazilian authorities have indicated that a Bill is being drafted by the Executive Branch which relates to the protection of whistleblowers, and consultations have occurred within the public administration. Details, including whether the Bill will cover reports of foreign bribery instances, have not yet been disclosed. The Bill is expected to be completed by the end of 2007.

Commentary:

Given the important role that whistleblowers can play in detecting and reporting suspected foreign bribery instances committed by corporations, the lead examiners recommend that Brazil adopt comprehensive measures to protect whistleblowers in order to encourage those employees to report suspected cases of foreign bribery without fear of retaliation.

3. Detecting and Reporting Foreign Bribery in the Public Sector

a. General reporting procedures

37. Article 116(VI) of Law 8 112 of 11 December 1990 places a duty on public officials to inform their hierarchy of irregularities they become aware of as a result of their office. Article 127 of the Law states the range of disciplinary sanctions which may be imposed for failure to comply with any provision of the Law, including reporting obligations. These sanctions range from a warning to dismissal from the official position held. Clause XIV(m) of Decree 1 171 of 22 June 1994 further specifies, for civil servants of the federal executive, that it is their duty to communicate immediately to their superior any act or fact that runs against the public interest, demanding that appropriate measures be taken. In addition, the CGU website on the Anti-Bribery Convention recalls the obligation incumbent upon civil servants to “detect and denounce irregular conduct to avoid illicit transactions and non official payments.”²¹ There is no provision in law or elsewhere relating to reporting directly to law enforcement authorities.

38. Public officials at the on-site visit appeared aware of this reporting obligation. They outlined that, under the law, they were obliged to report to their hierarchy, but that, as private citizens, they could report directly to law enforcement authorities. In practice, it appears that most reports made by Brazilian public officials concern common crimes committed by other Brazilian civil servants, and very rarely by private individuals or companies. As of the time of this review, Brazilian authorities were not aware of any report made by a Brazilian public official concerning suspicions of foreign bribe payments by a Brazilian national.

Commentary:

The lead examiners recommend that Brazil issue regular reminders to public officials concerning their obligation to report suspected foreign bribery instances which they may uncover in the course of their work, and encourage and facilitate such reporting.

²¹ See <http://www.cgu.gov.br/ocde/obrigacoes/funcionariosPublicos/index.asp> on obligations of civil servants in the context of the fight against foreign bribery.

b. Foreign diplomatic representations

(i) Awareness raising efforts

39. As regards action to raise awareness of staff in Brazilian diplomatic representations, the Ministry of External Relations reported that a circular had been sent in May 2007 to all embassies and posts abroad in which the Ministry recalls the commitment of the Brazilian State to implement the OECD Convention on Bribery of Foreign Public Officials in International Business Transactions. The circular highlights the provisions of the Convention and explains the work of the OECD Working Group on Bribery, as well as the methodology of evaluations, including Brazil's Phase 1 and Phase 2 processes. Representatives of the Ministry of External Relations also indicated that, as of the last quarter of 2007, Convention issues would become a feature of the ethics module included in all training of diplomats.

40. With regard to disseminating information to the private sector related to the foreign bribery offence and its legal consequences under Brazilian law, the above mentioned circular instructs all postings to adopt the necessary measures to raise awareness about, and commitment to, the Convention, among Brazilian individuals and companies within their jurisdiction. Representatives of companies present during the on-site visit were not aware of this initiative on the part of the Ministry, although this was probably due to the fact that this circular had been only recently issued and had not had time to reach all concerned parties, including private sector entities.

41. Finally, as pointed out earlier, the Ministry of External Relations maintains a comprehensive website for Brazilian exporters and investors, BrazilTradeNet, which aims to provide all relevant information for Brazilian businesses intending to expand abroad. Yet, at the time of the on-site visit, reference to the foreign bribery offence and its criminalisation under Brazilian law was not apparent to the lead examiners in the manuals for exporters, nor did it appear that any of the country guides referred to the risk of corruption and the legal consequences faced by any Brazilian national engaging in such conduct in the context of an international business transaction. The Brazilian authorities have subsequently explained that the BrazilTradeNet website does provide information on government efforts to combat corruption in international business transactions, including references to the Convention. The information however, is provided through a privileged location on the website for the benefit of trading entities. Moreover, it was indicated that the lack of explicit anti-corruption information in the individual country guides was intentional, so as not to unintentionally accuse other states of presenting a potential corruption risk for exporters.

(ii) Detection of foreign bribery and duty to report

42. As is the case with all other Brazilian civil servants, officials from the Ministry of External Relations are subject to the same reporting obligations as defined under article 116(VI) of Law 8 112 of 11 December 1990, and clause XIV(m) of Decree 1 171 of 22 June 1994.

43. The Brazilian authorities have confirmed that the abovementioned circular issued by the Ministry of External Relations to all postings abroad (relating to the Anti-Bribery Convention) does remind staff that, according to law, all individuals must report any crime they are aware of. Furthermore, the Ministry of External Relations has included in its training programme for diplomats and officials, a topic covering the Convention which makes specific reference to the reporting obligation. The Ministry of External Relations, through its circular, has instructed each embassy and other postings to disseminate information on the Convention to Brazilian companies and citizens operating abroad. In that regard, authorities in Brazil have informed the lead examiners that the Ministry has left it to each of the postings to determine the most suitable way of: (1) raising awareness of Brazilian companies and citizens about the Convention; and (2) encouraging Brazilian companies confronted with bribe solicitations, or with the irregular

behaviour of less scrupulous competitors, to report such offences to their Brazilian embassy. The Brazilian Embassy in Guiné-Bissau was cited as an example of one of the postings that has already taken steps to raise awareness of Brazilian companies about the Convention and specifically, the application of Brazilian laws prohibiting bribery of a foreign public official in international business transactions.

Commentary:

Given the important role that foreign diplomatic representations may play in interacting with Brazilian companies operating abroad, both in terms of awareness raising as well as reporting of suspicions of foreign bribery, the lead examiners recommend that Brazil:

- continue to carry out awareness raising activities, for instance through circulars, newsletters, seminars and training, for staff in overseas posts, particularly those posted in sensitive geographic areas, on all important aspects of the foreign bribery offence under Brazilian law;***
- issue regular reminders to foreign representations on their obligation to report suspicions of foreign bribery, and encourage and facilitate such reporting; and***
- ensure that foreign diplomatic representations, in their contacts with Brazilian individuals and businesses operating abroad (i) disseminate information on the corruption risks in their country of operation and the legal consequences of a foreign bribery offence under Brazilian law, and (ii) encourage Brazilian individuals and businesses to report suspected instances of foreign bribery to appropriate Brazilian authorities.***

c. Officially supported export credits

(i) Awareness raising efforts

44. The Brazilian institution responsible for granting export credits is the Brazilian Development Bank (BNDES), bound to the Ministry of Development, Industry and Foreign Trade. BNDES has two credit lines to finance exports: (i) support for the exporting of goods and services, and (ii) support for the internationalisation of enterprises. The purpose of the credit line to support the exporting of goods and services is to provide credit to exporters. Between 2000 and 2006, disbursements by BNDES to support exports have more than doubled, from USD 3 000 million to over USD 6 300 million). The credit line to support the internationalisation of enterprises aims at encouraging the insertion and strengthening of Brazilian national capital companies in the international market by supporting investments or projects to be carried out abroad.

45. Brazil is not a member of the OECD Working Party on Export Credit and Credit Guarantees (ECG), and, consequently, has not had to comply with the Action Statement on Bribery and Officially Supported Export Credits, including measures to disseminate information on the foreign bribery offence, and to detect and sanction applicants involved in foreign bribery. As of the time of this review, no formal steps had been taken by Brazil to adhere to the new 2006 OECD Council Recommendation on Bribery and Officially Supported Credits, as provided in Article 3 of this Recommendation, which invites “Parties to the Anti-Bribery Convention which are not OECD members to adhere to this Recommendation.”²²

²²

In December 2006, the Action Statement became the OECD Council Recommendation on Bribery and Officially Supported Export Credits, with enhanced provisions to deter briber in officially supported export credits.

46. As of the time of the review, no specific action had been undertaken within BNDES to raise awareness of staff and applicants regarding foreign bribery, its legal consequences for Brazilian nationals engaging in it, and the need to detect and report it (see also section (ii) below on detection and reporting of foreign bribery within BNDES). However, in May 2007, the Superintendent of the Area of Foreign Trade Division²³ decided, as per Service Instruction 02/2007 of 22 May 2007 to create a Working Group within BNDES to “study measures aiming at the adaptation of BNDES’s financing lines to exportations to the provisions of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.” According to representatives of BNDES present at the on-site visit, this Working Group should, *inter alia*, develop proposals relating to training of BNDES officials and dissemination of information on the Convention for applicants, to be submitted to BNDES’s Administration. The lead examiners were also informed by the Brazilian authorities, after the on-site visit, that the BNDES has been warning clients about the Convention during the many events promoted to export enterprises.

(ii) *Detection of foreign bribery and duty to report*

47. As noted above, Brazil is not a member of the ECG, and has therefore not undertaken any commitment under the OECD Recommendation on Bribery and Officially Supported Credits to adopt measures to detect, report and sanction occurrences of foreign bribery when granting export credit support.

48. Indeed, as confirmed in the Phase 2 Responses and by representatives of BNDES during the on-site visit, as of the time of this review, no specific measures have been taken by BNDES to (i) verify that applicants or anyone acting on their behalf have not engaged and will not engage in foreign bribery, (ii) provide training to BNDES staff to ensure they are able to verify and possibly detect instances of foreign bribery committed by applicants, and (iii) suspend or withdraw support where there is suspicion or evidence of bribery (see also section C(4)(b)(i) below on sanctions in the context of officially supported export credits). Representatives of BNDES indicated that these matters could be considered by the Working Group established in May 2007, which is due to present a set of proposals to the BNDES’s Administration (as per Service Instruction 02/2007 of 22 May 2007). The lead examiners welcomed the information provided by the Brazilian authorities (after the on-site visit) that the BNDES is considering proposals to amend the conditions and procedures for the grant of officially supported export credits with the view to strengthening its efforts to detect, prevent and combat foreign bribery

49. As regards reporting obligations by BNDES staff, BNDES’s employees are generally governed by the private sector labour laws, which do not include general reporting obligations of irregularities or illegalities. However, item 5.1(f) of the Guidelines for Personnel does include an obligation to “report to the superior authority irregularities that they get notion of.” There also exists a more specific obligation under Resolution 773/91 of 25 November 1991 to report occurrences of wrongful use of public resources granted by BNDES.

Commentary:

The lead examiners welcome the initiative to set up within BNDES a Working Group with the aim of adapting BNDES’s procedures to provisions of the OECD Anti-Bribery Convention. In this respect, the lead examiners recommend that Brazil also take note of provisions in the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits, and consider adhering to it, as provided in Article 3 of this Recommendation.

²³

The Brazilian authorities have explained that the “Superintendent” is the general-manager of the Export Credit Division of BNDES, who is responsible for submitting export credit transactions to the Board of Directors for approval. The “Superintendent” is the qualified person to recommend the necessary adjustments in the credit facilities to the Board of Directors.

Generally, with respect to combating foreign bribery in officially supported export credits, the lead examiners recommend that Brazil:

- raise awareness of the foreign bribery offence among the BNDES staff and among applicants requesting export credit support;*
- ensure that employees of BNDES are provided adequate training on due diligence procedures to detect foreign bribery, are fully aware of their obligation to report foreign bribery instances they may come across in the course of their work, and encourage and facilitate such reporting;*
- insert express references to the foreign bribery offence and its legal consequences under Brazilian law in BNDES's contracts; and*
- take appropriate measures to ensure that applicants for export credit support, or anyone acting on their behalf, have not been engaged in, and will not engage in, foreign bribery.*

d. Official development assistance

50. Brazil does not provide official development assistance, as defined by the OECD Development Assistance Committee.

51. However, since the beginning of the 2000s, the BNDES has been financing infrastructure projects in several Latin-American and African countries, with the contracts being adjudicated to Brazilian contractors. The financial framework is as follows: the contracts are paid with commercial credits owed to Brazil by the countries where the infrastructure projects are to be carried out. The firms are paid in Brazilian currency (Real) locally in Brazil. Upon payment, the corresponding credits are cancelled. Thus, the foreign country is not directly financed, and BNDES acts as a financial agent. Brazilian exports for infrastructure projects in other countries represented disbursements of USD 882 million in the period between 2004 and 2006. As confirmed by BNDES, and as it is the case for all other BNDES funding of exports and investments abroad, there are no specific anticorruption clauses in BNDES's contracts to finance these infrastructure projects.

Commentary:

The lead examiners recommend that Brazil promptly undertake awareness raising activities, both internally within BNDES and with regard to potential contractors, to inform and prevent occurrences of foreign bribery in its contracts for infrastructure projects, and in any future aid funded procurement contracts.

In addition to including anti-corruption clauses in its contracts for financing infrastructure projects abroad, the lead examiners recommend that BNDES put in place effective means for detecting instances of foreign bribery by contractors, establish procedures to be followed by employees for reporting credible information about foreign bribery offences that they may uncover in the course of performing their duties, and encourage and facilitate such reporting.

4. The Tax Administration

a. Tax treatment of bribes

52. The applicable taxation laws in Brazil do not expressly deny the tax deductibility of bribes to foreign public officials. However, the Brazilian tax authorities have strongly maintained that law and practice in Brazil do not allow the deductibility of bribes in any circumstances. The non tax deductibility of bribes was already identified in the Phase 1 evaluation of Brazil as a potential issue for concern. As it did at the time of the Phase 1, Brazil asserts in its Phase 2 Responses that “the impossibility of deducting expenses related to the commitment of illegal acts is an indisputable matter in Brazil.” Representatives of the Brazilian Internal Revenue Secretariat (Secretaria de Receita Federal – SRF) interviewed during the on-site visit were confident that any payment which constitutes an illegal payment, including foreign bribe payment, would never be tax deductible. However, there is no rule stating this explicitly.

53. Brazil refers to Decree 3 000 of 26 March 1999 as the relevant tax law on this matter. There is no reference in any way to the legality of expenses under criminal law as a criterion for non deductibility. Instead, article 299 of the Decree (see Appendix 3) lays out the criteria which must be met for an expense to qualify as an “operational expense”, eligible for tax deductibility:

- Article 299 states that operational expenses are those “needed to the company’s activities and the maintenance of the corresponding producing source.” There is therefore concern that bribe payments may fulfil this criterion because a bribe to a foreign public official could be considered necessary to maintaining a company’s activities and resources.
- Article 299(1) further states that these expenses must be paid to “carry out the transactions or operations required by the company’s activities.” There is concern that again, a bribe payment in an international business transaction could be considered as required if it could be established that the payment of a bribe was necessary to carry out business.
- Article 299(2) specifies that the operational expenses admitted are “the usual and ordinary ones in the kind of transactions, operations or activities of the company”. Although this criterion provides a safeguard against deducting unusual expenses, there is concern that it could be argued that, where bribe payments are a common feature either of the industry the company is active in, or of the foreign market where the company operates, bribe payments are justifiable operational expenses.

54. In addition to the very broad criteria for *prima facie* allowing deductions under article 299, there is no limitation on this criteria which would effectively prevent a tax payer from disguising a bribe payment to a foreign public official as a commission, bonus or gratuity, for which a deduction is denied only under very limited circumstances. Pursuant to article 304 of Decree 3 000 (see Appendix 3) on unjustified payment or payment to unidentified beneficiaries, “amounts paid as commissions, bonuses, gratifications [...] are not deductible where the operation or the cause that gave origin to the income fails to be indicated or where the payment slip fails to name the beneficiary of such income”. Thus the only limits to disguising a bribe to a foreign public official as a commission, bonus or gratuity under article 304 are that the purpose of the commission, bonus or gratuity, and the beneficiary must be identified. In the absence of evidence that the tax authorities systematically verify whether commissions, *etc* paid to agents and intermediaries for their role in business relations with foreign public officials are legitimate, the limits under article 304 do not appear adequate in practice. In addition, it is not even clear that the tax authorities would have the authority to deny such a deduction, if it were determined by the tax authorities that a bribe to a foreign public official were disguised as a commission, *etc*, given the wide scope for deductible

expenses under article 304, and the absence of an express provision denying the deductibility of such bribes (or even illegal payments in general).

55. Finally, Brazil provided in its Phase 2 Responses and during the on-site visit, decisions by the Taxpayers' Council in support of its position. However, where these decisions review whether an expense could indeed be claimed as tax deductible, the Taxpayers' Council reviews these expenses against the criteria set forth in Decree 3 000, and not against any general criterion of legality of the expense under criminal law.

56. The Brazilian tax administration has strongly argued that only licit expenses are capable of being deducted under the tax system and that this position is well understood by tax officials when applying the law.²⁴ At both a policy level and also historically, the Brazilian authorities have explained that an express provision to prohibit the tax deductibility of bribes to foreign public officials or even of payments made in relation to illegal activity generally is unnecessary under the established framework and principles of the Brazilian tax system. In their view, there is no basis at law or in practice for bribes to be considered a regular tax deductible expense. However, this ignores the principle under Article 299 of the Decree that expenses are *prima facie* deductible and that the tax authorities must therefore defend a denial of tax deductibility, not the other way around. Moreover, they state that there have not been any cases which have precluded the right of tax officials conducting audits to comment on expenses that are clearly illicit (such as bribes) and thereby deny deductibility.

57. With regard to the very wide scope for deductions under article 304 of Decree 3 000 for, inter alia, payments including commissions, bonuses and gratuities, the Brazilian tax administration argues that any expense that is related to the payment of a bribe, could not satisfy the requirements of an "operational expense" pursuant to article 299 of Decree 3 000 for the purposes of determining tax deductibility of expenses. Moreover, if in claiming an expense as tax deductible, the tax payer fails to identify the beneficiary or provide supporting documentation, the tax administration states that the taxpayer will not be able to deduct this expense from the taxable income. The tax administration points out that they do have systems in place that enable the legitimacy of payments of commissions, bonuses and gratifications to be checked, based on objective selection criteria for the conduct of audits, and auditing principles that require proof of payment by means of legitimate documentation.

b. Detection and exchange of information by tax authorities

(i) Awareness and training

58. The SRF provides information to and encourages training for its employees. Training for tax inspectors is provided by the Brazilian School of Financial Administration (ESAF), is well developed and targets a very broad number of SRF staff and issues. Some information and training is also provided to tax inspectors in the context of the National Programme against Corruption and Money Laundering (PNLD), but focuses on issues of money laundering. However, awareness raising on the non tax deductibility of foreign bribery, and training to detect foreign bribe payments in tax declarations have not been provided in the context of these courses or information dissemination. In comments provided after the on-site visit, the Brazilian tax authorities have asserted that because the payment of bribes to foreign public officials is well understood by tax officials to constitute an illicit payment (and not capable of being lawfully deducted) a specific training course is unnecessary. In relation to tax manuals, the authorities also argue that no specific treatment is required on this issue as the generally applicable procedures for checking taxpayers' expenses

²⁴ The Brazilian authorities cite article 166, Item II of the Civil Code, and assert that legal acts for illicit purposes are considered null and void for the purposes of the law and it is argued, therefore, cannot be deducted for tax purposes.

remain relevant and these are already the subject of periodic training courses and seminars. The lead examiners remain concerned that Brazil has not expressly communicated to its tax inspectors (through guidelines, tax manuals or training programmes) the non-tax deductibility of bribes in Brazil or the specific need to be attentive to any outflows of money that could represent bribes to foreign public officials.

59. At the time of the on-site visit, the OECD Bribery Awareness Handbook for Tax Examiners had just been circulated by the CGU to the International Unit of the SRF. However, representatives of the SRF present during the on-site visit were from a different unit and not aware of the distribution of this manual.

(ii) *Exchange of information*

Within Brazil

60. Article 198 of the Brazilian Tax Code imposes a general prohibition on SRF to divulge any information obtained for tax assessment purposes. However, this rule is not absolute, and tax information can be requested by certain agencies, notably by judicial authorities (article 198(1)) and the public prosecution (article 8(2) of Complementary law 75/93) in the context of criminal proceedings. Representatives of the public prosecution reported that they did not generally encounter problems in obtaining tax information necessary for the purpose of criminal investigations. Passing of information to the police is not envisaged.

61. The Brazilian authorities indicated that tax officials, like all public officials in Brazil, are required to observe the reporting obligation under Law 8 112 of 11 December 1990 (see section B.3.a of this Report). In addition, tax officials are subject to a more specific obligation which requires them, under certain circumstances, to communicate to the public prosecution facts that could amount to criminal offences against the tax order, against the public administration or that constitute a loss to the Treasury. It does not appear that foreign bribery offences would meet these criteria, as they would rarely, if ever, constitute offences against the Brazilian public administration or involve public moneys.

Internationally

62. As regards sharing of information internationally, information exchange with other tax authorities depends on the existence of double tax treaties, and would be for the use of the treaty partner's authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes covered by the tax treaty concerned. As regards providing tax information to foreign law enforcement authorities, this would have to take place through the use of rogatory letters, in the context of mutual legal assistance requirements. According to most tax treaties, information received by a competent authority from its counterpart may only be used for tax purposes and cannot therefore be reported to law enforcement authorities to counteract bribery. The commentary to the new Article 26 of the OECD Model Tax Convention provides language for Contracting States that may wish "to allow the sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities on certain high priority matters (e.g. to combat money laundering, corruption, terrorist financing).

Commentary

With respect to the tax treatment of bribes to foreign public officials, the lead examiners appreciate the extensive explanations provided by the Brazilian authorities on the functioning of their tax system. However, they continue to have serious concerns that the current tax laws do not clearly prohibit the deductibility of bribes to foreign public officials. In addition, neither awareness raising measures nor secondary material such as circulars or tax manuals reinforce the position of Brazil. Therefore, the lead examiners urgently recommend that Brazil clarify

the prohibition on the deductibility of bribes by introducing an express denial for foreign bribe payments either in the tax legislation or through another appropriate mechanism that is binding and publicly available..

With regard to awareness raising and training, the lead examiners recommend that Brazil expressly communicate to tax inspectors the non-tax deductibility of bribes and the need to be attentive to any outflows of money that could represent bribes to foreign public officials, including commissions, bonuses and gratuities, through the issuance of guidelines or manuals, and training programmes. In this respect, the lead examiners welcome the CGU's initiative to circulate the OECD Bribery Awareness Handbook for Tax Examiners to the SRF, and recommend its broad dissemination among tax inspectors.

5. Accounting and Auditing

a. Awareness raising efforts

63. The accounting and auditing profession in Brazil has not engaged in any specific awareness-raising with regard to the issue of foreign bribery and the role of accountants and auditors in the fight against foreign bribery. Rather, it has been the Office of the Comptroller General (CGU) which has been the most active in disseminating information on the foreign bribery offence, through its website and distribution of its leaflet and booklet. The CGU website also presents information that is addressed to private sector stakeholders, including recommendations for accountants and lawyers regarding bookkeeping obligations of companies, sanctioning of false accounting offences, auditor independence, and, more generally awareness raising and dissemination of information on the foreign bribery offence. As to the principle bodies that regulate the accounting and auditing professions in Brazil, namely the Federal Accounting Council (CFC); the Brazilian Institute of Independent Auditors (IBRACON); and the Securities and Exchange Commission (CVM); these bodies have not produced any training materials, newsletters or other documents that specifically address foreign bribery.

b. Accounting and auditing standards

64. Article 8 of the Convention requires that within the framework of its laws regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibit the making of falsified or fraudulent accounts, creating statements and records for the purpose of bribing foreign public officials or of hiding such bribery. Accounting and auditing requirements in Brazil with respect to the maintenance of books and records and financial statement disclosures are regulated by Law 6 404 of 1976 (Companies Law) which applies to all companies; the rules of the Securities and Exchange Commission, which applies to only publicly listed companies; and Law 10 406 of 2002 (Civil Code), which has general application to all business entities. In addition, accounting standards are issued by the Federal Accounting Council.

65. The Civil Code prescribes basic requirements for bookkeeping, adoption of an accounting system, and the preparation of annual balance sheets and statements of economic results that must be observed by all business entities in Brazil.²⁵ Similarly, Law 6 404 of 1976 (Companies Law) requires corporations to maintain permanent bookkeeping records, in conformity with commercial legislation and

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See article 1 179 of the Brazilian Civil Code, Law 10 406 of 2002. Articles 1 180 and 1 184 of the Civil Code, in addition to the books required by law, corporations must also maintain a “Journal”. All operations relating to the company’s activities are recorded daily in the “Journal” individually, clearly and characterizing the respective document, either by direct bookkeeping or reproduction.

with “generally accepted accounting principles”.²⁶ The Securities and Exchange Commission prescribes rules for accounting and financial reporting of listed companies. As to accounting standards, the Federal Accounting Council has issued a resolution on the Bookkeeping of Brazilian Corporations which describes standards and formalities to be followed for the correct bookkeeping of corporations.²⁷ Although the abovementioned provisions do not contain an express provision that prohibits the establishment of off-the-books accounts or of the other activities referred to in Article 8 of the Convention, Brazilian authorities maintain that the legal requirements in place contribute substantially to combating corruption and fraud.

66. The adoption and harmonization of international accounting standards with existing standards in Brazil has been slow. In 2005, the Federal Accounting Council established an Accounting Procedures Committee which was charged with responsibility to “study, prepare and issue Technical Pronouncements on Accounting Procedures and disseminate information.” The aim was to achieve a greater level of convergence between Brazilian accounting and auditing standards and international standards. The slow pace of reform in this area is of particular concern given significant problems identified by representatives from accounting and auditing bodies during the on-site visit. In that regard, the lead examiners were informed that many significant Brazilian companies are not publicly listed and are therefore not subject to the more rigorous accountancy, reporting and disclosure requirements of public companies. Often, they are controlled by major families or the State, and according to many representative of the accountancy and audit professions, the overall transparency, reporting and disclosure requirements applicable to these companies are inadequate. Moreover, given that Brazilian law does not require companies to present consolidated accounts that cover branches or subsidiaries abroad, members of the accounting and auditing professions remarked that it would be highly unlikely that an auditor would be in a satisfactory position to detect irregularities or unlawful payments made by a wholly-owned foreign subsidiary.

67. The Brazilian authorities have indicated that processes are in place with the view to developing reforms, including the establishment of the Accounting Procedures Committee to bring Brazilian accounting and auditing requirements in line with international standards. There are also examples of business entities in Brazil, including the Central Bank of Brazil, that have unilaterally decided to adopt international accounting standards. In addition, there are a number of prominent Brazilian companies that have publicly listed in the United States and are required to follow the stringent rules of the US Securities and Exchange Commission including the publication of accounting statements based on the Generally Accepted Accounting Principles of the United States (*i.e.* the US GAAP standards).

c. Internal controls, supervisory boards and audit committees

68. The Revised Recommendation asks Working Group Members to encourage the development and adoption of adequate internal company controls and standards of conduct in companies. Effective internal controls systems can enhance the quality of financial reporting and assist to minimise financial, operational and compliance risks. As such, they have a potential for enhancing firms’ capacity to internally detect and prevent fraud that can be related to foreign bribery. The Revised Recommendation also asks Working Group Members to encourage the creation by companies of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards. In that regard, a firm’s bribery prevention strategy can potentially benefit from the presence of a focused and capable corporate monitoring body.

²⁶ See article 177 Companies Law 6 404 of 1976.

²⁷ The Federal Accounting Council (CFC) issued NBC T 2.1 on the Bookkeeping of Brazilian Corporations through Resolution CFC 563/83. NBC T 2.1.

69. Research into codes of conduct of Brazilian companies, as well as the views of corporations and members of the accounting and auditing professions present at the on-site visit, indicated that an increasing number of Brazilian companies (mostly large corporations) are adopting corporate codes of conduct. A preliminary review of the codes available to the lead examiners indicated that the issue of corruption is covered in most codes. Several codes also explicitly prohibit bribery of public officials. Most of the codes stated in general terms that the principles are to apply in the context of international business transactions, and to anyone representing the company, including suppliers, service providers, customers and partners. The issue of prohibiting all bribes including those paid through intermediaries or paid for the benefit of third parties are not explicitly dealt with. The codes do not generally address the behaviour of foreign agents, representatives and subsidiaries.

70. A prominent feature of the corporate landscape in Brazil is that many of its larger corporations are unlisted entities that have traditionally had highly concentrated ownership structures that are often controlled by Brazilian families or the State. The lead examiners were left with the distinct impression that the promotion of high standards of ethical conduct and compliance programmes for bribery prevention was not currently a priority for management and supervisory boards for many of these companies. Moreover, there were concerns with regard to the quality of internal controls related to international operations: accounting and auditing professionals met during the on-site visit indicated that control mechanisms by Brazilian companies over foreign branches and subsidiaries were particularly weak.

71. Another important issue is the effectiveness of supervisory bodies in Brazilian corporations and of audit committees. Law 6 404 (Companies Law) requires listed companies to publish an annual report for shareholders, including the opinion of a company “finance committee”. This committee plays an oversight role in relation to the accounts, financial statements and affairs of Brazilian corporations, and could essentially perform the role of audit committee.²⁸ However, a general requirement to establish a supervisory body or an audit committee is not mandatory under Brazilian law or under applicable Brazilian accounting standards. The representatives of the accounting and auditing professions informed the lead examiners that this was still an evolving area of corporate governance in Brazil.

d. External auditing

(i) Entities subject to the auditing requirement

72. Law 6 385 of 7 December 1976, which governs the securities market, requires that the accounts of listed companies, and other companies regulated by the Securities and Exchange Commission (CVM), be audited.²⁹ Representatives from the accounting and auditing professions estimated that there were about 700 listed companies in Brazil that are required to comply with the auditing requirement, together with a range of institutions in the financial sector such as banks, insurance companies and mutual funds. The proportion of firms that must undergo an annual external audit of their financial statements is relatively low, because of the large number of micro and small (non-listed) firms in Brazil. There are approximately 5 million small and medium enterprises (SME’s) in Brazil, representing about 98% of all businesses in Brazil. Although most of these businesses are localized and unlikely to ever trade abroad, industry and accounting representatives remarked that some of the more successful SME’s have in fact been entering the capital market in Brazil and making initial public offerings with the view to expanding and developing their business (mostly in Brazil, but in some cases abroad).

²⁸ See article 133 (IV) Companies Law 6 404 of 1976.

²⁹ See article 26, Law 6 385 of 7 December 1976.

73. More problematic, however, are the prominent, large and commercially powerful unlisted Brazilian business entities engaged in international trade that are not subject to strict auditing requirements under existing laws. According to the Ministry of Development, Industry and Trade, in 2005, there were about 17 500 Brazilian exporting companies. Of these, approximately 3 600 were large firms, answering for 89% of the total value of exports. Only a small proportion of these companies are legally required to submit to an external audit. This fact was a matter of obvious concern to members of the accounting and auditing profession. It was explained that corporate ownership in Brazil is very concentrated, and that a number of large corporations are owned and managed either by prominent Brazilian family business enterprises or unlisted state controlled companies. Significantly, there is a Bill before the National Congress which is designed to amend the Law 6 404 of 1976 (Companies Law) by extending to large companies, even if not constituted as a joint stock company, the obligations to prepare and publish financial statements, including consolidated statements, and the obligation to submit to an independent audit. The Bill applies to large companies, or a set of companies that are part of the same group or are under common control, that have assets above BRL 120 million (USD 64.4 million) or annual gross revenue above BRL 150 million (USD 80.5 million) in the previous year. There was a high degree of support for this reform from amongst representatives of the accounting and auditing profession present at the on-site visit. At the time of the on-site visit the prospects and timing for the enactment of this Bill were unclear.

(ii) *Independence of auditors and supervision of the profession*

74. There are a number of applicable requirements under relevant laws and rules that seek to ensure the independence of external auditors in Brazil. In that regard, external company audits may only be carried out by audit firms or independent accounting auditors registered with the Securities and Exchange Commission (CVM). These auditors are subject to the rules of the CVM and the Federal Accounting Council, and also the Independent Auditors' Institute, with regard to professional conduct. Rules issued by the CVM include a ban on the provision of services by auditors to the same client for more than five consecutive years (with an interval of three years before being rehired).³⁰ This rule is applicable to external independent auditors for listed companies, and other legal entities under the control of the CVM. The Brazilian Central Bank adopts the same procedure for financial institutions. The CVM may impose penalties on auditors and audit firms, including warnings, fines, suspension or cancellation of authorization or registration, where they acted in breach of the securities or company laws and regulations.³¹ Independent auditors are also required to have their quality control reviewed every four years. This review is carried out by another independent auditor, who must also be registered with the Securities Commission.

75. The rules on independence of auditors, approved by the Federal Accounting Council prohibit an auditor from auditing any entity if he or she has, in relation to that entity or its associated companies, subsidiaries, parent company or members of the same economic group, a close blood relationship with any director or shareholder, a recent working relationship, a direct or indirect financial interest, or any other function or position which gives rise to a conflict of interest.³² The Brazilian authorities have explained that instructions issued by the Securities and Exchange Commission prohibit auditors from owning shares in, or providing certain consultancy services to, customer companies.³³

³⁰ Article 31 of the CVM Normative Instruction 308 of 14 May 1999

³¹ Article 11 of Law 6 385/1976.

³² Resolution 821/97 of the CFC.

³³ CVM Instruction 308/99.

76. The inspection and supervision of the accounting and auditing profession is carried out by the Federal Accounting Council and the Regional Accounting Councils. Inspections are standardized by an “Inspection Manual” and they have two main objectives: to ensure compliance with the laws, principles and regulations of the accounting profession; and to encourage honesty and ethical principles. Regional Council Inspectors have daily inspection targets to meet in accounting organizations, enterprises in general and government agencies, among others. Professional accountants and auditors that breach their professional obligations may be subject to a range of sanctions under various applicable laws and instruments: administrative sanctions (warnings, fines, suspension from professional practice); civil sanctions (can be personally liable); and criminal sanctions (offences related to the concealment of information, providing misstatements to financial authorities under tax laws; or forgery, misrepresentation, and use of false documents under the Penal Code). A large number of cases against accounting professionals have been cited by the Regional Accounting Councils and also at the appeal level of the Federal Council. Statistics on the number of complaints upheld and penalties imposed have not been provided.

e. The duty to report foreign bribery

77. In general, if an independent auditor uncovers any mistakes, fraud, or other crimes in the course of auditing a company, there is no express requirement under Brazilian law for an auditor to report suspected criminal activity, including foreign bribery or money laundering offences, to law enforcement authorities. The auditor’s obligation is to communicate any irregularities to the directors of the company, and to suggest corrective measures.³⁴ That said, a report of this nature is only required if the auditor assesses that there is the requisite level of materiality, that is, circumstances which might significantly affect the financial statements of the company being audited. If a report is made by an auditor (e.g. citing evidence of a bribe payment or money laundering) and the company management does not adequately respond, members of the accounting and auditing profession stated that the only option available to the auditor is to resign.

Commentary

The lead examiners recommend that Brazil take measures to encourage Brazilian companies: (i) to develop and adopt adequate internal company controls and standards of conduct in Brazilian companies, with a particular focus on the control of foreign operations and on compliance with the law criminalising foreign bribery; and (ii) to create, develop and strengthen corporate monitoring bodies, such as audit committees, that are independent of management and that have the effective power and competence to perform their full functions.

The lead examiners also recommend that Brazil, in consultation with relevant professional associations: (i) take steps to encourage the detection and reporting of suspected bribery of foreign public officials by accountants and internal and external auditors, in particular through guidelines and training for these professionals and through raising the awareness of the management and supervisory boards of audited companies about these issues; (ii) require external auditors to report all indications of possible acts of foreign bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, regardless of whether or not the suspected bribery has a material impact on the financial statements; (iii) consider requiring external auditors, in the face of inaction after appropriate disclosure within the company, to report such suspicions to the competent law enforcement

³⁴ The Brazilian authorities have advised that the source of this obligation is in Federal Accounting Resolution 770/91, item 11.1.4.2 of NBC T11 – Independent Auditing Standards of Accounting Statements.

authorities; and (iv) encourage the enactment of legislative reforms that would require all large Brazilian companies to submit to an external audit.

6. Money Laundering Reporting

78. An effective system designed to detect and deter money laundering may uncover underlying predicate offences like foreign bribery. In Brazil, money laundering was criminalized in 1998 pursuant to Law 9 613 of 3 March 1998. This law also established the Brazilian Financial Intelligence Unit: the Council of Control of Financial Activities (*Conselho de Controle de Atividades Financeiras*, hereinafter the COAF) within the Ministry of Finance. Subsequent amendments to the anti-money laundering legislation in 2002 broadened the range of predicate offences for money laundering to include bribery of foreign public officials.

a. Suspicious transaction reporting

79. Law 9 613 establishes the reporting system for suspicious transactions in Brazil. All banks and major financial institutions in Brazil are subject to the reporting obligations, together with a range of other reporting entities including stock broking firms, real estate agents, insurance companies, credit card administrators, and entities that trade in jewellery, precious stones and metals *etc.* The representatives of the COAF confirmed at the on-site visit that the reporting obligations do not yet apply to professions such as lawyers and accountants, although representatives from the COAF and CGU stated that legislation was under consideration which is intended to extend the reporting obligations to cover both professions. All reporting entities must comply with strict legal requirements for the clear identification of customers, the maintenance of transaction records, and the reporting of suspicious or large transactions.

80. The COAF provides an overall coordination function for the reporting of suspicious transaction reports (STRs). The reporting entities are required to report transactions that may represent a serious indication of a crime (*i.e.* offences covered by Law 9 613) and also cash transactions equal to or higher than BRL 100,000 (USD 53 682). All STRs must be made directly to the relevant “competent authority” within 24 hours. In that regard, some entities report directly to the COAF, which is a designated competent authority; whilst others report directly to their regulatory or supervisory body which also performs the role of a “competent authority”, for the purposes of the Law. The competent authority for the banks and other financial institutions, for example, is the Central Bank of Brazil (BACEN). Upon receipt of any STRs, the Central Bank enters the information onto a data base which is directly accessed by the COAF. For entities in the securities sector, STRs are sent to the securities regulator, the Securities and Exchange Commission (CVM), who then forwards them to the COAF. The other competent authorities, notably the Superintendence of Private Insurance (SUSEP) for the insurance sector; and the Complementary Pension Secretariat (SPC) for the pension funds, also have arrangements in place for the COAF to access STRs. In relation to those reporting entities that are not subject to any specific monitoring or regulatory agency (*e.g.* real estate agencies, and credit card administrators) STRs are made directly to the COAF.

81. In 2005 the COAF received 29,120 STRs, either through direct reporting or via the other competent authorities. This figure represented a substantial increase compared to the previous year (2004) when 9,050 STRs were received. Reports of suspicious or cash transactions made to the COAF or to the other competent authorities are examined by COAF personnel and all abnormal transactions (*i.e.* those that could be linked to a crime) are reported to the Public Prosecution (usually the Federal or State *Ministério Público*) or the Federal Police, for the purposes of criminal investigation. In that regard, the representatives of the COAF present at the on-site visit emphasized that the COAF did not have a formal investigative role, but rather its function is to analyse STRs and other accessible data in order to identify abnormal transactions. The COAF was not aware of any suspicious transactions reported to the COAF that involved money laundering potentially associated with active bribery of foreign public officials.

b. *Typologies, guidelines, training and resources*

82. In relation to the identification of STRs the competent authorities for the specific financial sectors (the Central Bank of Brazil *etc.*) have adopted guidelines that set out the STR reporting obligations, including a list of indicators that should be reported. The representatives of the COAF explained that the typologies that have been developed are in line with international practice. Although the offence of foreign bribery does not directly form an element of the typologies *per se*, it was explained that the criteria adopted is designed to identify abnormal transactions and trigger red flags for transactions that could relate to any of the crimes covered by Law 9 613, including the foreign bribery offence. The COAF explained that, in practice, its analysts often do not precisely know which crime may have been committed, as the reporting criteria simply target the identification of abnormal transactions. Under this system it is the law enforcement authorities that determine and investigate the crime. However, an outline of the predicate offences, including foreign bribery, is included in the training conducted by the COAF for its personnel.

83. The Banks and other financial institutions present at the on-site visit confirmed that in compliance with the law, they had developed procedures for customer identification and they had established the necessary parameters and criteria for systematically monitoring transactions in order to identify abnormal transactions. The banks also indicated that they had specifically introduced measures in order to “know their customer” with the view to ascertaining ownership, control and other related interests behind a company and to identify any risk factors that bank personnel should monitor or be made aware. This process was especially utilised in relation to foreign clients that held accounts in Brazilian banks. All the banks and financial institutions indicated that they had in place anti-money laundering programmes to train relevant personnel and to ensure compliance with the anti-money laundering requirements. Bank representatives stated that the Convention did not always specifically feature in training programmes, but corruption (as a predicate offence) was often covered in a more general way. The Central Bank of Brazil did indicate, however, that the Convention, and specifically the foreign bribery offence, had formed part of its training regime.

84. As to the resources and training of law enforcement authorities, the Brazilian authorities stated that they had worked hard to develop the capacity and specialization of Federal Police and of the Public Prosecution (in particular, the Federal and State *Ministério Público*) to more efficiently and proficiently deal with the investigation of money laundering, and crimes associated with money laundering. This capacity has been further strengthened by the establishment in Brazil of specialist federal criminal courts on anti-money laundering and financial crimes. As foreign bribery is a predicate offence to money laundering, this fact has been noted in courses offered to Federal Police, prosecutors and judges.

c. *Monitoring compliance and sanctions for failure to report*

85. Pursuant to Law 9 613, there are administrative sanctions that can be imposed on legal entities as well as their managers that fail to comply with anti-money laundering requirements under the Law. The administrative sanctions are enumerated in article 12, and include: a warning; a monetary fine, ranging from 1% to double the amount of the transaction; up to 200% of the profits actually or presumably obtained as a result of the transaction, or up to BRL 200,000 (USD 107,904); a temporary prohibition for up to 10 years to hold any management position in the legal person; and cancellation of the authorisation to operate.

86. A number of the banks and other financial institutions present at the on-site visit outlined a series of internal audits, external audits and regulatory audits that are undertaken each year to ensure compliance with anti-money laundering laws and procedures. The professionalism and wide powers available to supervisory bodies to conduct external audits was generally acknowledged. Participants were not, however,

aware of any cases brought by authorities for the contravention of anti-money laundering requirements by reporting entities (nor against their managers or employees).

d. *Exchange of information with other Brazilian government bodies*

87. Law 9 613 requires the COAF to notify the law enforcement authorities whenever it finds evidence of crimes defined under the Law or of any other illicit activity. COAF is also required to coordinate and suggest systems to facilitate the exchange of information to enhance the anti-money laundering detection and reporting system. In that regard, the COAF is empowered to require agencies of the public administration to provide certain banking and financial details of people involved in suspicious activities.³⁵ The representatives of the COAF and law enforcement authorities present at the on-site visit were generally satisfied with the level of cooperation and exchange of information between them. As noted above, the COAF received 29,120 STRs in 2005, indicating the large amount of information that is required to be examined and assessed in any one year. The Federal Police and prosecutors from the Federal *Ministério Público* observed that any investigations flowing from STRs could be conducted by any of the Police or Prosecution authorities across the country (State and Federal) depending on the nature and location of the transaction, and the resources available. The Federal Police has established a centralised unit that initially receives STRs forwarded by the COAF, whilst the Public Prosecution has specialized prosecutors at both the State and Federal level that deal specifically with money laundering cases. No particular problems were identified by participants, despite the large volume of information that is sometimes exchanged between the COAF and law enforcement authorities.

88. The adoption of the National Strategy to Fight Corruption and Money Laundering (ENCCLA) in 2003 has provided a major platform for bringing together law enforcement authorities, the judiciary, and relevant Ministries and agencies to coordinate action to fight corruption and money laundering. This has contributed to enhanced capacity, training and coordination of efforts to combat money laundering in particular. The COAF has developed strong links with law enforcement bodies, government agencies (including the tax administration) and reporting entities (particularly the banks and other major financial institutions) which have in turn promoted cooperation and the exchange of information. A number of representatives from Brazilian banks also expressed very positive views about their relationship with the COAF, stating that financial institutions generally had a good working relationship with the COAF and an open channel of communication.

e. *International exchange of information*

89. Brazil can provide mutual legal assistance (MLA) linked to money laundering within the context of a treaty or on the basis of reciprocity. Although Brazil has not established criminal liability for legal persons, the authorities maintain that Brazil could still provide MLA to a requesting country where such criminal liability existed. As will be discussed in section C(1)(d) below, this proposition has not yet been tested at law. In relation to the COAF, it regularly exchanges information directly with foreign financial intelligence units and other competent authorities. In 2005, for example, it responded to 87 requests for information received from abroad, predominantly from Portugal, the United States, Bolivia, Peru, Belgium, and Venezuela. In the same year, the COAF made 464 requests for information mostly to the USA, Uruguay, the Cayman Islands, the British Virgin Islands and Italy. At the time of the on-site visit, the COAF had not exchanged any information internationally on money laundering cases related to the offence of foreign bribery; and the Department of Assets Recovery and International Co-operation (DRCI) which is responsible for mutual legal assistance, had not received any requests for MLA regarding the offence of money laundering where the predicate offence was the bribery of a foreign public official.

³⁵ See articles 14 and 15 of Law 9 613 of 3 March 1998.

Commentary

Brazil has made significant efforts for the continuous development of a comprehensive regime for the prevention and detection of money laundering. In this context improvements could be made by ensuring that reporting entities required to report suspicious transactions, their supervisory authorities, as well as the COAF itself, receive appropriate directives and training (including typologies) on the identification and reporting of active bribery and of attempts to conceal bribes and the proceeds of foreign bribery. Brazil is also encouraged to proceed with the adoption of the foreseen legislation which aims to extend money laundering obligations and reporting requirements to members of the legal and accounting professions.

C. INVESTIGATION, PROSECUTION, AND SANCTIONING OF FOREIGN BRIBERY

1. Investigation and Prosecution of Foreign Bribery

a. Law enforcement authorities

(i) Competence of federal authorities

90. The Brazilian criminal justice system is organised in a federal and state system. As provided in article 109 of the Brazilian Constitution, the five federal regional tribunals are responsible for cases in which the federal administration's interest has been affected or that have international effects,³⁶ and offences violating international agreements, such as, for instance, terrorism and serious financial and economic crime, including money laundering and foreign bribery. The state judiciary would only intervene in cases presenting a major interest in the concerned state, such as, for instance, local or state corruption.

91. Where conflicts of competence arise between the federal and state justice systems, two higher courts have competence to decide on jurisdiction. According to article 105(I)(d) of the Brazilian Constitution, the Superior Court of Justice is responsible for deciding on conflicts of competence between the federal and state courts.³⁷ As regards conflicts of attributions between the federal and state prosecution authorities (*Ministério Público*), there is no legal provision identifying the responsible court for deciding on these. Thus, the basis for deciding on competence in such matters has been established by jurisprudence of the Supreme Federal Court (*Supremo Tribunal Federal*, or STF). The STF ruled that, taking into consideration the provisions set forth in article 102(I)(f) of the Brazilian Constitution,³⁸ "it belongs to the STF to decide upon the conflict of attributions involving the *Ministério Público Federal* and the *Ministério Público of the State*."³⁹ Finally, where a criminal case involves both federal and state offences,

³⁶ An extract of Article 109 of the Brazilian Constitution is provided in Annex 3 of this Report.

³⁷ An extract of Article 105 of the Brazilian Constitution is provided in Annex 3 of this Report.

³⁸ An extract of Article 102 of the Brazilian Constitution is provided in Annex 3 of this Report.

³⁹ Petition of the *Supremo Tribunal Federal* 3.528-3 Bahia of 28 September 2005.

jurisprudence of the Superior Court of Justice has established that the federal justice system shall have jurisdiction for managing the entire case.⁴⁰

(ii) *The Federal Police Department*

92. The Federal Police Department (*Departamento de Polícia Federal*, or DPF) is the responsible police body for the prevention and repression of federal criminal offences such as foreign bribery, throughout the Brazilian territory, according to the Brazilian Constitution and Law 10 683 of 28 May 2003.⁴¹ The DPF is administratively subordinate to the Ministry of Justice, but retains full autonomy to investigate crimes falling within its remit. There are seven Directorates within the DPF. As explained by the Brazilian authorities, the Department for Combating Organised Crime (DICOR) is the department which holds responsibility for investigating foreign bribery offences.

93. In terms of training, the National Police Academy (ANP) trains and offers specialist courses to the federal police. To this end, several manuals and training courses have been elaborated by the ANP regarding how federal investigators and police officers should operate. These manuals cover a wide range of issues including money laundering, financial crime, theft and robbery, *etc.*, as well as specific manuals in investigative techniques such as detection of fake documents and information security. Foreign bribery has been included in these courses only as a predicate offence to money laundering, and not with any specific focus on the issue as a stand-alone offence. The police authorities have also received training in the context of the National Programme on Capacity Building and Training for Combating Corruption and Money Laundering (PNLD), which covers themes such as corruption, asset recovery, international guidelines and international legal cooperation. However, as noted earlier, the focus of the PNLD to date has been money laundering, and foreign bribery has been included in this programme only in as far as it constitutes a predicate offence to money laundering.

94. As regards training of state police, the Phase 2 Responses did not indicate that any training on foreign bribery had taken place, and representatives of the state police in São Paulo indicated that they did not recall the foreign bribery offence being covered in any training provided to them. While it is true that the state police would not be competent to investigate a foreign bribery offence, it is important that they receive at least basic training on the foreign bribery offence, in order to be able to identify and detect it before forwarding it to competent federal police authorities.

95. Concerning the transfer of a foreign bribery case from the state police to the DPF, representatives of the state and federal police explained that two situations could occur:

- The case concerns only foreign bribery, or several federal offences, including foreign bribery: in that case, the state police would presumably transfer the case to the DPF as soon as it realised it had no competence on any offence; or
- The case concerns foreign bribery, as well as other state offences: in this situation, the state police would transfer the relevant parts of the case concerning the federal offences to the DPF, and the two investigations would be pursued in parallel by the state and federal police. After the initial 30 days of investigation, the case would be presented to the court for transmission to the prosecution (see section (b)(i) below on proceedings), and the court would then transfer the case to the federal system.

⁴⁰ Sumulus 122 of the Superior Court of Justice states that “it belongs to the Federal Justice to institute legal proceeding and trial of offences connected with the federal and state competences...”

⁴¹ An extract of Article 144(1) of the Brazilian Constitution is provided in Annex 3 of this Report.

(iii) *The Ministério Público Federal*

96. The functions of the Public Prosecution are defined in articles 127 to 130 of the Brazilian Constitution. The Public Prosecution comprises (1) the Public Prosecution of the Union, including the Federal Public Prosecution, Labour Public Prosecution, Military Public Prosecution, and the Public Prosecution of the Federal District and the Territories, and (2) the Public Prosecution of the States.⁴² The Federal Prosecutors, or *Ministério Público Federal*, is the prosecution authority with responsibility over foreign bribery offences.

97. The Head of the *Ministério Público Federal* is the Attorney-General of the Republic. He/she is appointed by the President for two years (renewable), subject to approval by the absolute majority of the Federal Senate. He/she can be removed under the same process.⁴³ The independence of the Public Prosecution is guaranteed under the Constitution through financial and administrative autonomy of the Public Prosecution Service,⁴⁴ and also to individual prosecutors who enjoy life tenure and a range of other guaranteed employment conditions.⁴⁵

98. Within the *Ministério Público Federal*, there are no specialised offices dealing with foreign bribery specifically or more generally with economic and financial crime, nor are there any case prioritisation models. As explained by prosecutors present at the on-site visit, this would go against the principle of mandatory prosecution, according to which all cases reaching the prosecutorial stage should be pursued and can only be dropped for a limited number of specified reasons (see section (c) below on principles of prosecution). However, in comments made after the on-site visit, the Brazilian authorities indicated that the *Ministério Público Federal* played an important role in the establishment of investigative taskforces (that are regularly formed across the country) and it also provided a national coordination role for federal prosecutors. In that regard, it was stated that, where possible, specialist expertise would be utilised, particularly in relation to financial crimes and money laundering cases.

99. The lack of internal structure within the *Ministério Público Federal* (and also within the state *Ministério Público*, for that matter) was analysed by certain prosecutors, as well as by some non-governmental organisations, as a chronic problem of this institution. The Attorney-General of the Republic and his deputies do not exercise any authority over prosecutors, because each prosecutor enjoys complete autonomy. Clearly, this is beneficial in terms of ensuring that prosecutors are independent, notably from political pressures, but it also contributes to making any planning harder. As a result, the *Ministério Público Federal* depends on the individual initiative of each prosecutor and management of human and financial resources is a critical issue. This absence of functional hierarchy could be counterbalanced by a more efficient internal structure which would allow for better planning and organising of the *Ministério Público Federal*'s activities, but also ensure improved adaptability of the institution to the evolution of complex criminal cases. In comments after the on-site visit, the Brazilian authorities pointed out that the *Ministério Público Federal* conducts meetings each year involving some of its functional areas in order to discuss subjects which should be prioritised. Moreover, the authorities emphasised that the development of a national coordination role for the *Ministério Público Federal* has also proven to be effective in assisting the successful prosecution of a number of criminal cases across the country.

⁴² Article 128, *ibid.*

⁴³ Article 128(1) and (2), *ibid.*

⁴⁴ Article 127(2), *ibid.*

⁴⁵ Article 128(5)(I), *ibid.*

100. Regarding training, as has been the case concerning the DPF, the foreign bribery offence has only been approached as a predicate offence to the crime of money laundering, and essentially in the context of the PNLD. General training is provided by the Federal Public Prosecutors' Office College (ESMPU), which also publishes "Scientific Bulletins" and "Operating Manual Series". However, as of the time of this review, the ESMPU had not turned its attention specifically to issues of foreign bribery.

Commentary:

The lead examiners are concerned that the existing resources dedicated to foreign bribery investigations and the level of training, both within the DPF, State Police, and Ministério Público Federal may not be sufficient for adequate detection and investigation of foreign bribery offences. Thus, they recommend that Brazil ensure that sufficient resources are made available and that training be provided to relevant law enforcement authorities for the effective detection and investigation of foreign bribery offences.

Given the increasing complexity of economic and financial crime, including foreign bribery, and the intricate corporate structures potentially involved, the lead examiners also recommend that Brazil consider developing specialised prosecutors' offices (as is the case of the specialised units within the DPF) to deal with these types of offences, in order to ensure they are more effectively investigated and prosecuted.

b. The conduct of investigations

(i) Commencement of proceedings

101. The conduct of investigations in Brazil, like the prosecution, is based on the principle of mandatory investigation. This entails that, once an inquiry has been opened by the police, it must be forwarded to the prosecution, and can only be closed by decision of the prosecution, with oversight by the courts (see section (c) below on principles of prosecution for procedures applicable to prosecutorial decisions). Because of this functioning of the Brazilian system and the numerous controls it involves for the closing of cases, the issue of the threshold for opening or closing inquiries arises at the stage of the initiation of proceedings by the police.

102. According to the Code of Criminal Procedure, police inquiries can be opened (i) *ex officio* by the police, (ii) where *flagrante delicto* occurs (i.e. where the criminal is caught in the act of committing a crime) or where the criminal is caught right after committing the crime or is in the possession of objects or instruments that allow the conclusion that he/she committed it (iii) at the request of a judge or the Public Prosecutor's Office, or (iv) on petition by the victim.⁴⁶ The Public Prosecutor's Office may also request the police authority to start an inquiry, as provided by article 129(VIII) of the Brazilian Constitution.⁴⁷ The Brazilian authorities explain that, pursuant to these provisions, the police authority is under a legal obligation to open an inquiry as soon as it is informed of a crime through any of the abovementioned channels. The police can be exempted from the obligation to open an inquiry where there is no circumstantial evidence whatsoever of the crime, or the fact reported does not constitute an offence. Where the police decline to open an inquiry, the decision must be motivated, and an appeal may be lodged by the victim to the chief commissioner or a request can be referred to the Public Prosecution.

⁴⁶ Article 5(I) and (II) of the Code of Criminal Procedure.

⁴⁷ An extract of Article 129(VIII) of the Brazilian Constitution is provided in Annex 3 of this Report.

103. Based on their experience in domestic bribery cases, representatives of the DPF indicated that information on the bribe payments made to public officials often arise in the context of another investigation or prosecution, and from reports made by other public agencies (such as the CGU, the Tax Administration, the Court of Accounts, and the Council of Control of Financial Activities), and individuals. Where the public agencies reporting the suspected bribery are also the victims, they could appeal any decision of the police not to open an inquiry. Only in a few cases would an investigation be triggered as a result of the briber being caught in *flagrante delicto*.

104. DPF representatives further stated that, in the context of foreign bribery cases, they would expect information to arise from reports by authorities outside Brazil (international police liaison officers, foreign law enforcement authorities, embassies, etc.), by the media, and also by dismissed employees of the concerned companies (in the view of the DPF, employees still under employment would rarely be willing to denounce illegal practices if they were still employed by the company, given the risks of retaliation – see section B(2)(b) above on the absence of protection for whistleblowers). As regards victims and their role in triggering the opening of police inquiries, the Brazilian authorities are of the view that, in the case of bribery of foreign public officials, the victim would be the foreign country, an understanding based on the analogy with domestic bribery, where the Brazilian public administration is viewed as the potential victim. Based on foreign bribery cases which have arisen in other countries Party to the Convention, it currently seems highly unlikely that a foreign bribery investigation would be triggered by a complaint of the victim.

105. Thus, it could reasonably be expected that foreign bribery investigations in Brazil would be initiated either by the police itself, or on request of the prosecution. Therefore, the relative lack of proactivity of these authorities in the context of certain instances of suspected foreign bribery involving Brazilian companies is one that raised some concern among lead examiners. Indeed, as noted in the introduction to this Phase 2 Report (see section A(2)(e) above on cases involving the bribery of foreign public officials), several serious, substantiated allegations of foreign bribery involving Brazilian companies were brought to light in the Report of the Independent Inquiry Committee into the United Nations Oil-for-Food Programme (the IIC Report) and in the media. Yet, only very preliminary investigations were opened by the police, none of them resulting (as of the time of this review) in the opening of a formal inquiry. It was also clear from remarks by representatives of the DPF and the *Ministério Público Federal* present at the on-site visit that prosecutors had not made use of their prerogative to request opening of investigations by the police. After the on-site visit, the Brazilian authorities informed the lead examiners that the Federal Police are now investigating four cases related to the IIC Report.

106. Once the inquiry is formally opened, the police have 30 days to conduct their inquiry, and only 10 days where the accused has been arrested in *flagrante delicto*. Where the case presents particular difficulties, and provided the defendant is at large, the police may request from the judge an extension of the time limits for completing the investigation.⁴⁸ The extended time which the judge may allow to complete the investigation is not specified in the Code of Criminal Procedure. Representatives of the DPF and *Ministério Público Federal* indicated that these time limits did not usually pose problems, since the judges were generally willing to extend them as necessary. Assurances were given that any pending request for mutual legal assistance would not be counted in these time limits. They also underlined that, in any case, once the time limits run out, the police inquiry is sent to the competent judge for referral to the Public Prosecution, and the prosecutor in charge may then in turn request new investigatory procedures from the police.

⁴⁸ Article 10 of the Code of Criminal Procedure.

(ii) Investigative techniques

General and special investigative techniques

107. General and special investigative techniques are provided for under the Code of Criminal Procedure, including cross-examination, forensics analysis, confrontations, and search and seizure. In addition, Law 9 296 of 24 July 1996 regulates the interception of telecommunications. Where the investigation requires the use of more intrusive investigative powers (such as search and seizure or interception of telecommunication, *etc.*), legal authorisation from a judge must be requested, either by the police authority in the course of the investigation and/or by the Public Prosecution. Representatives of the police interviewed during the on-site visit indicated that they regularly make use of all these techniques, notably interception of telecommunications (telephone, e-mail, *etc.*), in domestic bribery cases.

108. Where crimes are committed by criminal organisations, additional investigative techniques are allowed under Law 9 034 of 3 May 1995, such as controlled police action and use of undercover agents. However, the application of these additional investigative techniques in the context of foreign bribery investigations may be very limited, particularly where the offence has been committed by regularly established Brazilian businesses on foreign markets. The Brazilian authorities have pointed out that following amendments to the law (in 2001) the additional investigative techniques can be used against a broader range of criminal organisations or associations, and this could, for example, be applied to an investigation involving a group of partners or employees who use a company structure to bribe a foreign public official.

Bank secrecy

109. As regards access to financial information held by banks, Law 9 034 of 3 May 1995 (see above) allows access to financial information in the context of acts perpetrated by criminal organisations. Outside this context, Complementary Law 105 of 10 January 2001 regulates breaches of bank secrecy. Article 1 of the Law sets out a general duty of confidentiality for financial institutions, but also specifies in its paragraph 4 that breaches of confidentiality may be ordered “when it is necessary to verify the occurrence of any illegal activity, in any stage of investigations or legal proceedings”. Paragraph 4 sets out a non-exhaustive list of offences which may justify breaches of bank secrecy, which includes “acts against the Public Administration”, and therefore foreign bribery.⁴⁹ Representatives of the DPF and *Ministério Público Federal* reported that, in practice, they do not encounter difficulties in getting approval from the courts to request such information, nor in obtaining information from banks and financial institutions in the context of criminal investigations. (See also section C.1.d of this report on bank secrecy in the context of mutual legal assistance requests)

Witness protection

110. Witness protection is available under the Federal Programme of Assistance to Victims and Witnesses under Threat, as governed by Law 9 807 of 13 July 1999. In addition, each state may have in place its own witness protection programme. The Federal Programme of Assistance to Victims and Witnesses under Threat does not place any restriction on the types of offences justifying witness protection, and could thus protect witnesses in the context of foreign bribery proceedings.

111. According to representatives of civil society as well as law enforcement authorities, the witness protection programmes are essentially used to protect witnesses of organised crimes. These panellists also

⁴⁹ The foreign bribery offence is in Chapter IIA of Section XI of the Brazilian Penal Code entitled “Crimes against the Public Administration”.

pointed out weaknesses in the Brazilian witness protection system, which, in their view are essentially due to the fact that the system is still in its first steps and suffers from lack of practice.

Commentary:

The lead examiners are concerned about the apparent lack of proactivity of the DPF and Ministério Público Federal in initiating investigations of potential foreign bribery cases. They recommend that the Brazilian authorities remind the DPF and the Ministério Público Federal of the importance of actively looking into possible sources of detection of foreign bribery. Furthermore, the lead examiners encourage the Brazilian authorities to monitor and evaluate the performance of the DPF and the Ministério Público Federal with regard to foreign bribery allegations on an on-going basis, including with regard to decisions not to open investigations. They recommend that the Working Group on Bribery follow-up on this issue.

With regard to time limits to conclude investigations, the lead examiners recommend that the Working Group follow-up the practice in this respect to assess whether the limitation period on investigations provides for adequate time for investigation of foreign bribery offences, in particular, where information is required from abroad.

Finally, the lead examiners welcome the broad range of investigative measures available to investigative authorities in the context of foreign bribery investigations. They urge the law enforcement authorities to make full use of these techniques to effectively investigate suspicions of foreign bribery.

c. Principles of prosecution

112. Once the police inquiry has been completed, it is sent to the competent judge, who refers it to the Public Prosecution. The Public Prosecution may then decide to request additional investigation, file an indictment, or ask the judge to close the case. If the judge rejects the request to close the investigations, he/she will then refer the records to the Coordination and Revision Chamber of the Federal Prosecution Office (or to the Attorney-General of the State if the request is made by a state prosecutor).

113. With regard to the filing of indictments, there are strict time limits for the filing of charges by the Public Prosecution once it has received the police report. The deadline is 5 days from receiving the police report where the accused is in custody, and 15 days where the accused is at large or has been released on bail. Representatives of the *Ministério Público Federal* indicated that these time limits were generally sufficient, notably because article 46 of the Code of Criminal Procedure specifies that, if the inquiry needs to be returned to the police for further investigation, the deadline is only counted from the date the Public Prosecution receives the court records again.

114. In addition to the Public Prosecution, victims may also participate in proceedings, as “an assistant to the prosecution”, as provided in article 268 of the Code of Criminal Procedure. As explained above, in a foreign bribery case, the victim would be the foreign country, based on an analogy with the domestic bribery offence. The foreign country has two possibilities to act as victim: through a direct channel, by contracting a Brazilian proxy to act as assistant to the prosecution; or by requesting international judicial cooperation. In this latter case, the Office of the Brazilian Attorney-General, as a judicial representative of the Brazilian State, has legitimacy to act as assistant to the prosecution. With regard to other victims, the Brazilian prosecutorial authorities expressed the view that it was unlikely that competitors in the international business transaction involving the foreign bribery act could be considered victims.

115. As regards the closing of cases, because the Brazilian criminal legal system is based on the principle of mandatory prosecution, a decision to discontinue prosecution cannot be made discretionarily by the public prosecutor. To uphold this principle of mandatory prosecution, the Brazilian law requires that a request be made to a judge, who can either accept or reject the request to close a case. As specified in article 43 of the Code of Criminal Procedure, valid reasons for requesting that a case be closed include situations (i) where the act does not constitute an offence; (ii) where the criminal act can no longer be punished, for instance, due to the expiration of the statute of limitations (12 years in the case of a foreign bribery offence), or other reasons; and (iii) where illegitimacy of the party is clear, or where an element required by law for the exercise of the criminal action is absent. Considerations of national economic interest, the potential effect upon relations with another State, or the identity of the natural or legal person involved are not included as possible reasons to close a case,⁵⁰ nor are there general considerations of “public interest” which the prosecution may take into account to discontinue prosecution. In addition, any decision to close a case has to be validated by a judge, which provides an additional safeguard to ensure that undue considerations are not taken into account in decisions to prosecute.

116. The one minor exception to the principle of mandatory prosecution, as outlined by Brazil, is the possibility (subject to certain conditions) for the Public Prosecution, upon filing an indictment, to propose that a case be adjourned for two to four years, where it concerns offences carrying a minimum imprisonment penalty of one year or less. This would concern foreign bribery offences, which currently carry a penalty of one to eight years in prison. However, if Bill 7 710, which aims to increase sanctions for foreign bribery offences, is adopted by Parliament (see also section 4 below on sanctions), the sanctions for foreign bribery will be raised to 2 to 12 years imprisonment, and the possibility of adjournment will no longer apply to foreign bribery cases. Brazil indicated that, as of December 2007, this Bill had been approved by the Constitutional Committee and had to be approved by the House of Representatives before being sent to the Senate.

d. Mutual legal assistance and extradition

(i) Mutual legal assistance

Treaty versus non-treaty mutual legal assistance

117. Parties to the Convention are required to provide prompt and effective legal assistance to other Parties to the Convention to the fullest extent possible under their laws, treaties and arrangements for the purpose of criminal proceedings and non-criminal proceedings within the scope of the Convention. Furthermore, the Parties themselves, in order to effectively prosecute foreign bribery, must be able to seek and use evidence from abroad efficiently.

118. Brazil can provide mutual legal assistance (MLA) on the basis of a relevant treaty or on the principle of reciprocity. Brazil has entered into a number of bilateral treaties regulating mutual legal assistance in criminal matters, five of which are with Parties to the Convention.⁵¹ There are a further 10 bilateral treaties awaiting congressional approval, four of which are with Parties to the Convention⁵² whilst negotiations are ongoing with another 27 countries, eight of which are Parties to the Convention.⁵³

⁵⁰ Under Article 5 of the Anti-Bribery Convention, investigation and prosecution of the foreign bribery offence shall not be influenced by such considerations.

⁵¹ Brazil has entered into bilateral mutual legal assistance treaties in criminal matters with the United States of America, France, Colombia, Peru, Portugal, Italy and the Mercosur states of Argentina, Paraguay and Uruguay.

⁵² At the time of the on-site visit the Brazilian authorities indicated that the National Congress has approved, pending enactment, bilateral mutual legal assistance treaties in criminal matters with China, Lebanon and

119. The Brazilian authorities have also stated that mutual legal assistance requests can be based on multilateral treaties, including the OECD Anti-Bribery Convention, although to date there have not been any instances where the Convention has been used for this purpose. The Brazilian authorities have executed mutual legal assistance requests linked to the crime of money laundering which is covered in certain multilateral treaties, including the United Nations Convention Against Corruption, the United Nations Convention Against Organized Crime, and the Inter-American Convention Against Corruption. However, the Brazilian authorities have not indicated whether they have bilateral or multilateral MLA treaties with the requesting countries.

120. In relation to mutual legal assistance requests from countries with which Brazil has not concluded a bilateral or multilateral MLA agreement, assistance is provided on the basis of reciprocity, although there is no applicable legislation governing mutual legal assistance which enshrines the principle of reciprocity into law. Thus, since Brazil currently has only five treaties with Parties to the Convention, in the absence of practical examples where Brazil has provided assistance to Parties to the OECD Convention or any other criminal law related Convention which is not *per se* an MLA treaty, how effectively the principle of reciprocity is applied is a significant factor in determining how well Brazil applies Article 9 of the Convention.

Practical aspects of mutual legal assistance

121. The Department of Assets Recovery and International Co-operation (DRCI) within the Ministry of Justice is the responsible central authority in Brazil for mutual legal assistance both in criminal matters and civil matters. Brazil can provide mutual legal assistance either by means of letters rogatory or directly with the foreign requesting authority, depending on the nature of the request. All requests for international legal cooperation received by the DRCI are analysed to ensure compliance with legal requirements that apply to the requested measure. In cases where the request is made by letters rogatory, the mutual legal assistance requests are initially filed with the Superior Court of Justice in order to obtain the necessary authorisation to proceed with the execution of the request (known as the “*exequatur*”). After the authorization has been granted, Federal judges are competent to determine, at first instance, the execution of the letters rogatory. In circumstances where mutual legal assistance can be provided by means of “direct assistance” to the foreign authority, the DRCI will arrange execution of the request, by referring the request to the relevant Brazilian authority or, where required by law, filing the request with a court to obtain the necessary judicial authorization (*e.g.* for the production of documentation or obtaining access to financial records).

122. At the on-site visit, the lead examiners were not informed of any serious problems in providing prompt and effective mutual legal assistance to requesting parties. Brazilian authorities indicated that direct assistance, provided on the basis of reciprocity, could usually be executed more rapidly than requests made pursuant to mutual legal assistance treaties, which often require more rigorous formalities to be adhered to. Some additional time could be expected where a court order is required, for example, to enable the lifting of bank secrecy. During the onsite visit the lead examiners raised a number of specific issues that could

Switzerland. Furthermore, agreements with Angola, Canada, Cuba, Nigeria, Spain, Surinam and the United Kingdom are awaiting consideration and approval by the National Congress. After the on-site visit, the Brazilian authorities informed the lead examiners that the bilateral treaty with Cuba had been approved by the Brazilian National Congress.

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At the time of the on-site visit, the Brazilian authorities indicated that there are 27 countries with which Brazil is negotiating bilateral mutual legal assistance treaties in criminal matters: Albania, Algeria, Australia, Belgium, British Virgin Islands, Cayman Islands, Ecuador, Egypt, Germany, Greece, Hong Kong, India, Israel, Lithuania, Mexico, Moldova, Morocco, Nicaragua, Panama, Poland, Romania, South Africa, Syria, Thailand, The Bahamas, Turkey and United Arab Emirates.

impact on the execution of requests, these included: the requirement of dual criminality; the use of general investigative powers and specialist investigative techniques in responding to requests; access to financial records; and the capacity of Brazil to assist a requesting country where the request relates to criminal or administrative proceedings against a legal person, including the enforcement of foreign confiscation orders. These issues are outlined below.

123. Brazilian authorities have stated that the requirement of dual criminality is included in only some of the mutual legal assistance treaties entered into by Brazil. The Brazilian authorities consider that the Convention would be a sufficient basis for dual criminality where a request for MLA is submitted by another Party to the Convention.

124. 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. However, where a request requires the use of specialist investigative techniques (*e.g.* telephone intercept powers) the Brazilian authorities have pointed out that the measure must be specifically envisaged in the agreement or treaty that provides the grounds for the request. In cases where a request for MLA is based on reciprocity, Brazil is able to execute the request, provided that legal provisions in both Brazil and the requesting country for the use of the relevant specialist investigative techniques have been complied with.

125. The Convention requires that a Party must not decline to render mutual legal assistance for criminal matters within the scope of the Convention on the grounds of bank secrecy. In that regard, the requirement of the confidentiality of bank information, which is expressly provided for in legislation, has been interpreted by the Federal Supreme Court to be guaranteed by the Federal Constitution.⁵⁴ The relevant legislation also provides an exception to the confidentiality rule “when it is necessary to verify the occurrence of any illicit activity, in any stage of investigations or legal proceedings, and especially in the case” of certain listed crimes, which include both domestic and foreign bribery under the general heading of “acts against the Public Administration”.⁵⁵ In any case, representatives of the Federal Police and *Ministério Público Federal* indicated that the list of crimes was non-exhaustive and only contained examples of offences for which breach of bank secrecy could be ordered. In practice, a court order is required to obtain access to bank records pursuant to this provision.

126. In order to obtain a court order, the court must be satisfied that there is a “relevant public interest” and “a fact establishing, at least in principle, the existence of a crime.”⁵⁶ The Brazilian authorities explained that, in the context of mutual legal assistance, this would require the requesting state to show well grounded reasons existed for obtaining such a court order. In that regard, a clear narrative of the facts is usually sufficient, provided that it demonstrates the link between the measure sought and the illegal activities that are the subject of the request. The law enforcement authorities themselves did not indicate any inherent problems in obtaining confidential information from banks, either for their own domestic cases (of which, a number of cases were cited by Brazil) or in relation to executing a mutual legal assistance request from abroad. Banks present at the on-site visit also indicated that they regularly received

⁵⁴ In Brazil, banking confidentiality has been interpreted by the Federal Supreme Court as a constitutional guarantee pursuant to Article 5, clauses X and XII of the Federal Constitution. Banks and other financial institutions are specifically bound to respect the confidentiality of their customers’ affairs by Complementary Law 105 of 10 January 2001.

⁵⁵ See article 1, paragraph 4 of Complementary Law 105 of 10 January 2001.

⁵⁶ See section 9.3 of the Phase 1 Report of Brazil, adopted 31 August 2004, p. 30.

judicial orders to provide information to law enforcement authorities, and these were generally processed promptly and without substantive difficulties.

127. Another important issue canvassed at the on-site visit was the provision of mutual legal assistance in respect of legal persons. Although Brazil has not established the criminal or administrative liability of legal persons for the bribery of foreign public officials, the authorities maintain that Brazil could still provide assistance to a requesting country where such criminal or administrative liability existed. The authorities confirmed that if a requesting state had launched criminal proceedings against a legal person for the foreign bribery offence, and no natural person had been identified, this would not act as an impediment to executing the request: a court order to obtain access to the financial records of a company could be issued or an order for the search and seizure of particular documents held by a company located in Brazil could be made, provided the request conformed to the required formalities. In practice however, these assurances remain untested, as Brazil has not yet had to deal with such requests. Similarly, in relation to outgoing requests, there is no clear indication of the basis on which Brazil could seek evidence located abroad in connection with its own administrative proceeding against a legal entity implicated in a foreign bribery case.

128. With regard to the provision of mutual legal assistance in respect of the enforcement of a confiscation order against a legal person imposed by a foreign court, there are particular formal requirements that must be satisfied. The Brazilian authorities have indicated that in Brazil confiscation requires a conviction for a criminal offence, and thus in relation to the foreign bribery offence, it is only available in relation to natural persons. In the context of international cooperation however, Brazilian authorities state that a mutual legal assistance request to confiscate assets of a legal person may be executed, provided that the request is based on a foreign judicial decision against the legal person and that the court decision satisfies certain formal requirements (*i.e.* related to ensuring that the decision of the foreign court is valid, final, and recognized by Brazil) in order for the request to be executed.⁵⁷ In practice though there have been no cases which confirm that mutual legal assistance can be provided in this situation.

(ii) Extradition

129. Article 10(1) of the Convention obliges Parties to “deem to be included” bribery of a foreign public official as an extraditable offence under their laws and the extradition treaties between them. Brazil has stated that foreign bribery is an offence for which extradition can be granted, although no such requests have been received to date. The Law on Extradition states that extradition can be provided on the basis of a convention, treaty or reciprocity.⁵⁸ Thus, consistent with the Convention, in the absence of a treaty, the Convention may be considered the legal basis for extradition in respect of the foreign bribery offence. Case law was provided by Brazil in support of this assertion.⁵⁹

130. As to the formalities, 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 processes and judges the extradition petition, including checking its legality, and rules on whether the executive branch is authorised to grant the

⁵⁷ The necessary procedures to be followed are stated to be in the “Deed of Homologation of Foreign Court Decision at the Superior Court of Justice”.

⁵⁸ Article 75 of Law 6 815 of 19 August 1980 on Extradition. Note that the original Brazilian text of this Law includes conventions as one of the basis for providing extradition, whereas the English translation does not.

⁵⁹ See recent extradition decisions such as, for instance, Extradition JO78-Min. Gilmar Mendes-Judgement of 15 October 2007; and Extradition JO15-Min. Joaquim Barbosa-Judgement of 21 June 2007.

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.⁶⁰ The Brazilian authorities informed the lead examiners that the extradition process takes on average 9 months to be decided by the Supreme Court, although the additional time taken for the executive to make the final decision was not provided. In the absence of information about the time that it takes on average from the receipt of the extradition request to the making of the decision of the executive branch, the lead examiners cannot be certain that the process runs smoothly, in particular in view of the comments of a legal academic during the on-site visit that extradition in Brazil is cumbersome and outdated. In any case, there are no time limits stipulated in law for completing extradition procedures. In 2005 Brazil made 8 extradition requests to foreign states, whilst it received 47 extradition requests from foreign states and 27 requests were executed in that year. In explaining the difference between the received requests (45) and the executed requests (27) the Brazilian authorities pointed out that, in many cases, requests received in a particular year may be granted in the year after. In response to a question from the lead examiners as to whether “political reasons” could justify a denial of extradition, for instance, whether such reasons could justify the non-extradition of a political figure, the authorities responded that almost every extradition approved by the Supreme Federal Court is executed. However, the authorities could not definitively rule out denial of extradition on these grounds, stating that extradition denials for political reasons are very rare and will depend on a case by case analysis.⁶¹

131. The conditions which preclude the granting of extradition are enumerated in article 77 of Law 6 815 of 19 August 1980. Significantly, extradition is precluded when the person is of Brazilian nationality at the time of the commission of the offence. In circumstances where an extradition is not granted because the person is a Brazilian national, the Ministry of Justice, through the Department of Foreign Affairs, informs the requesting state that the extradition request had been suspended. The lead examiners were informed that the responsibility for requesting a criminal prosecution of the individual by Brazil rested with the requesting country. This approach is inconsistent with the Convention. In circumstances where a request to extradite a person for the foreign bribery offence is declined solely on the ground that the person is its national, Article 10(3) of the Convention requires a State Party (*i.e.* on its own initiative) to submit the case to its competent authorities for the purpose of prosecution. When pressed on this issue by the lead examiners, the Brazilian authorities did assert that in practice they had conducted a number of prosecutions involving Brazilian nationals, even where the request had not, at first, been suggested by the state requesting extradition.

Commentary

Given the remaining uncertainties concerning the execution of mutual legal assistance requests by Brazil, the lead examiners recommend that the Working Group follow-up to ensure that Brazil provides prompt and effective mutual legal assistance for the purpose of investigations of offences within the scope of the Convention.

Follow-up is recommended to ensure that, in practice, Brazil can execute requests linked to criminal proceedings against a legal person, despite the absence of criminal liability for legal persons in Brazil. Similarly, in relation to outgoing mutual legal assistance requests, follow-up

⁶⁰ The decision maker in the Executive branch is the head of the Foreign Citizens Department of the Ministry of Justice.

⁶¹ Since this information was received after the on-site visit, the lead examiners were unable to explore whether similar factors would be taken into consideration in the investigation and prosecution of foreign bribery cases or the provision of mutual legal assistance.

is recommended to ensure that Brazil could seek evidence located abroad in connection with its own administrative proceeding against a legal entity implicated in a foreign bribery case.

In relation to extradition, the lead examiners recommend follow-up to ensure that Brazil does initiate prosecutions of its nationals in circumstances where extradition is refused, in accordance with Article 10(3) of the Convention. In addition, the lead examiners recommend follow-up on the issue of extradition to ensure that the consideration of political factors does not impede the effective implementation of Article 10(1) of the Convention.

e. Jurisdiction

(i) Territorial jurisdiction

132. Article 4(1) of the Convention requires each Party to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.” Commentary 25 clarifies that “an extensive physical connection to the bribery act” is not required. In Brazil, territorial jurisdiction is established under article 5 of the Penal Code, whilst article 6 states: “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.” For jurisdiction to be exercised, the Brazilian authorities have explained that it is enough for the offence to have “touched” Brazilian territory, and that for this purpose it suffices if part of the criminal conduct has taken place in Brazilian territory, or if the result has taken place in Brazilian territory. They have asserted that a telephone call, fax or email emanating from Brazil would be sufficient to establish jurisdiction over an offence of foreign bribery which mostly takes place elsewhere. The use of these means in Brazil to commit a crime which is consummated abroad is enough to found territorial jurisdiction, because part of the act will have taken place in Brazil. No supporting examples were available.

(ii) Nationality jurisdiction

133. Article 4(2) of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”. The Brazilian Penal Code provides that “criminal offences” committed by “Brazilians” are subject to Brazilian law, even though committed abroad.⁶² The concept of “criminal offences” includes the offence of foreign bribery. As to the meaning of “Brazilians”, this excludes permanent residents of Brazil who, unlike Brazilian nationals, are subject to extradition.

134. In order for Brazil to have jurisdiction over its nationals for criminal offences, including foreign bribery, the Penal Code requires certain conditions to be met. article 7 clause (II) (b) of the Penal Code requires that: (i) the offender enters Brazilian territory; (ii) the act is also punishable in the country where it was committed; (iii) the criminal offence is included among those for which Brazilian law authorises extradition; (iv) the offender has not been tried and found not guilty abroad or has not served the sentence there; (v) the offender has not been pardoned abroad or, for any other reason, the sentence has not been eliminated, pursuant to the most favourable law. The first condition, which requires that the offender enter Brazilian territory, could act as an impediment to establishing nationality jurisdiction in relation to the perpetrator of the foreign bribery offence. The Brazilian authorities maintain 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. As to the second condition, requiring that the criminal act is also punishable in the country where it was

⁶² Article 7, paragraph II (b), Penal Code.

committed, the Brazilian authorities have stated that the bribery of a foreign public official by a Brazilian national, in contravention of that country's laws against domestic bribery, would be sufficient. Furthermore, in circumstances where a Brazilian national bribes a foreign public official from country A while in country B, the requirement will be met so long as the act constitutes any kind of punishable offence in country B.

(iii) *Legal persons and jurisdiction*

135. Pursuant to the Civil Code, a company is considered a domestic company if it is incorporated under Brazilian law and has its entire management and control in Brazil.⁶³ Brazil has not however, introduced criminal or administrative liability for legal persons for foreign bribery. The lead examiners consider that the standards for jurisdiction over legal persons should be considered and adopted in conjunction with any reforms introduced to ensure that the substantive liability of legal persons for foreign bribery, pursuant to the Convention, are established. In the context of such reforms, Brazil should ensure that the determination of the nationality of a legal person takes a flexible approach, as the standard under the Civil Code would exclude companies not incorporated in Brazil even if their main seat is in Brazil (*i.e.* the principal administrative function such as the board and management are located in Brazil). The current standard would also exclude companies that have their main management and control situated in Brazil if some part of this function is located outside of Brazil. The issue of liability of legal persons is discussed in section C.3.

Commentary:

The lead examiners recommend that the Working Group follow up on the application of territorial and nationality jurisdiction concerning offences committed in whole or in part abroad.

The lead examiners also recommend that any reforms to the liability of legal persons for the offence of bribing a foreign public official (see later recommendation) ensure a broad interpretation of the nationality of legal persons, so that companies with their main management and control situated in Brazil are considered Brazilian companies, regardless of place of incorporation and regardless if some part of this function is located outside of Brazil.

f. *Statute of limitations*

136. In Brazil, the statute of limitations is twelve years for the offence of foreign bribery. This is the same as for domestic bribery. Under the Penal Code, crimes carrying a maximum penalty of not less than four but not more than eight years' imprisonment, the limitations period provided under article 109, clause III is twelve years. Foreign bribery falls within this category of offences. Article 111 provides that the limitations period begins to run "from the day the crime was committed". The "interruption" of the limitation period for the prosecution of the foreign bribery offence is governed by clauses I to IV of article 117: by receipt of the accusation or complaint; by the indictment; by the decision confirming the indictment; and by a verdict of guilty, which can be appealed. Under paragraph 2 of article 117, a new limitation period starts to run after each interruption.

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Article 1 126 of the Civil Code - Law 10 406 of 10 January 2002.

2. The Offence of Bribery of Foreign Public Officials

a. Background

137. In order to meet the requirements of the Convention, Brazil enacted its implementing legislation in 2002 which introduced the offence of “active bribery in an international business transaction” in article 337-B of the Brazilian Penal Code, and the definition of a “foreign public official” in article 337-D (see Annex 3). A further offence, “the traffic of influence in an international business transaction” was also introduced in article 337-C of the Penal Code. As there have been no cases of foreign bribery in Brazil, the offence in article 337-B and the definition of a “foreign public official” in article 337-D have not been directly considered by the Brazilian courts. Accordingly, the scope and application of the foreign bribery offence in the Penal Code remains untested, although case law related to the domestic bribery offences is, where relevant, relied on by Brazil for interpretative guidance.⁶⁴ In that regard, particular case examples and legal doctrine referred to by Brazilian authorities indicates that there has been judicial consideration of important elements of the domestic offence including: intention; offer; promise; giving a bribe; and the meaning and scope of an “undue pecuniary or other advantage”. In the Phase 1 review of Brazil, the Working Group formed the general opinion that the relevant Brazilian laws, including article 337-B, largely conformed to the standards of the Convention. Nevertheless the Working Group did recommend that the scope of the definition of “foreign public official” in the Penal Code be reviewed in Phase 2.

b. Elements of the offence

(i) Definition of a foreign public official

138. The concept of a “foreign public official” is defined in article 337-D of the Penal Code as follows: “A foreign public official is deemed to be, for the purposes of the law, anyone, even though temporarily or in an unpaid capacity, who holds a position, a job or a public function in state bodies or in diplomatic representations of a foreign country.” Furthermore: “anyone who holds a position, a job or function in an organisation or enterprise directly or indirectly controlled by the Public Authorities of the foreign country or in international public organisations is deemed to be equivalent to a foreign public official.” The lead examiners consider that the potential application of this definition is quite wide in scope.

139. It was explained in Phase 1 that the definition in article 337-D was based on the definition of “public official” in article 327 of the Penal Code (applicable to the domestic bribery offence).⁶⁵ In citing article 327 as a point of comparison, Brazilian authorities have stated that, based on jurisprudence, the definition of “public official” in article 327: covers all spheres of activities of the State including the executive, legislative and judicial functions; has been broadly interpreted by the courts to include any person that exercises in any way, a public function; and is to be interpreted by reference to the nature of the function and not on the existence of a formal link (or an employment bond) with the public administration and, on that basis, it is argued that the definition in article 337-D (and article 327) would cover agents providing services to the state. Brazilian authorities argue that the broad scope and interpretation of the

⁶⁴ The Penal Code includes the offence of active corruption of domestic officials (article 333), passive corruption of domestic officials (article 317), and a definition of a “public official” (article 327).

⁶⁵ Article 327 of the Brazilian Penal Code defines “public official” in the following terms: “*For the purposes of criminal law, anyone who, even though temporarily or unpaid, performs a public job, position or function is deemed to be a public official.*”

Paragraph 1: Anyone who performs a public job, or holds a function in a para-state body or who works for a service-providing company hired or contracted to carry out any typical activity in the Public Administration is also deemed to be a public official.”

definition in article 327 can be applied, by way of extension, to the definition of “foreign public official” in article 337-D. Another aspect of the definition of “foreign public official” in article 337-D of the Penal Code, is that it expressly includes anyone holding a function in a state-controlled enterprise or organization, or a public international organization. The Brazilian authorities argue that this would encompass persons exercising a function “for or on behalf of” such an entity.

140. There are certain differences in the language used in each of the two provisions (*i.e* between the articles 327 and 337-D of the Penal Code) which gave rise to concerns expressed by the Working Group in Phase 1 that article 337-D might be applied more restrictively. At that time, doubt was expressed as to whether a person exercising a public function for a foreign public agency would be covered by the definition of “foreign public official” in article 337-D of the Penal Code. The Penal Code does not include definitions for the key terms of “public function”, “public authority”, “state bodies”, “foreign country”, and “international public organizations”. A senior legal academic at the on-site visit expressed the view that the definition in the Penal Code was of sufficient scope to cover the requirements of the Convention. Moreover the Brazilian authorities re-iterated that because the Convention has legal force in Brazil, the courts would use the Convention or Commentaries as interpretative tools in order to determine the scope of these terms.

(ii) *Bribery through intermediaries*

141. Article 337-B of the Penal Code states that the offence can be committed “directly or indirectly”, and the Brazilian authorities argue that the reference in the provision to “indirectly” covers bribery through an intermediary. Moreover, the authorities have given assurances that the active briber remains criminally liable regardless of whether or not the intermediary is aware of the briber’s intent. No supporting case law was available. Furthermore, it is not clear that a case where the intermediary does not carry through with the offer or giving would in all circumstances be covered under article 337-B.

(iii) *Bribery for acts outside of the official’s authorised competence*

142. Article 1(4)(c) of the Convention states that the term “‘act or refrain from acting in relation to the performance of official duties’ includes any use of the public official’s position, whether or not within the official’s authorised competence”. Given that article 337-B of the Brazilian Penal Code applies to the act of bribing a foreign public official “in order for him or her to put into practice, to omit, or to delay any official act relating to an international business transaction”, it is not entirely clear that acts not within the official’s authorised competence are covered under this provision. At the on-site visit, the lead examiners discussed the example given in Commentary 19 on the Convention which clarifies that “one case of bribery which has been contemplated...is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office—though acting outside his competence—to make another official award a contract to that company”. The Brazilian authorities re-iterated that the offence will be committed if the act bears any relationship, ‘even indirectly’, with the functions of the public official, and that it would be no defence that the act was outside the scope of the official’s authority. No supporting case law was available.

143. The formulation for the foreign bribery offence in the Penal Code departs from the formulation in Article 1 of the Convention in another important respect, that is, under the Convention the purpose of the bribe is to obtain an act by a foreign public official which will enable the briber to “obtain or retain business or other improper advantage in the conduct of international business”. Under the Brazilian Penal Code, the purpose of the bribe must be to obtain “any official act relating to an international business transaction.” By linking the act or omission of the foreign public official to an international business transaction, rather than linking it to enabling the briber to obtain or retain an advantage in the conduct of international business, it is not clear whether certain acts and omissions would be covered. For instance, would advantageous tax treatment or the lifting of customs duties be covered under the Penal Code

formulation?⁶⁶ This issue was identified in the Phase 1 review. The Brazilian authorities (in Phase 1) stated that the offence was not drafted with the intention to limit the scope of the offence.

Commentary

The lead examiners have concluded that the foreign bribery offence in the Penal Code, including article 337-B and the definition of 'foreign public official' in article 337-D largely conform to the standards of the Convention. However, it is recognised that the full scope and application of the foreign bribery offence in the Penal Code remains untested before the Brazilian courts. Accordingly, given the absence of case law, the lead examiners recommend that the Working Group follow-up on the scope and application of the foreign bribery offence in the Penal Code, including whether: (1) the offence encompasses an act of bribery through an intermediary (including where "the offer" or "the giving" of the bribe is not carried through by the intermediary); (2) the offence covers any use of the public official's position, whether or not within the official's authorised competence; (3) the offence and definition of "foreign public official" in the Penal Code applies to all aspects of the term "foreign public official" as defined in the Convention; and (4) whether the linking of the act or omission of the foreign public official to an international business transaction in the Penal Code, narrows the scope of the foreign bribery offence, contrary to Article 1 of the Convention

c. Defences and exclusions from liability

(i) General defences

144. There are a number of general defences or exclusions from liability available under the General Part of the Penal Code that could be invoked by a defendant for a criminal offence, including foreign bribery. The principal defences are: mistake of law; mistake of fact; necessity; self defence; and duress. The lead examiners sought clarification as to the scope of the necessity and duress defences under Brazilian law. In general terms, a state of necessity, requires that the person that performed the criminal act, does so in order to avoid provoking danger or actual danger to him or herself. In accordance with the Convention, the defence is not applicable where a bribe is motivated by the alleged necessity of the payment to obtain or retain business or other improper advantage.⁶⁷ In relation to duress of the person, this defence is limited in scope and is only applicable where the criminal act is committed under irresistible coercion by, or in strict obedience of an order of, a hierarchical superior.

(i) Demands, intimidation or coercion by a public official

145. Under Brazilian criminal law a perpetrator that bribes a Brazilian public official could escape punishment under the domestic active bribery offence if the bribe was paid because the public official "demanded" the bribe. In these circumstances, it would be the public official that instead faces punishment for a separate offence of "concessão" under article 316 of the Penal Code for demanding the bribe.⁶⁸ The lead examiners sought to ascertain whether, in the context of international business transactions, a perpetrator that pays a bribe in response to a demand from a foreign public official could similarly benefit from the existence of the "concessão" offence and thereby avoid prosecution for the foreign bribery

⁶⁶ Brazilian authorities have stated that this example is clearly covered under the Penal Code provision.

⁶⁷ Commentaries on the Convention, paragraph 7.

⁶⁸ If the public official is found guilty of "concessão" then he or she could face imprisonment of between 2 to 8 years and also a fine, pursuant to article 316 of the Penal Code.

offence. The "concessão" offence was the subject of much discussion with a range of legal practitioners in the Phase 2 examination, particularly with prosecutors, defence lawyers and legal academics. Although there was not a consistent view about the scope of the offence, most legal practitioners downplayed its relevance or application in the context of foreign bribery. Moreover, assurances were given that prosecution of the briber is not precluded where the public official had been convicted of "concessão".

146. At its most basic level, prosecutors submitted that the intended purpose of the "concessão" provision was to punish Brazilian public officials that "demanded" a bribe. The concept of "demand" was suggested by many prosecutors to be construed, not as a mere request or simple demand for a bribe but rather involving a level of coercion or intimidation by a Brazilian public official in order to obtain payment of the bribe. This view was not universally held by Brazilian prosecutors however, as there were suggestions that a simple demand could also be sufficient to trigger the offence of "concessão". In either case, prosecutors sought to re-assure the lead examiners that a decision to prosecute a Brazilian public official for the offence of "concessão" would not necessarily preclude prosecution of the person that paid the bribe (*i.e.* the active briber). The position at law on this point remains unclear.

147. In relation to international business transactions, the Brazilian authorities stated that the offence of "concessão" is not applicable in cases of foreign bribery. The lead examiners observed that the "concessão" provision itself, in article 316, is not expressly limited in application to domestic public officials. Nevertheless prosecutors explained that the "concessão" offence pre-dated the Convention, has been part of the criminal law for over 100 years and was always intended to preserve the integrity of the domestic public administration.⁶⁹ In that regard, the offence falls under Title XI of the Penal Code "Crimes against the public administration", and is specifically included in Chapter X "Crimes Committed by a Public Agent against the Administration in General". This is the same chapter that incorporates the offences of active and passive bribery of Brazilian public officials. The Brazilian authorities argued that the inclusion of the "concessão" offence in the chapter dealing with domestic bribery offences is deliberate, and it confines the scope of "concessão" to the domestic context.

148. The foreign bribery offence is included in a separate chapter of the Penal Code, Chapter XI, and is specifically entitled "Crimes committed by individuals against a foreign public administration." In highlighting their view, the Brazilian authorities stated that for a "concessão" offence to be applied in the context of bribery in international business transactions, a new international "concessão" provision would have been required, and no such provision has been enacted. In short, many prosecutors, academics and defence lawyers expressed the view that the offence of "concessão" could not be invoked in a case of foreign bribery where an individual (the active briber) paid the bribe upon demand by the foreign public official. But, even if circumstances prevailed where this offence could be applied to prosecute a foreign public official, some prosecutors suggested that as a matter of legal principle, this would not necessarily result in the active briber being exonerated and it would still be possible to prosecute the foreign bribery offence under article 337-B of the Penal Code.⁷⁰ These propositions have not been tested at law.

⁶⁹ The Brazilian authorities have stated that the "concessão" provision in article 316 of the Brazilian Penal Code was enacted by Decreto-Lei 2.848, from December 7th, 1940. But, before this, it was in the Brazilian Criminal Code of 1890.

⁷⁰ The authorities have indicated that, although unlikely, perhaps a foreign public official could be charged with "concessão" by Brazilian authorities, but only if the standards of extraterritorial jurisdiction could be met (*i.e.* in article 7 of the Penal Code). Again, however, the authorities emphasized that a charge against a foreign public official for "concessão" would not preclude a charge also being brought against the perpetrator that paid the bribe for the foreign bribery offence in article 337-B of the Penal Code.

Commentary

The lead examiners noted the views of prosecutors that the offence of "conculssão" in article 316 of the Penal Code is not intended to apply to the foreign bribery offence, and thus could not be used as a basis to preclude prosecution of a perpetrator for the offence of bribery of a foreign public official. In the absence of case law or guidelines to support this view, follow-up on the application of this provision is recommended.

3. Liability of Legal Persons

a. Establishing liability of legal persons

(i) Introduction

149. Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official”. Although a Party is able to adopt its own method for implementing Article 2 of the Convention (i.e., in accordance with its legal principles) Parties are subject to two limitations. First, a Party is not required to establish criminal responsibility for foreign bribery if, pursuant to its legal system, criminal responsibility is not “applicable” to legal persons.⁷¹ Second, pursuant to Article 3(1) of the Convention, legal persons shall be subject to effective, proportionate and dissuasive criminal sanctions for foreign bribery, and pursuant to Article 3(2), in the event that a Party’s legal system does not provide for the criminal responsibility of legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions.

150. Brazil has not established criminal or administrative responsibility for legal persons for the foreign bribery offence. As will be outlined below, whilst there have been a couple of statutes that have adopted explicit corporate liability regimes for specific offences; none applies to the offence of foreign bribery. Given that the Convention requires all Parties to directly establish the liability of legal persons for the foreign bribery offence, the lead examiners have concluded that Brazil’s failure to do so is inconsistent with Article 2 of the Convention. This conclusion deviates from the position expressed in the Phase 1 Report on Brazil.⁷² The lead examiners revisited the Phase 1 conclusions following further scrutiny of the applicable laws, a review of Brazil’s answers to the Phase 2 questionnaires, and discussions with various participants at the on-site visit to Brazil. Furthermore, the lead examiners note that a Phase 1 recommendation by the Working Group, to amend Law 8 884 (Protection of Economic Order) to specifically identify bribery as a prohibited act, has not been implemented by Brazil.

⁷¹ See Commentary 20 on the Convention.

⁷² The main text of the Phase 1 Report on Brazil states (on page 12) that: “The coverage afforded by the forms of administrative and civil liability of legal persons applicable to acts of foreign bribery that currently exist in Brazil appears as a whole to be sufficient to satisfy the requirements of Articles 2 and 3 of the Convention, provided the available remedies are in fact applied to cases of foreign bribery. The question whether the penalties available provide effective, proportionate and dissuasive sanctions remains to be reviewed as practice develops.” In the comments on the evaluation of Brazil (at page 35) it is stated that the Working Group: “takes note of Brazil’s explanation that Law 8 884 (Protection of the Economic Order) imposes administrative liability on legal persons and that bribery, including transnational bribery, although not named, is encompassed within the general prohibitions of the Law. Nevertheless, the Working Group recommends that Brazil amend Law 8 884 to specifically identify bribery as a prohibited act. Further, the Working Group proposed to review the application of this Law in Phase 2).”

(ii) *The legal basis for liability of legal persons in Brazil*

151. Mainstream Brazilian legal thought strongly rejects the possibility of attributing criminal liability to legal persons. This position is corroborated by statutes, the jurisprudence and the majority of legal scholars. 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. However, the necessity of identifying a single individual with the appropriate *mens rea* does not, in the view of the lead examiners, address modern complex decision-making structures in large corporations where it is often difficult to identify one individual decision maker within a management chain. Nevertheless, the authorities in Brazil maintain that under legal theory in Brazil, a legal person is considered to have an “abstract, intangible and unreal existence” and therefore it 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 that have the capacity for criminal liability. A notable exception to this rule is a provision in the Constitution, often cited by Brazilian officials, that enables the imposition of criminal and administrative sanctions on legal persons that cause harm to the environment.⁷³

152. The constitutional basis relied upon for enacting laws that establish administrative liability on legal persons is found in article 173, paragraph 5 of the Federal Constitution which 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.” Although it is arguable that a bribe paid by a Brazilian company to a foreign public official abroad may not of itself constitute an act “against the economic and financial order and against the popular economy” of Brazil, the authorities are adamant that this constitutional provision provides a strong legal basis for implementing Article 2 of the Convention. In particular, Brazilian officials have highlighted three Laws that have been enacted based on article 173, paragraph 5 of the Federal Constitution, which have established a range of administrative sanctions applicable to legal persons. The scope and effectiveness of these laws, in relation to the offence of foreign bribery, are considered below.

(iii) *Laws creating administrative liability*

153. There is no direct administrative prohibition in Brazil that expressly establishes liability for legal persons engaged in the bribery of foreign public officials. The authorities have explained that legal persons implicated in the bribery of foreign public officials could be subject to other forms of administrative liability established under Brazilian law, depending on the circumstances of the case. There are three laws cited by Brazil as providing a possible basis for imposing administrative liability on legal persons implicated in a case of foreign bribery: (i) Law 8 666 of 21 June 1993 (Law of Procurement); (ii) Law 6 385 of 7 December 1976 (Publicly Held Corporations); and (iii) Law 8 884 of 11 June 1994 (Protection of the Economic Order). The three laws are briefly examined below.

Law 8 666 of 21 June 1993 (Law of Procurement)

154. Law 8 666 is entirely focused on regulating procurement within Brazil at the federal, state and municipal levels and, accordingly, its application or relevance to foreign bribery matters is likely to be negligible. The Brazilian authorities have indicated that the offence of bribery of a foreign public official could fall within the concept of “illegal acts” within article 88 of the Law. However, administrative sanctions against legal persons could only be applied to “illegal acts” related to public tenders and

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Article 225, paragraph 3, of the Brazilian Constitution addresses liability for environmental harm, but it does not expressly establish “criminal” responsibility for legal persons *per se*, but simply refers to the imposition of penal (*i.e.* criminal) or administrative sanctions. The provision is extracted in Annex 3.

contracts in respect of works and services within the scope of the powers of the Brazilian Federal Government, the States, the Federal District and the Municipalities.⁷⁴ In addition, the administrative sanctions available under Law 8 666 are not monetary sanctions, but relate to participation in public procurement contracting, and thus can only be considered as “additional civil or administrative sanctions” pursuant to Article 3(2) of the Convention. The lead examiners have concluded that the application and purpose of this law is not capable of achieving compliance with Article 2 of the Convention.

Law 6 385 of 7 December 1976 (Publicly Held Corporations)

155. Article 4, subparagraph IV (b) of Law 6 385 states that the Brazilian Securities and Exchange Commission (CVM) shall perform the duties provided for under the Law in order to “protect securities holders and market investors...against illegal acts of officers and controlling shareholders of publicly held corporations, or managers of securities portfolios”. Furthermore, subparagraph V states that the CVM shall “avoid or prevent any kind of fraud or manipulation intended to create artificial conditions of supply, demand or price of the securities traded on the market”. In order to carry out its functions, the CVM has the power under article 9 to undertake certain investigative activities “whenever there are indicia of illegal activities”. The notion of “illegal activities” could arguably include the bribery of foreign public officials although its application to such cases is likely to be low. Law 6 385 is entirely domestic in scope, as its purpose is to protect holders of Brazilian securities and investors in the Brazilian market. Prevention of the bribery of a foreign public official in international business transactions does not come under this overall goal.

156. Moreover, pursuant to article 9, subparagraph VI of the Law, the penalties, which include a fine or warning, can only be applied to managers, members of the finance committee and shareholders of publicly held corporations, intermediaries and other market participants (*i.e.* not legal persons directly). In addition, pursuant to article 9, subparagraph 6. I, they can only apply where “there have been damages to individuals living in Brazilian territory, wherever the accident has happened”; or “material actions or omissions have happened in Brazilian territory”. In any case, the overall scope of Law 6 385 only relates to listed companies and does not extend to other common forms of legal persons created under Brazilian law.

Law 8 884 of 11 June 1994 (Protection of the Economic Order)

157. Law 8 884 specifically addresses anti-competitive behaviour in relation to the Brazilian market.⁷⁵ Thus, like the other two laws outlined above, it is entirely domestic in scope: pursuant to article 2, the acts must be wholly or partly performed in Brazil or the effects must be “suffered therein”. Effects could only be “suffered” in Brazil if they related to the Brazilian market. A company implicated in a foreign bribery offence is unlikely to directly constitute an act that violated the economic order of Brazil. Article 20(1) makes it a violation of the economic order “to limit, distort, or in any way injure open competition or free enterprise”. Article 21 enumerates examples of acts which will, “among others”, be deemed a violation of the economic order, including: price-fixing; and unreasonably selling goods below cost. The foreign bribery offence is not specifically included in the list. The Working Group on Bribery recommended in Phase 1 that Brazil amend this Law to specifically identify bribery as a prohibited act. This has not been done. However, as indicated by Brazilian authorities during the on-site visit, because the purpose of Law

⁷⁴ See article 1 of Law 8 666 of 21 June 1993.

⁷⁵ There are three relevant government bodies that have carriage of Law 8 884: the Treasury Department’s Economic Monitoring Secretariat (SEAE), the Ministry of Justice’s Economic Law Office (SDE) and the Administrative Council for Economic Defense (CADE). Investigations of anti-competitive behaviour under the Law are carried out by the SDE, and its opinion is forwarded to the CADE for a final decision to be taken.

8 884 is to clearly prohibit anti-competitive behaviour, this legislation may not be the most suitable vehicle for directly punishing foreign bribery by legal persons.

158. The offence of bribing a foreign public official is indirectly related to the terms of Law 8 884. At best, the legislation could be used to sanction foreign bribery where the conduct of the legal person is directly related to anti-competitive behaviour, provided that this conduct also has an effect in Brazil. In that regard, an example given was where a company bribes a foreign public official either to enable the operation of a cartel to be set up abroad or alternatively, to implement a plan designed to manipulate a tender process abroad: in either case, if effects are caused in Brazil, it appears that this could attract liability under Law 8 884. It is clear however, that the foreign bribery aspect is only incidental to the primary offence and is not, of itself, directly punishable under the Law.⁷⁶

(iv) *Inconsistency with Articles 2 and 3 of the Convention*

159. The lead examiners have concluded that Brazil has failed to implement Article 2 of the Convention. Indeed of the three statutes submitted by Brazil as having relevance to the liability of legal persons for the bribery of foreign public officials, none is directly relevant to such bribery. The first (Law 8 666) relates to domestic public procurement-related activities, and does not provide for monetary sanctions. The second (Law 6 385) is entirely domestic in scope, only provides penalties for individuals with a certain relationship to the company, and only applies in relation to publicly held companies. The third (Law 8 884) applies specifically to anti-competitive behaviour which could indirectly involve foreign bribery, but only if it affects the Brazilian market. Moreover, a recommendation by the Working Group in Phase 1 to amend this statute to refer specifically to foreign bribery in the list of acts deemed a violation of the economic order has not been acted on.

160. International experience suggests that corporate entities are frequent vehicles for the payment of bribes, and the use of elaborate financial structures and accounting techniques to conceal the nature of transactions is commonplace. In relation to large companies which are often characterized by complex corporate structures, decentralized operations and multiple layers of decision-making authority, it will often be difficult for investigators to attribute responsibility to any one specific individual. The failure to take proper account of the role of legal entities in foreign bribery could result in insufficient attention being paid to them in detection efforts, as well as in targeting measures of deterrence and prevention. In addition, the absence of liability of legal persons may present a significant obstacle to the effective implementation of other obligations by Brazil under the Convention, in particular in respect of money laundering, mutual legal assistance and confiscation.

161. The lead examiners are also concerned that many different forms of legal person established in Brazil are not adequately covered by the existing administrative liability regime. Indeed, one of these laws (Law 6 385 on Publicly Held Corporations) only applies to certain individuals related to publicly held corporations. This issue should be addressed in any future legislative reforms. Apart from listed companies, members of the accounting and auditing profession stated that many significant companies in Brazil are unlisted and are directly or indirectly controlled by major families or the State. Moreover, there is an estimated five million small and medium sized enterprises, representing about 98% of all Brazilian

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The Brazilian authorities have acknowledged that bribing a foreign public official is indirectly related to the terms of Law 8 884 of 1994. In the example given – that is, where a company bribes a foreign public official to enable the operation of a cartel set up abroad or to implement a plan to manipulate a tender process abroad, it is essential that the prohibited conduct causes effects in Brazil. In terms of enforcement, the companies that formed the cartel would be prosecuted and the foreign public official would be summoned to appear before the Ministry of Justice’s Economic Law Office to help with their investigations.

enterprises, which operate under various business structures, including: sole proprietorships; partnerships, private companies, unincorporated associations, and foundations. All forms of legal persons in Brazil should be covered in order to comply with Article 2 of the Convention. The lead examiners also note that if the offender is a wholly-owned foreign subsidiary of a Brazilian company, the likelihood of the parent company being subject to liability for foreign bribery is remote, if not impossible, under the current state of the law: this issue should also be considered in any reforms to the corporate liability regime applicable to the foreign bribery offence.

162. In relation to Article 3 of the Convention, legal persons in Brazil are not subject to effective, proportionate and dissuasive sanctions for bribery of foreign public officials. As has been discussed above, although one of the laws cited by Brazil (Law 8 884 which addresses anti-competitive behaviour) provides a basis for imposing significant administrative sanctions on legal persons for particular offences, the offence of foreign bribery is not one of them. The sanctions available for legal persons (for other offences) include the following: (1) Legal persons that engage in illegal acts under Law 8 666 of 1993 (Law on Procurement) face suspension or exclusion from all public tenders or contracts with the Brazilian public administration; and (2) In cases of anti-competitive behaviour, under Law 8 884, the basic penalty is a fine of between one to thirty percent of a company's gross pre-tax earnings for the previous financial year, with fines able to be doubled for recurring violations. In addition, authorities can require publication of the sentence in a newspaper, and in serious cases companies can be disqualified from all public financing or bids for five years or more.

163. The lead examiners acknowledge that the sanctions available under the two abovementioned laws are significant, although in most cases the available sanctions could not be applied to punish legal persons that bribe a foreign public official. Until the law is changed to ensure direct liability for legal persons for the foreign bribery offence, the lead examiners believe that the imposition of effective, proportionate and dissuasive sanctions for foreign bribery will be precluded, contrary to Article 3 of the Convention.

b. The investigation and prosecution of legal persons

164. As Brazil has not directly established the liability of legal persons for the foreign bribery offence, there have been no such cases in practice. The lead examiners remain very concerned that, under the current law, there is little prospect of a legal person ever being prosecuted in Brazil for the offence of foreign bribery. Moreover, under the current administrative liability regime, none of the existing regulatory bodies are specifically charged with detecting, investigating or prosecuting cases of foreign bribery. In relation to the Brazilian Securities and Exchange Commission (CVM), for example, its primary purpose under Law 6 385 is to protect holders of Brazilian securities and investors in the Brazilian market. As mentioned above, prevention of the bribery of a foreign public official in international business transactions does not come under this overall goal. Similarly, investigations carried out by the Ministry of Justice's Economic Law Office (SDE), pursuant to Law 8 884, are primarily focused on anti-competitive behaviour: there is no direct authority or responsibility to investigate cases of foreign bribery involving Brazilian companies. It is the view of the lead examiners that it would be desirable to ensure that an appropriate regulatory (or other) body is clearly vested with responsibility for investigating and sanctioning legal persons implicated in foreign bribery, and that it is capable of coordinating its activities with Federal Police, prosecutors or other authorities where necessary. The lead examiners believe that whichever body is in the future charged with responsibility for investigating and sanctioning foreign bribery cases involving legal persons, it is also important that relevant personnel receive training on the Convention; that the body is adequately resourced; that it has access to the necessary expertise and is able to employ the full range of investigative powers, including specialist investigative techniques, in order to effectively combat foreign bribery. Following the on-site visit, the lead examiners were informed that the topic of liability of legal persons and corruption had also been discussed in the context of the Brazilian anti-corruption strategy, and has become part of the ENCCLA 2008 directives. In this respect, the Brazilian authorities further informed the lead examiners that a Bill would

be presented before Congress in 2008 establishing the liability of legal persons in corruption cases. Officials from the CGU have indicated that the CGU will analyse the Bill to help ensure that it conforms to the legal principles of the Convention.

Commentary

As of December 2007, Brazil had not taken the necessary measures to establish the liability of legal persons for the bribery of a foreign public official, in accordance with its legal principles. Accordingly, the lead examiners have concluded that the current statutory regime for liability of legal persons under Brazilian law is inconsistent with Article 2 of the Convention. The lead examiners regard this situation as a serious gap in the law that needs to be urgently addressed.

In relation to sanctions, and under the current legislation, the lead examiners consider that bribery of a foreign public official by legal persons is not punishable in Brazil by effective, proportionate and dissuasive sanctions as required by Article 3 of the Convention principally because of the considerations set forth above relating to the regime for the liability of legal persons.

However, the lead examiners welcomed information provided by Brazil that the topic of liability of legal persons and corruption has been formally included in Brazil's anti-corruption strategy (ENCCLA) for 2008 and further welcomed the news that a Bill would be presented before Congress to establish the liability of legal persons in corruption cases. The lead examiners strongly recommend that Brazil ensure that liability of legal persons for the bribery of a foreign public official is covered under the Bill (or in any other relevant laws that are subsequently enacted), and that effective, proportionate and dissuasive sanctions are provided. They urge the Brazilian authorities to proceed with the adoption of this new legislation at the earliest opportunity.

4. Adjudication and Sanction of the Foreign Bribery Offence

a. Sanctions imposed by the courts

(i) Criminal sanctions

165. Currently, imprisonment sanctions for bribery of foreign public officials in international business transactions run from one to eight years. However, these sanctions could be increased to two to twelve years imprisonment, as proposed in Bill 7 710 presented to the National Congress on 1 January 2007. Brazil indicated that, as of December 2007, this Bill had been approved by the Constitutional Committee and had to be approved by the House of Representatives before being sent to the Senate.

166. Fines may also be imposed, in addition to imprisonment sanctions, but not in lieu of.⁷⁷ Fines for foreign bribery are between 10 and 360 “daily fines”. A daily fine is defined as one thirtieth to five times the highest monthly minimum wage in force at the time of the commission of the crime.⁷⁸ As of the time of this review, the minimum wage is in the amount of BRL 380 (USD 199). One daily-fine would therefore be set between USD 6.63 and USD 995, the courts taking into account exclusively the economic status of the defendant. The daily fine is then multiplied by a factor ranging from 10 to 360, allowing for such

⁷⁷ Under article 60(2) of the Penal Code, sentences of imprisonment of no more than six months may in some circumstances be replaced by a fine.

⁷⁸ Article 49 of the Penal Code.

factors as the seriousness of the offence, *etc.* Article 59 of the Penal Code describes the general rules for applying the sanction, but no English translation has been provided. Given the calculations indicated above, fines could therefore range from a minimum of USD 66.30 (10 times 1/30th of the minimum wage) to USD 358 200 (360 times 5 times the minimum wage).

167. These penalties (imprisonment and fines) can be increased by one-third where the foreign briber payment was made in order to obtain that the foreign public official act in breach of his/her official duty. In such cases of aggravated foreign bribery, imprisonment sanctions would therefore run from 16 months to 128 months (10 years and 8 months), and fines would run from USD 8.84 to USD 477 600.

168. Unease was voiced by some representatives of the *Ministério Público Federal* regarding the leniency with which they perceive certain white collar crime offenders to be treated by the courts in some cases. They expressed concern regarding the tendency of certain higher courts to take an excessively protective view of private citizens and to take crimes of violence more seriously than economic crime.

(ii) *Confiscation*

169. Criminal confiscation is referred to in article 91 of the Penal Code as “loss in favour of the Union” (or “loss to the Federal Government”). Confiscation is “an effect of the sentence”, which, as Brazil confirmed, entails that confiscation measures are mandatory. In terms of process, article 122 of the Code of Criminal Procedure specifies that the judge decrees the “loss to the Federal Government” 90 days after the definitive sentence has been issued, provided that no injured party has manifested itself to obtain damages.

Confiscation of the bribe

170. Confiscation of the bribe itself would be extremely unlikely in the context of a foreign bribery offence in Brazil.

171. According to article 91(II)(a) of the Penal Code, confiscation of the instrument of the crime (*i.e.* the bribe) is only possible if it consists of “things whose manufacture, sale, use, bearing or detention constitutes an illegal act”. The Brazilian authorities confirmed the view already expressed at the time of the Phase 1 that a bribe still in the hands of the briber could not be confiscated as it would yet have to be put to unlawful use. In a domestic bribery context, once the bribe is in the hands of the corrupt official, it could be confiscated from the domestic public official convicted of passive bribery. It is unlikely that the bribe could ever be confiscated in a foreign bribery context, since, in all likelihood, the foreign public official would not be in Brazil, and would not be tried and convicted in Brazil. There is no possibility either under Brazilian law for confiscation of the monetary equivalent of the bribe.

Confiscation of the proceeds of bribery

172. Confiscation of the proceeds of bribery, whether direct or indirect, is a mandatory effect of a conviction, and should thus be an effective sanction under Brazilian law, provided it applies to persons criminally convicted of foreign bribery. However, confiscation of proceeds in the hands of third parties not acting in good faith, and notably in the hands of legal persons, appears extremely unlikely in a foreign bribery context.

173. Article 91(II)(b) of the Penal Code provides for the possibility of confiscating “the product of the criminal offence” or “any good or security constituting a gain made by the offender from committing the criminal offence”. This would include both direct and indirect proceeds resulting from the bribe payments.

174. As indicated above, confiscation ‘or “loss to the Union” is an effect of the conviction. Thus, confiscation can generally be obtained only where there has been a previous criminal conviction against a

specified person. This interpretation was confirmed by Brazil at the time of the Phase 1, who indicated that “confiscation can be imposed against a third party who possesses the instrument or the proceeds of an offence, if that person is an accomplice or co-author of the offence.” This was confirmed by law enforcement authorities at the on-site visit.

175. This definition of confiscation as an “effect” of the criminal sanction raises particular concern with regard to confiscation of proceeds in the possession of legal persons. Because legal persons cannot be held criminally liable under the Brazilian system (except for environmental crimes), confiscation as an immediate effect of the criminal conviction under article 91 will not be possible. Civil action to obtain confiscation may be possible, but will be of little effectiveness in a foreign bribery context.

176. Indeed, in Phase 1, and again during the on-site visit in Phase 2, the Brazilian authorities stated that confiscation of a product of crime could be imposed against a legal person, but that this “requires a civil action to be instituted by the government as the injured party.”⁷⁹ Brazilian law enforcement and judicial authorities reported on several domestic bribery cases where this process has been successfully used. As mentioned earlier in this report, the Brazilian authorities stated in their Phase 2 Responses that “in the case of bribery of foreign public officials, it is understood that the victim, or the passive subject of the crime, is the foreign country.” Thus, a civil action instituted by a foreign government, acting as the injured party, would be required to obtain confiscation under this procedure, a situation that would rarely, if ever, occur, in the current context.

177. Finally, in addition to the criminal confiscation procedures, provisions under the money laundering legislation (Law 9 613 of 3 March 1998) could be relied on to obtain confiscation of assets in the context of a conviction for money laundering with foreign bribery as the predicate offence. In this situation, the burden of proof is reversed, with the defendant’s assets usually being frozen from the outset and only freed if the accused is able to prove that they originated from licit activities.

(iii) Additional civil or administrative sanctions

178. 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. Furthermore, it may only be pronounced in cases of crimes of abuse of power or breach of duty with regard to the Public Administration (this would rarely apply to foreign bribery cases), and, in all other cases, when a prison sentence of four years or more is imposed.⁸⁰ Thus, in the specific context of foreign bribery cases, this loss of position may only be pronounced against natural persons convicted of four years or more of imprisonment.

179. Finally, civil remedies in favour of the injured party are also available and can be triggered by the criminal sentence. Article 63 of the Code of Criminal Procedure provides for the possibility for victims to ask for reparation of damages before the civil judge, as an effect of the criminal sentence.

Commentary:

The lead examiners are of the view that the provisions on confiscation of proceeds will not be applicable in foreign bribery cases to proceeds in the hands of third parties (not in good faith). Thus, they are concerned that corporate vehicles could be used to protect the proceeds

⁷⁹ See Phase 1 Report, section 3.6.

⁸⁰ See Phase 1 Report.

obtained from bribing a foreign public official from confiscation. Given that monetary sanctions are a fundamental deterrent for economic offences such as foreign bribery, they recommend that Brazil take all necessary measures to provide that proceeds of bribery of a foreign public official can always be confiscated, including where they are in the hands of a third party not acting in good faith, and regardless of whether that third party is a natural or legal person, or that monetary sanctions of comparable effect are applicable.

With regard to legal persons, the lead examiners consider that Brazil does not apply effective, proportionate and dissuasive sanctions on legal persons for foreign bribery as required by the Convention principally because of the considerations set forth above relating to the regime for the liability of legal persons.

In view of the concerns expressed by some prosecutors about the perceived leniency of the courts in certain economic crimes, as well as the possible difficulties under the current confiscation regime, the lead examiners are concerned that this may affect the effective, proportionate and dissuasive character of sanctions in Brazil for the foreign bribery offence. Given the absence of any foreign bribery conviction to date, the lead examiners recommend that the Working Group monitor the level of sanctions and application of confiscation measures when there has been sufficient practice, in order to ensure that the sanctions handed down by the courts are effective, proportionate and dissuasive.

b. Sanctions imposable by agencies other than the courts

180. In addition to criminal, administrative and civil sanctions, as well as confiscation sentences which may be pronounced by the courts, additional measures may be taken by public bodies or agencies in charge of administering public funds and subsidies to sanction acts of foreign bribery committed by applicants.

(i) Officially supported export credits

181. As noted earlier (see section B(2)(c) on prevention and detection in the context of officially supported export credits), Brazil is not a member of the OECD Working Party on Export Credit and Credit Guarantees (ECG). As a result, the Brazilian Development Bank (BNDES), Brazil's export credit agency, has not undertaken any commitment under the OECD Recommendation on Bribery and Officially Supported Credits, which are aimed at sanctioning applicants involved in foreign bribery.

182. As of the time of this review, BNDES contracts for export credit guarantees do not provide for the possibility of withdrawing support to applicants where they have been or are involved in foreign bribery. Nor are there any specific measures for suspending support or undertaking enhanced due diligence where there are suspicions of foreign bribery concerning applicants. After the on-site visit, the Brazilian authorities informed the lead examiners that the BNDES is considering proposals to amend the conditions and procedures for the grant of officially supported export credits with the view to strengthening its efforts to detect prevent and combat foreign bribery.

(ii) Official development assistance

183. As indicated earlier, Brazil does not provide official development assistance, as defined by the OECD Development Assistance Committee. BNDES does however finance infrastructure projects in several Latin-American and African countries, with the contracts being adjudicated to Brazilian contractors (see section B(2)(d) on prevention and detection in the context of official development assistance, including explanations on the financial architecture of these contracts). There are no specific anti-

corruption clauses included in these contracts which would exclude companies previously convicted of foreign bribery, or at least place such companies under enhanced due diligence.

(iii) *Public procurement and privatisation*

Public procurement

184. Law 8 666 of 21 June 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. With a view to ensuring the respect of these conditions by companies bidding in any public tender, bidders are asked to sign an undertaking certifying that they have not been declared unfit to bid or enter into contract with the Public Administration.

185. The first criterion on tax fraud is clear and explicit. The second criterion, if it were to relate to corruption, would concern bribery of Brazilian domestic public officials, as it refers to the bidding process under consideration (i.e. the Brazilian public tender). Thus, questions during the on-site visit focused on whether the previous involvement of a bidding company in foreign bribery would amount to illicit acts committed by the company, making it “unfit” to bid in a Brazilian public procurement process (as defined under criterion (iii) mentioned above). As discussed above in section 3, serious concerns exist regarding the liability of legal persons for acts of foreign bribery in Brazil. If a company cannot be convicted for a foreign bribery offence, it will not be excluded from participation in public tenders as a consequence of foreign bribery. Finally, even if a company were convicted of a foreign bribery offence (in Brazil or by a foreign jurisdiction), it is far from explicit in Law 8 666 that this offence would constitute an “illicit act” for the purpose of excluding that company from a public procurement process.

Privatisation

186. Brazil’s privatisation programme has been large, amounting to over USD 100 billion in receipts since 1992, starting with manufacturing in the early 1990s and followed by utilities in the second half of the decade. Among the remaining state-owned enterprises which could be the object of future privatisation, are companies in the electric industry, the oil industry (including *Petrobrás*), and the financial sector (including *Banco do Brasil*). BNDES is the agency responsible, at the federal level, for overseeing each privatisation process, from initial tenders for consultants to the final sale operation, advising the Privatisation Council (CND) on process (time-scale, restructuring of companies, sale terms), and carrying out decisions by the CND. At the state level, BNDES advances financial resources to state governments, and provides technical assistance in privatisation procedures.⁸¹

187. As indicated above, procedures put in place by BNDES for managing any type of public subsidies do not currently include anti-corruption clauses, which would specifically aim at preventing, detecting and sanctioning foreign bribery on the part of companies bidding in privatisation processes. However, as noted earlier in this Report, a Working Group has been set up in May 2007 within BNDES to examine further measures which could be adopted to adapt to provisions in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. It is hoped that proposals to be made by this Working Group to BNDES’s Administration would also include anti-corruption measures in the area of privatisation processes.

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See information on the BNDES website at <http://www.bndes.gov.br/english/studies.asp>.

Commentary:

The lead examiners recommend that agencies in charge of administering public funds and government contracts, notably BNDES and other federal and state agencies responsible for public procurement and privatisation processes, take due consideration of prior convictions for foreign bribery offences in their contracting decisions. They also recommend that Brazil put in place due diligence procedures where there are suspicions that applicants or clients have been or are involved in payment of bribes to foreign public officials, both before the contract is awarded and during its execution, with a view to suspending or withdrawing support.

The lead examiners welcomed the information provided by the Brazilian authorities (after the on-site visit) that the BNDES is considering proposals to amend the conditions and procedures for the grant of officially supported export credits with the view to strengthening its efforts to detect, prevent and combat foreign bribery.

5. The Money Laundering Offence

a. Scope of the money laundering offence and associated sanctions

188. Bribery of a domestic and foreign public official are predicate offences for the purposes of Brazil's money laundering legislation by virtue of Law 9 613 of 3 March 1998, as amended by Law 10 467 of 2002. The offence of money laundering, which is defined in article 1 of Law 9 613, was described in the Phase 1 Report of Brazil.⁸² The punishment upon conviction is imprisonment of 3 to 10 years and a fine. In the case of conviction for the predicate offence (e.g. the offence of foreign bribery) and also the crime of money laundering, the sentence provided for the money laundering offence is applied cumulatively with the sentence imposed for the predicate offence. Other available sanctions include: the restraint and confiscation of the object or proceeds of crime; the suspension of the right to hold offices of any nature in the public service, a position as a company director, or as a manager of any of the legal entities referred to in article 9 of the Law (i.e. reporting entities which covers banks, other financial institutions, stock brokers, insurance companies etc.). A sentence may be reduced by one to two-thirds in the event that the perpetrator freely agrees to cooperate with the authorities by providing information which may lead to the detection of a crime and the object or proceeds of the crime.

189. The money laundering offence can be applied in a situation where the predicate offence occurs abroad. The requirement is that the predicate offence must correspond to one of the acts listed in the catalogue of prior crimes under article 1 of Law 9 613 of 1998. This list includes acts committed by an individual against a foreign public administration.⁸³ Following the on-site visit, Brazil confirmed that there is no requirement of dual criminality 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.

190. A conviction for money laundering in Brazil requires sufficient evidence to demonstrate that the predicate offence has been committed. At the on-site visit the Brazilian authorities emphasized that in order to obtain a conviction for the crime of money laundering, evidence indicating the perpetration of the prior crime is sufficient, and that a conviction for the predicate offence is not required at law.⁸⁴ In fact a money laundering conviction can be secured even when the offender of the predicate offence is unknown

⁸² Brazil: Phase 1 Report, adopted 31 August 2004, pp. 22-25.

⁸³ See article 1(VIII) of Law 9 613 of 1998.

⁸⁴ According to article 2(II) of Law 9 613 of 3 March 1998.

or exempt from punishment.⁸⁵ Another important issue concerns legal persons: although Brazil does not have criminal liability for legal persons, the authorities have stated that the offence of money laundering can still be prosecuted where the predicate offence is committed abroad by a legal person. Case law on this point was not available.

191. The Brazilian authorities informed the lead examiners that Bill 209 of 2003, to amend the existing money laundering provisions, is currently before the Congress. If enacted, the Bill will delete the list of predicate offences enumerated in Law 9 613 for the crime of money laundering and replace it with an “all crimes approach” which would enable any crime recognised under Brazilian law to act as a predicate offence to money laundering. In addition, the Bill proposes to increase the maximum penalty for the money laundering offence from 10 years to 18 years imprisonment (together with a fine).

b. Enforcement of the money laundering offence

192. The Federal Police has established a centralised unit that deals with money laundering cases whilst the Public Prosecution has specialized prosecutors at both the State and Federal level that deal specifically with money laundering cases. Another important feature of the Brazilian legal system has been the establishment of specialized tribunals throughout the country to deal with money laundering cases. Statistics provided by Brazil indicate that there have been a large number of investigations initiated into the money laundering offence, with some 5 419 cases investigated in 2006. In the same year there were 625 inquiries, 41 penal actions, and the number of convictions secured was 51. There have been no cases so far under the money laundering legislation where the predicate offence was the bribery of a foreign public official. Statistics on the sanctions imposed by the courts in practice, including confiscation, were not available.

Commentary

The lead examiners recommend that the Working Group follow-up: (1) to confirm that the offence of money laundering can still be prosecuted where the predicate offence is committed abroad by a legal person; (2) whether the money laundering offence can effectively be enforced in cases where the predicate offence is foreign bribery regardless of the place where the bribery occurred, including in a foreign country which is not the country of the bribed foreign public official and where foreign bribery is not criminalised; and (3) the application of sanctions for the crime of money laundering, including the level of sanctions and the confiscation of proceeds of crime.

6. The Offence of False Accounting

193. Bribe payments made to foreign public officials in the context of international business transactions can be detected through analysis of books and records violations by accountants and auditors. According to the Brazilian authorities, the establishment of off-the-book accounts, the making of off-the-book or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object and the use of false documents, prohibited under Article 8 of the Convention, could constitute crimes against the economy, the tax system or particular provisions of the Penal Code.

194. The Brazilian Penal Code establishes offences that apply to the generation or creation of false source documents or underlying supporting documentation. Pursuant to article 297, falsifying, in all or in

⁸⁵ See article 2(III), paragraph 1 of Law 9 613 of 3 March 1998.

part, a “public document”, or altering a “genuine public document” is punishable by imprisonment from 2 to 6 years, and a fine. In that regard, “accounting records” are deemed to be equivalent to a “public document”.⁸⁶ Article 298 provides for penalties of deprivation of liberty from 1 to 5 years for such acts with respect to a “private document”. Moreover, it is an offence under article 299 to omit in a “public or private document” any declaration that ought to be made, or include or cause to include in such a document a false declaration or one different from that to be included, in order to damage the law or to create or alter the truth as to a “legally relevant fact”. Penalties are imprisonment from 1 to 5 years and a fine, with respect to a “public document”, and imprisonment from 1 to 3 years and a fine, with respect to a “private document”. Furthermore, article 304 applies to the use of any falsified or altered documents referred to in these articles. Penalties are equivalent to those for falsification and alteration prescribed under relevant articles. The Brazilian authorities have stated that these provisions apply to the activities of all types of enterprises, but only natural persons are subject to the criminal penalties. No case law in relation to these offences was available.

195. Another provision cited in Phase 1 addresses crimes against the national financial system, in particular, under article 11 of the Law 7 492 of 1986, it is an offence to maintain or move resources or value not in accordance with bookkeeping requirements, which provides a sanction of imprisonment of one to five years and a fine. There was no case law available that demonstrated either the connection between this offence and the conduct prohibited under Article 8 of the Convention.

196. The Brazilian authorities also cite provisions relating to crimes against the tax system, as a basis for punishing the prohibitions listed in Article 8 of the Convention. In that regard, under article 1 of Law 8 137 of 1990, it is a crime to omit or reduce payment of a tax or other charges by omitting information, providing a false declaration to financial authorities; introducing incorrect elements, or omitting operations of any nature in documents or records required by the tax legislation; forging or altering invoices or any other documents relating to taxable operations and preparing, distributing, providing, issuing or using any knowingly false or incorrect documents, *etc.* The offences are punishable by imprisonment of between one and five years and a fine. Similarly, article 1 of the Law 8 137 of 1990 dealing with crimes against the tax system, prohibits falsifications or omissions to reduce a tax or social contribution or other ancillary payments by means of introducing inaccurate elements or omitting income or transactions in the documents or books required by tax law, furnishing or issuing false documents, altering or increasing expenses, or altering invoices or other documents relating to commercial transactions, *etc.* The offence is punishable by imprisonment of between 2 to 5 years and a fine. These prohibitions and penalties are restricted to falsifications for tax purposes.

197. Brazil has stated that whilst the abovementioned provisions do not contain an express prohibition for the establishment of off-the-books accounts (or of the other activities referred to in Article 8 of the Convention) it maintains that the illicit conduct would be effectively prohibited by the abovementioned laws. There was no specific case law available to confirm this position. The authorities also pointed out that companies are obliged to comply with the general rules and regulations to maintain adequate records, including bookkeeping obligations and other accountancy requirements. The case law provided in this respect related to offences for the failure to prepare financial statements. The general accountancy and reporting requirements are outlined in section B (5) of this Report.

⁸⁶ See article 297, paragraph 2 of the Penal Code.

Commentary

The lead examiners recommend follow-up to ensure that, as practice develops, all of the activities listed in article 8.1 of the Convention are effectively prohibited under existing laws, including the establishment of off-the-books accounts and the recording of non-existent expenditures for the purpose of bribing foreign public officials or of hiding such bribery.

D. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

198. Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Brazil, the Working Group (i) makes the following recommendations to Brazil, and (ii) will follow-up certain issues when there has been sufficient practice.

1. Recommendations

Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials

1. With respect to prevention, awareness raising and training activities to promote implementation of the Convention and the Revised Recommendation, the Working Group recommends that Brazil:

- a) Pursue its efforts to raise the level of awareness of and provide training on the foreign bribery offence within the public administration, notably among diplomatic representations, trade promotion, export credit and development aid agencies, as well as other public institutions involved with Brazilian companies operating abroad (Revised Recommendation, Paragraph I);
- b) Significantly step up efforts, in cooperation with business organisations and other civil society stakeholders, to improve awareness of the foreign bribery offence among companies, and in particular small and medium size companies, active in foreign markets, and advise and assist companies with regard to the prevention and reporting of foreign bribery (Revised Recommendation, Paragraph I); and
- c) With respect to export credits, (i) take necessary measures to raise awareness of the foreign bribery offence among staff of the Brazilian Development Bank (BNDES); (ii) ensure that applicants requesting export credit support are made expressly aware of the foreign bribery offence and its legal consequences; (iii) put in place due diligence procedures to verify that applicants are not engaging in acts of bribery; and (iv) consider adhering to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits. A similar approach should be considered in the context of infrastructure projects and any aid funded procurement contracts run by BNDES (Revised Recommendation, Paragraphs I, II.v and VI.iii).

2. With respect to the detection and reporting of the foreign bribery offence and related offences to the competent authorities, the Working Group recommends that Brazil:

- a) Adopt comprehensive measures to protect public and private sector whistleblowers in order to encourage those employees to report suspected cases of foreign bribery without fear of retaliation (Revised Recommendation, Paragraphs I and V.C.iv);
- b) Regularly remind Brazilian public officials (particularly those in diplomatic representations, the tax administration, and in trade promotion, export credit and development aid agencies, as well as in other public institutions involved with Brazilian companies operating abroad) of their obligation to report instances of foreign bribery, and encourage and facilitate such reporting (Revised Recommendation, Paragraph I);
- c) Take additional measures to encourage Brazilian businesses active in foreign markets (i) to implement adequate internal company controls and standards of conduct, with a particular focus on the control of foreign operations and on compliance with the law criminalising foreign bribery; (ii) to develop monitoring bodies (such as audit committees) that are effective and independent from management; and (iii) to make statements in their annual reports about their internal compliance programs for the prevention and detection of foreign bribery (Revised Recommendation, Paragraphs I, II.iii and V.C);
- d) With regard to accounting and auditing, (i) work with the accounting and auditing professions to raise awareness of the foreign bribery offence and encourage the detection and reporting of suspected instances of foreign bribery; (ii) require external auditors to report all indications of possible acts of foreign bribery to company management and, as appropriate, to corporate monitoring bodies; (iii) consider requiring external auditors to report such suspicions to the competent law enforcement authorities; and (iv) consider enactment of legislative reforms that would require all large Brazilian companies (whether listed or unlisted) to submit to an external audit (Revised Recommendation, Paragraphs I, II.iii and V.B); and
- e) With regard to money laundering and foreign bribery, ensure that the institutions and professions required to report suspicious transactions, their supervisory authorities, as well as the Council of Control of Financial Activities (COAF) itself, receive appropriate directives and training (including typologies) on the identification and reporting of information that could be linked to foreign bribery; and proceed with the adoption of foreseen legislation which aims to extend money laundering reporting, due diligence and record keeping obligations and requirements to members of the legal and accounting professions (Convention, Article 7; Revised Recommendation, Paragraph I).

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery and related offences

3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Brazil:

- a) Ensure that sufficient resources are made available and that training is provided to relevant law enforcement authorities, including the Federal Police, State Police, and the Ministério Público Federal, for the effective detection and investigation of foreign bribery offences; and consider developing specialised prosecutors' offices to more effectively investigate and

prosecute complex economic and financial crimes, including the foreign bribery offence (Convention, Article 5; Revised Recommendation, Paragraphs I and II);

- b) Take necessary measures to ensure that all credible foreign bribery allegations are proactively investigated, and remind the Federal Police and the Ministério Público Federal of the importance of actively looking into the range of possible sources of detection of foreign bribery (Convention, Article 5; Revised Recommendation, Paragraphs I and II); and
- c) Encourage law enforcement authorities to make full use of the broad range of investigative measures available to Brazilian investigative authorities, including special investigative techniques and access to financial information, in order to effectively investigate suspicions of foreign bribery (Convention, Article 5; Revised Recommendation, Paragraphs I and II).

4. With respect to the liability of legal persons, the Working Group acknowledges the recent initiatives taken by Brazil in this area and recommends that Brazil (i) take urgent steps to establish the direct liability of legal persons for the bribery of a foreign public official; (ii) put in place sanctions that are effective, proportionate and dissuasive, including monetary sanctions and confiscation; and (iii) ensure that, in relation to establishing jurisdiction over legal persons, a broad interpretation of the nationality of legal persons is adopted (Convention, Articles 2, 3 and 4; Revised Recommendation, Paragraph I).

5. With respect to sanctions for foreign bribery, the Working Group recommends that Brazil:

- a) Take all necessary measures to provide that proceeds of foreign bribery can always be confiscated, including where they are in the hands of a third party not acting in good faith, and regardless of whether that third party is a natural or legal person, or that monetary sanctions of comparable effect are applicable (Convention, Article 3); and
- b) Pursue efforts to require agencies in charge of administering public funds and government contracts (including those responsible for export credit guarantees, public procurement and privatisation processes) to (i) take due consideration of prior convictions for foreign bribery offences in their contracting decisions and (ii) put in place due diligence procedures where there are suspicions that applicants or clients have been or are involved in payment of bribes to foreign public officials, with a view to suspending or withdrawing support (Revised Recommendation, Paragraphs I, II.v and VI).

6. With respect to related tax offences, the Working Group recommends that Brazil:

- a) Clarify the prohibition on the deductibility of bribes by introducing an express denial for foreign bribe payments either in the tax legislation or through another appropriate mechanism that is binding and publicly available (Revised Recommendation, Paragraph IV; 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials); and
- b) Expressly communicate to tax inspectors the non-tax deductibility of bribes and the need to be attentive to any outflows of money that could represent bribes to foreign public officials, including commissions, bonuses and gratuities, through the issuance of guidelines or manuals, and training programmes (Revised Recommendation, Paragraph IV; 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials).

2. Follow-up by the Working Group

7. The Working Group will follow up the issues below, as practice develops, in order to assess:

- a) The adequacy of the limitation period for completing criminal investigations in foreign bribery cases (Convention, Article 6);
- b) Brazil's ability to (i) provide prompt and effective mutual legal assistance for offences under the Convention; and (ii) provide and obtain mutual legal assistance in foreign bribery investigations involving legal persons (Convention, Article 9);
- c) Whether, in relation to extradition, (i) considerations of national economic interest, the potential effect on relations with another State and the identity of the person involved unduly influence decisions to grant or refuse extradition; and (ii) whether Brazil initiates prosecutions of its nationals in circumstances where extradition is refused (Convention, Articles 5 and 10);
- d) How jurisdiction is exercised over natural and legal persons when the offence takes place in part or wholly abroad (Convention, Article 4);
- e) Whether the foreign bribery offence in the Penal Code (i) covers an act of bribery through an intermediary; (ii) covers any use of the public official's position, whether or not within the official's authorised competence; (iii) covers all elements of the definition of "foreign public official"; and (iv) effectively narrows the scope of the foreign bribery offence by linking the act or omission of the foreign public official to an international business transaction, contrary to Article 1 of the Convention (Convention, Article 1);
- f) Whether the offence of "concessão" in article 316 of the Penal Code can be relied on in foreign bribery cases and could be used as a basis to preclude prosecution of a perpetrator for the offence of bribery of a foreign public official (Convention Articles 1 and 5);
- g) Whether the sanctions, including confiscation measures, handed down by the courts for the offence of bribery of a foreign public official are effective, proportionate and dissuasive (Convention, Article 3);
- h) The application of the money laundering offence where the predicate offence is foreign bribery, including (i) where the foreign bribery is committed abroad by a legal person; (ii) where the foreign bribery is committed in a country which does not criminalise this predicate offence; and (iii) the sanctions imposed (Convention, Article 7); and
- i) The effective prohibition in Brazilian company law of offences listed in Article 8.1 of the Convention (Convention, Article 8; Revised Recommendation, Paragraph V).

APPENDIX 1. LIST OF PARTICIPANTS IN THE ON-SITE VISIT

Ministries, State Organs and Elected Representatives

- Attorney-General's Office
- Brazilian Court of Audit (TCU)
- COAF (Financial Intelligence Unit of Brazil)
- Comptroller General's Office (CGU)
- Council of Contributors
- Department of Brasil's Federal Income
- Escola da Administração Fazendária (ESAF)
- Members of Congress (5 representatives)
- Ministry of Development, Industry and Foreign Trade
- Ministry of Economy
- Ministry of External Affairs
- Ministry of Justice (including: Department of Asset Recovery and International Legal Cooperation, the DRCI)
- Ministry of Planning, Budget and Administration
- Ombudsman of the Union
- Secretaria da Receita Federal do Brasil
- Securities and Exchange Commission (CVM)

Law Enforcement and Judicial Authorities

- Federal Police Department (DPF)
- Federal Public Prosecutor's Office College (ESMPU)
- Federal Court Judges
- High Court Judge
- Ministério Público Federal
- Ministério Público (São Paulo)
- National Police Academy (ANP)
- Military Police
- State Police (São Paulo)

Accounting and Auditing Bodies

- Accounting Regional Council of São Paulo (CRC-SP)
- Federal Accounting Council (CFC)
- Institute of Independent Auditors (IBRACON)
- Internal Revenue Secretariat (SRF)

Legal Profession

- Barretto Ferreira Attorneys
- Kujawski, Brancher and Gonçalves Attorneys
- Professor of Law, Damásio de Jesus

Financial Institutions and Private Sector Entities

- Ambev
- Association of Capital Markets Analysts and Professionals (APIMEC NACIONAL)
- Banco do Bradesco
- Banco Itaú
- Brazilian Association of Public Companies (ABRASCA)
- Central Bank of Brazil (BACEN)
- Caixa Econômica Federal
- FEBRABAN (Bankers Association)
- Federação das Indústrias do Estado de São Paulo (FIESP, São Paulo Confederation of Industry)
- Brazilian Development Bank (BNDES, the Export Credit Insurance Company of Brazil)
- National Confederation of Industries (CNI)
- Petrobrás
- Unibanco

Civil Society

- Brazilian Institute of Corporate Governance (IBGC)
- Central Única dos Trabalhadores (CUT)
- Ethos Institute
- Transparencia Brasil

APPENDIX 2. LIST OF ACRONYMS AND ABBREVIATIONS

Acronyms

ANP	National Police Academy
BACEN	Central Bank of Brazil
BNDES	National Bank of Economic and Social Development
BRL	Brazilian Real (currency)
CFC	Federal Accounting Council
CND	Privatisation Council
COAF	<i>Conselho de Controle de Atividades Financeiras</i> (Council of Control of Financial Activities, Brazilian Financial Intelligence Unit)
CVM	Securities and Exchange Commission
CGU	Controladoria-Geral da União (Office of the Comptroller General)
DPF	Departamento de Polícia Federal (Federal Police Department)
DRCI	Department of Assets Recovery and International Co-operation (within the Ministry of Justice)
ECG	OECD Working Party on Export Credit and Credit Guarantees
ENCCLA	Estratégia Nacional de Combate à Corrupção e a Lavagem de Dinheiro (National Strategy to Fight Corruption and Money Laundering)
ESMPU	Federal Public Prosecutors' Office College
EU	European Union
EUR	Euro
FATF	Financial Action Task Force
FDI	Foreign direct investment
GDP	Gross domestic product
IBRACON	Brazilian Institute of Independent Auditors
IFRS	International Financial Report Standards
IIC	Independent Inquiry Committee into the United Nations Oil-For-Food Programme
ISA	International Standards on Auditing
MLA	Mutual legal assistance
NGO	Non-governmental organisation
OAS	Organisation of American States
OECD	Organisation for Economic Cooperation and Development
ODA	Official development assistance
PEPs	Politically exposed persons
PNLD	Programa Nacional de Capacitação e Treinamento para o Combate à Lavagem de Dinheiro (National Programme of Capacity Building & Training for the Combating of Money Laundering)
SDE	Economic Law Office (within the Ministry of Justice)
SME	Small and medium sized enterprises
SPC	Complementary Pension Secretariat
STF	Supremo Tribunal Federal (Supreme Federal Court)
STR	Suspicious transaction report
SUSEP	Superintendence of Private Insurance
TCU	Brazilian Court of Audit
UN	United Nations
USD	United States Dollar

Abbreviations

Convention	Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
Revised Recommendation	OECD Revised Recommendation on Combating Bribery in International Business Transactions (1997)
Working Group	OECD Working Group on Bribery in International Business Transactions

APPENDIX 3. EXCERPTS FROM RELEVANT LEGISLATION

[Unofficial English translation]

Constitution: Federative Republic of Brazil 1988

Article 5

All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:[...]

- X. the privacy, private life, honour and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured; [...]
- XII. the secrecy of correspondence and of telegraphic, data and telephone communications is inviolable, except, in the latter case, by court order, in the cases and in the manner prescribed by law for the purposes of criminal investigation or criminal procedural finding of facts; [...]

Article 102

The Supreme Federal Court is responsible, essentially, for safeguarding the Constitution, and it is within its competence

- I. to institute legal proceeding and trial, in the first instance, of: [...]
 - f. disputes and conflicts between the Union and the states, the Union and the Federal District, or between one another, including the respective indirect administration bodies;

Article 105

It belongs to the Superior Court of Justice:

- I. to institute legal proceeding and trial, in the first instance, of: [...]
 - d. conflicts of competence between any courts, except as provided in article 102 (I) (o) as well as between a court and the judges not subject to it and between judges subject to different courts.

Article 109

The federal judges have the competence to institute legal proceeding and trial of:

- I. cases in which the Union, an autonomous government agency or a federal public company have an interest as plaintiffs, defendants, privies or interveners, with the exception of cases of bankruptcy, of job-related accidents, and of those subject to the Electoral and Labour Courts;
- II. cases between a foreign state or international organization and a municipality or a person domiciled or residing in the country;
- III. cases based on a treaty or a contract between the Union and a foreign State or international organization;
- IV. political crimes and criminal offences committed against the assets, services or an interest of the Union or of its autonomous agencies or public companies, excluding misdemeanours and excepting the competence of the Military and Electoral Courts;
crimes covered by an international treaty or convention, when, the indirect administration of the cases within the prosecution having started in the country, the result has taken place or should have taken place abroad, or conversely; [...].

Article 127

The Public Prosecution is a permanent institution, essential to the jurisdictional function of the State, and it is its duty to defend the juridical order, the democratic regime and the inalienable social and individual interests.

Paragraph 1 - Unity, indivisibility and functional independence are institutional principles of the Public Prosecution.

Paragraph 2 - The Public Prosecution is ensured of functional and administrative autonomy, and it may, observing the provisions of article 169, propose to the Legislative Power the creation and extinction of its offices and auxiliary services, filling them through a civil service entrance examination of tests or of tests and presentation of academic and professional credentials; the law shall provide for its organization and operation. [...]

Article 128

The public prosecution comprises:

- I. the Public Prosecution of the Union, which includes:
 - a. the Federal Public Prosecution;
 - b. the Labour Public prosecution;
 - c. the Military Public Prosecution;
 - d. the Public Prosecution of the Federal district and the Territories
- II. the Public Prosecution of the states.

Paragraph 1 - The head of the Public Prosecution of the Union is the Attorney-General of the Republic, appointed by the President of the Republic from among career members over thirty-five years of age, after his name has been approved by the absolute majority of the members of the Federal Senate, for a term of office of two years, reappointment being allowed.

Paragraph 2 - The removal of the Attorney-General of the Republic, on the initiative of the President of the Republic, shall be subject to prior authorization by the absolute majority of the Federal Senate. [...]

Paragraph 5 - Supplementary laws of the Union and of the states, which may be proposed by the respective Attorneys-General, shall establish the organization, the duties and the statute of each Public Prosecution, observing, as regards their members:

- I. the following guarantees:
 - a. life tenure, after two years in office, with loss of office only by a final and unappealable judicial decision;
 - b. irremovability, save for reason of public interest, through decision of the competent collegiate body of the Public Prosecution, by the vote of two-thirds of its members, full defense being ensured;
 - c. irreducibility of pay, observing, as regards the remuneration, the provisions of articles 37, XI, 150, II, 153, III, 153, paragraph 2, I; [...]

Article 129

The following are institutional functions of the Public Prosecution: [...]

- VIII. to request investigatory procedures and the institution of police investigation, indicating the legal grounds of its procedural acts;

Article 144

Paragraph 1 – The federal police, instituted by law as a permanent body, organized and maintained by the Union and structured into a career, have the following competences:

- I. to investigate criminal offences against the political and the social order or to the detriment of property, services and interests of the Union and of its autonomous government entities and public companies, as well as other offences with interstate or international effects and requiring uniform repression as the law shall establish;
- II. to prevent and repress the illegal traffic of narcotics and like drugs, as well as smuggling, without prejudice to action by the treasury authorities and other government agencies in their respective areas of competence;
- III. to exercise the functions of maritime, airport and border police;
- IV. to exercise, exclusively, the functions of criminal police of the Union.

Article 173

[...]

Paragraph 5 – The law shall, without prejudice to the individual liability of the managing officers of a legal entity, establish the liability of the latter, subjecting it to punishments compatible with its nature, for acts performed against the economic and financial order and against the citizens' monies.

Article 225

[...]

Paragraph 3 – Procedures and activities considered as harmful to the environment shall subject the infractors, be they individuals or legal entities, to penal and administrative sanctions, without prejudice to the obligation to repair the damages caused. [...]

Penal Code – Decree Law 2 848 of 7 December 1940

Extraterritoriality

Article 7

The following are subject to Brazilian law, even though committed abroad:

- I. criminal offenses:
 - a. against the life or liberty of the President of the Republic;
 - b. against the assets or authority of the Federal Government, the Federal District, the States, the Territories, the Municipalities, a publicly-owned company, a mixed-ownership company, a government agency or foundation instituted by the Public Authority;
 - c. against the public administration, by anyone in its service;
 - d. of genocide, when the offender is Brazilian or domiciled in Brazil;
- II. criminal offenses
 - a. that under a treaty or convention, Brazil is obliged to suppress;
 - b. committed by Brazilians;
 - c. committed in Brazilian merchant or privately-owned aircraft or water-borne vessels, when abroad and not tried there.

Paragraph 1 – In the cases set out in clause I, the offender is punished under Brazilian law, even though tried and found not guilty or guilty abroad.

Paragraph 2 – In the cases set out in clause II, the application of Brazilian law depends on the concurrence of the following conditions:

- a. offender enters Brazilian territory;
- b. the act is also punishable in the country where it was committed;
- c. the criminal offense is included among those for which Brazilian law authorizes extradition;
- d. the offender has not been tried and found not guilty abroad or has not served the sentence there;
- e. the offender has not been pardoned abroad or, for any other reason, the sentence has not been eliminated, pursuant to the most favorable law.

Paragraph 3 – Brazilian law also applies to criminal offenses committed by foreigners against Brazilians abroad, if the conditions set out in the preceding paragraph are met and:

- a. extradition has not been requested or denied;
- b. there has been a requisition from the Ministry of Justice.

Sanctions

Article 49

The pecuniary sentence consists in the payment to the penitentiary fund of an amount determined in the sentence and calculated in daily fine. It shall be at least 10 (ten) and at the most 360 (three hundred and sixty) daily fine. (Provision set forth by the Law 7 209 of 11 November 1984)

§ 1 – the amount of the daily fine shall be determined by the judge and cannot be lower than one-thirtieth of the highest monthly minimum salary ruling at the time of the commission of the crime, nor higher than 5 (five) times this salary. (Provision set forth by the Law 7 209 of 11 November 1984)

§ 2 – the amount of the fine shall be updated, at the time of levying it, by the monetary correction indexes (Provision set forth by the Law 7 209 of 11 November 1984)

Article 91

The following are the effects of the sentence:

- I. the obligation to make good the damage caused by the criminal offense becomes certain;
- II. loss, to the Federal Government, except as regards the right of an injured party or a third party in good-faith:
 - a) of the instruments of the criminal offense, provided that they consist of things whose manufacture, sale, use, bearing, or detention constitutes an illegal act
 - b) of the product of the criminal offense or of any good or security constituting a gain made by the offender from committing the criminal offense.

Article 92

The following are also the effect of the sentence:

- I. the loss of position, public function, or term of office:
 - a) when the penalty of deprivation of liberty for a length of time equal to or greater than one year is applied, in the case of the crimes of abuse of power or breach of duty with regard to the Public Administration ;
 - b) when the penalty of deprivation of liberty for a length of time greater than 4 (four) years in other cases.
- [...]

Sole paragraph – The effects referred to in this article are not automatic, and must be specifically stated in the sentence.

Statute of Limitations

Article 109

Prescription before the final sentence is transited in rem judicatam, except as provided for in Paragraphs 1 and 2 of this Code is governed by the maximum penalty of deprivation of liberty provided for the crime, in compliance with:

- I. for 20 (twenty) years, if the maximum penalty is greater than 12 (twelve);
- II. for 16 (sixteen) years, if the maximum penalty is greater than 8 (eight) years and does not exceed 12 (twelve);
- III. for 12 (twelve) years, if the maximum penalty is greater than 4 (four) years and does not exceed 8 (eight);
- IV. for 8 (eight) years, if the maximum penalty is greater than 2 (two) years and does not exceed 4 (four);
- V. for 4 (four) years, if the maximum penalty equal to 1 (one) year, or, if greater, does not exceed 2 (two);
- VI. for 2 (two) years, if the maximum penalty less than 1 (one) year.

Causes for interrupting prescription

Article 117

The course of the prescription is halted:

- I. by receipt of the accusation or complaint;
- II. by the indictment;
- III. by the decision confirming the indictment;
- IV. by the a verdict of guilty, which is appealable against;
- V. by the beginning or continuation of serving the penalty;
- VI. by an act of recidivism.

Paragraph 1 – Except in the cases of clauses V and VI of this article, halting prescription produces effects in respect of all the perpetrators of the crime. In connected crimes, that are the object of the same action, the halt relating to any one of them is extended to all the others.

Paragraph 2 – Where prescription has been halted, other than in the case of clause V of this article, the entire term begins running again from the day of the halt.

Concussão

Article 316

1. Demand, for himself or for others, directly or indirectly, even when out of his/her duties (functions) or before assuming his/her duties (functions) but because of them, an undue advantage.
2. Penalty- imprisonment from 2 up to 8 years and fine.

Public official (in Brazil)

Article 327

For the purposes of criminal law, anyone who, even though temporarily or unpaid, performs a public job, position or function is deemed to be a public official.

§ 1st – Anyone who performs a public job, or holds a function in a para-state body or who works for a service-providing company hired or contracted to carry out any typical activity in the Public Administration is also deemed to be a public official. (Included by the Law 9 983 of 2000)

§ 2nd – The penalty shall be increased in one third when the perpetrators of the crimes set forth in this Chapter hold commissioned positions or management position or work as an assistant to a body in the direct administration, mixed-economy society, public company or foundation instituted by the public power. (Included by Law 6 799 of 1980)

Active Corruption (in Brazil)

Article 333

Offer or promise 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. (Included by Law 10 163 of 12 November 2003)

Sole Paragraph – the sentence shall be increased in one third if due to advantage or a promise, the official holds back or omits an official act or does and by doing so breaks his official duty.

Crimes committed by a natural person against a foreign public administration

Active bribery in an international business transaction

Article 337-B

Promising, offering, or giving, directly or indirectly, any improper advantage to a foreign public official, causing him or her to put into practice, to omit, or to delay any official act relating to an international business transaction.

Penalty – Deprivation of liberty of from 1 (one) year to 8 (eight) years plus a fine.

Sole paragraph. The penalty is increased by 1/3 (one third) if, because of the advantage or promise, the foreign public official actually delays or omits, or puts into practice the official act in breach of his or her functional duty.

The traffic of influence in an international business transaction

Article 337-C

Requesting, requiring, charging, or obtaining, for oneself or for another person, directly or indirectly, any advantage or promise of advantage in exchange for influencing an act carried out by a foreign public official in the exercise of his or her functions relating to an international business transaction:

Penalty – deprivation of liberty, of from 2 (two) to 5 (five) years, plus a fine.

Sole paragraph. The penalty is increased by half, if the perpetrator alleges or insinuates that the advantage is also intended for a foreign public official.

Foreign Public Official

Article 337-D

A foreign public official is deemed to be, for the purposes of the law, anyone, even though temporarily or in an unpaid capacity, who holds a position or a public function in state bodies or in diplomatic representations of a foreign country.

Sole paragraph. Anyone who holds a position or function in an organization or enterprise directly or indirectly controlled by the Public Authorities of the foreign country or in international public organizations is deemed to be equivalent to a foreign public official.

Code of Criminal Procedure

Article 5

In crimes of public action the police investigation will be begun:

I – ex officio;

II – by means of a requisition from the judicial authority or the Public Prosecutor's Office, or a petition of the victim or from whomever is qualified to represent him or her.[...]

Article 43

The accusation or complaint will be rejected where:

I – the circumstances narrated obviously do not constitute a crime;

II – the punishability has already been cancelled because of prescription or for any other reason;

III – where the party concerned is manifestly illegitimate or because of the absence of any element required by law for the exercise of the criminal action.

Sole paragraph. In the cases set out in III, the rejection of the accusation or complaint will not prevent the exercise of the criminal action, provided it is brought by a legitimate party or the condition is met.

Article 122

Without prejudice to the provisions of articles 120 and 133, when the period of 90 days following the definitive sentence transited in *rem judicatam* has elapsed, the judge will decree, if necessary, the loss to the Federal Government of the things apprehended (article 74, II, and b of the Criminal Code) and will, order the things to be sold at public auction.

Sole paragraph. The money raised, insofar as it does not belong to an injured party or to a third party in good faith, will be paid to the National Treasury.

Law 8 666 of 21 June 1993 (Public Procurement)

Article 1

This law lays down general rules on administrative tender auctions and contracts in respect of works and services, including advertising, purchases, sales, and rentals within the scope of the Powers of the Federal Government, the States, the Federal District and the Municipalities.

Sole paragraph – In addition to the bodies of the direct administration, special funds, independent government agencies, public foundations, publicly-owned companies and mixed ownership companies, and other organization controlled directly or indirectly by the Federal Government, the States, the Federal District and the Municipalities are governed by this Law.

Law 6 385 of 7 December 1976 (Publicly Held Corporations)

Article 4

The National Monetary Council and the Comissão de Valores Mobiliários (Brazilian Securities Commission) shall perform the duties provided for under the law in order to:

I – stimulate the creation of savings and their investment in securities;

II – promote the expansion and regular and efficient operation of the stock market, and stimulate permanent investments in the capital stock of publicly held corporations controlled by private Brazilian capital;

III – guarantee the efficient and correct operation of stock markets and over-the-counter markets;

IV – protect securities holders and market investors against:

a. the irregular issue of securities;

b. illegal acts of officers and controlling shareholders of publicly held corporations, or managers of securities portfolios;

c. the use of relevant information not disclosed to the market. (Text added by Law 10 303 of 31 October 2001)

V – avoid or prevent any kind of fraud or manipulation intended to create artificial conditions of supply, demand or price of the securities traded on the market;

VI – guarantee public access to information on the securities traded and the corporations issuing them;

VII – guarantee the observance of equitable business practice on the securities market;

VIII – guarantee compliance with the conditions established by the National Monetary Council regarding use of credit.[...]

Article 9

The Comissão de Valores Mobiliários (Brazilian Securities Commission), with due regard for the provisions of article 15, paragraph 2, may: (Text as determined by Decree-Law 3 995 of 31 October 2001)

I – examine and extract examples of accounting records, books or documents, including electronic programs, magnetic and optical files, as well as any other files, and also the paperwork of independent auditors. All of them have to be organized and preserved intact for at least 5 (five) years. (Text as determined by Decree-Law 3 995 of 31 October 2001)

- a. individuals and corporations pertaining to the securities distribution system;
- b. of publicly-held corporations and other issuers of securities and, whenever there are indicia of illegal activities, of the corresponding controlling and controlled companies, affiliated companies and companies under common control; (Text as determined by Law 10 303 of 31 October 2001)
- c. investment funds and corporations;
- d. securities portfolios and custodians;
- e. independent auditors;
- f. securities analysts and consultants;
- g. any other individuals or legal entities whenever they participate in any irregularities, which shall be investigated according to item V of this article, to ensure the non- occurrence of any illegal acts and inequitable acts. (Text as determined by Law 3 995 of 31 October 2001)

II – issue subpoenas requesting information or clarifications to the persons indicated in item I, under penalty of a fine, without prejudice to the penalties set out in Section 11; (Text as determined by Law 10 303 of 31 October 2001)

III – request information from any government agency, autarchy or public corporation;

IV – require publicly-held corporations to republish their financial statements, reports or information released, duly corrected or amended;

V – investigate, through administrative proceedings, illegal acts and inequitable practices of managers, members of the finance committee and shareholders of publicly-held corporations, intermediaries, and other market participants; (Text as determined by Law 10 303 of 31 October 2001)

VI – apply the penalties provided for in article 11 to any person committing the violations referred to in the previous item, regardless of civil or criminal responsibility.[...]

Paragraph 6. The Comissão (Brazilian Securities Commission) shall have authority to investigate as well as to impose penalties on the violators of the laws under the market whenever: (Text as determined by Decree-Law 3 995 of 31 October 2001)

I. If there has been damages to individuals living in Brazilian territory, wherever the accident has happened; (Text as determined by Decree-Law 3 995 of 31 October 2001)

II. Material actions or omissions have happened in Brazilian territory. (Text added by Decree-Law 3 995 of 31 October 2001)

Article 11

The Comissão de Valores Mobiliários (Brazilian Securities Commission) may impose the following penalties on the violators of any provision of this law, the Corporation Law, or its resolutions, as well as any other legal provisions which are the Comissão de Valores Mobiliários (Brazilian Securities Commission) responsibility to enforce:

I – warning;

II – fine;

III – suspension from duties of a director or member of the fiscal council of a publicly-held corporation, from an entity taking part of the distribution system, or from other bodies which require authorization by, or registration with, the CVM (Brazilian Securities Commission); (Text as determined by Law 9 457 of 5 May 1997)

IV – temporary disqualification, up to a maximum period of 20 years, from occupying the posts mentioned in the previous item; (Text as determined by Law 9 457 of 5 May 1997)

V – suspension of the authorization or registration for the execution of the activities covered by this law;

VI – cancellation of the registration or of the authorization to carry out the activities covered by this law; (Text as determined by Law 9 457 of 5 May 1997)

VII – temporary prohibition, up to a maximum period of 20 years, from practicing certain activities or transactions, to the entities that compose the distribution system or other entities that depend on authorization by, or registration with, the Comissão de Valores Mobiliários (Brazilian Securities Commission); (Text as determined by Law 9 457 of 5 May 1997)

VIII – temporary prohibition, for a maximum period of 10 years, to operate, directly or indirectly, in one or more types of transaction in the securities market. (Text as determined by Law 9 457 of 5 May 1997)

Paragraph 1. The fine shall not exceed the larger of the following amounts:

I – R\$ 500,000.00 (five hundred thousand Brazilian reais); (Text as determined by Law 9 457 of 5 May 1997)

II – 50 per cent of the amount of the securities issuing or of the irregular operation; or (Text as determined by Law 9 457 of 5 May 1997)

III – three times the amount of the economic advantage gained or loss avoided due to the violation. (Text as determined by Law 9 457 of 5 May 1997)

Paragraph 2. If the offense is repeated, the fines of the previous paragraph can be imposed and multiplied up to three times or, alternatively, the penalties provided for in items III to VIII of this article may be applied. (Text as determined by Law 9 457 of 5 May 1997)

Paragraph 3. Except for the provisions of the previous paragraph, the penalties provided for in items III to VIII of the caput of this Article will only apply when there has been a serious breach, as defined by the rules of the Comissão de Valores Mobiliários (Brazilian Securities Commission). (Text as determined by Law 9 457 of 5 May 1997) [...]

Law 8 884 of 11 June 1994 (Protection of the Economic Order)

TITLE V - VIOLATIONS OF THE ECONOMIC ORDER: CHAPTER I - GENERAL PROVISIONS

Article 15

This Law applies to individuals, public or private companies, as well as to any individual or corporate associations, established de facto and de jure — even on a provisional basis — irrespective of a separate legal nature, and notwithstanding the exercise of activities regarded as a legal monopoly.

CHAPTER II - VIOLATIONS

Article 20

Notwithstanding malicious intent, any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved, shall be deemed a violation of the economic order:

I – to limit, restrain or in any way injure open competition or free enterprise; [...]

Article 21

The acts spelled out below, among others, will be deemed a violation of the economic order, to the extent applicable under article 20 and items thereof:

I – to set or offer in any way — in collusion with competitors — prices and conditions for the sale of a certain product or service;

II – to obtain or otherwise procure the adoption of uniform or concerted business practices among competitors;

III – to apportion markets for finished or semi-finished products or services or for supply sources of raw materials or intermediary products;

IV – to limit or restrain market access by new companies;

V – to pose difficulties for the establishment, operation or development of a competitor company or supplier, purchaser or financier of a certain product or service;

VI – to bar access of competitors to input, raw material, equipment or technology sources, as well as to their distribution channels;

VII – to require or grant exclusivity in mass media advertisements;

VIII – to agree in advance on prices or advantages in public or administrative biddings;

IX – to affect third-party prices by deceitful means;

X – to regulate markets of a certain product or service by way of agreements devised to limit or control technological research and development, the production of products or services, or to dampen investments for the production of products and services or distribution thereof;

XI – to impose on distributors, retailers and representatives of a certain product or service retail prices, discounts, payment conditions, minimum or maximum volumes, profit margins, or any other marketing conditions related to their business with third parties;

XII – to discriminate against purchasers or suppliers of a certain product or service by establishing price differentials or discriminatory operating conditions for the sale or performance of services;

XIII – to deny the sale of a certain product or service within the payment conditions usually applying to regular business practices and policies;

XIV – to hamper the development of or terminate business relations for an indeterminate period, in view of the terminated party's refusal to comply with unreasonable or non-competitive clauses or business conditions;

XV – to destroy, render unfit for use or take possession of raw materials, intermediary or finished products, as well as destroy, render unfit for use or constrain the operation of any equipment intended to manufacture, distribute or transport them;

XVI – to take possession of or bar the use of industrial or intellectual property rights or technology;

XVII – to abandon of cause abandonment or destruction of crops or harvests, without proven good cause;

XVIII - to unreasonably sell products below cost;

XIX – to import any assets below cost from an exporting country other than those signatories of the GATT Antidumping and Subsidies Codes;

XX – to discontinue or greatly reduce production, without proven good cause;

XXI – to partially or fully discontinue the company's activities, without proven good cause;

XXII – to retain production or consumer goods, except for ensuring recovery of production costs;

XXIII – to condition the sale of a product to acquisition of another or contracting of a service, or to condition performance of a service to contracting of another or purchase of a product;

XXIV – to impose abusive prices, or unreasonably increase the price of a product or service.

Sole Paragraph. For the purpose of characterizing an imposition of abusive prices or unreasonable increase of prices, the following items shall be considered, with due regard for other relevant economic or market circumstances:

I – the price of a product or service, or any increase therein, vis-à-vis any changes in the cost of their respective input or with quality improvements;

II – the price of a product previously manufactured, as compared to its market replacement without substantial changes;

III – the price for a similar product or service, or any improvement thereof, on like competitive markets; and

IV – the existence of agreements or arrangements in any way, which cause an increase in the prices of a product or service, or in their respective costs.

CHAPTER III - PENALTIES

Article 23

The following antitrust penalties shall apply:

I – for companies: a fine from one to thirty percent of the gross pretax revenue thereof as of the latest financial year, which fine shall by no means be lower than the advantage obtained from the underlying violation, if assessable; [...]

Article 24

Without prejudice to the provisions of the preceding article, the fines listed below may be individually or cumulatively imposed on violations, whenever the severity of the facts or the public interest so requires: [...]

II – ineligibility for official financing or participation in bidding processes involving purchases, sales, works, services or utility concessions with the federal, state, municipal and the Federal District authorities and related entities, for a period equal to or exceeding five years; [...]

Complementary Law 105 of 10 January 2001 – Bank Secrecy

Article 1

The financial institutions shall keep the confidentiality of their active and passive transactions and services rendered. [...]

Paragraph 3 – The actions listed below shall not be considered a violation of the duty of confidentiality: [...]

IV. the reporting of illicit activities to the competent authorities, including information on transactions that involve funds deriving from criminal activities; [...]

Paragraph 4. The breach of confidentiality may be ordered, when it is necessary to verify the occurrence of any illicit activity, in any stage of investigations or legal proceedings, and especially in the case of the following crimes:

I. terrorism;

II. illicit trafficking in narcotic substances or similar drugs;

III. smuggling or trafficking in weapons, munitions, or materials used for their production;

IV. extortion through kidnapping;

V. acts against the Brazilian financial system;

VI. acts against the Public Administration;

VII. acts against the fiscal and social security order;

VIII. money laundering or concealment of assets, rights, and valuables;

IX. acts committed by a criminal organization.

Decree 3000 of 26 March 1999 – Income Tax regulation

Article 249

In the determination of the real profit, it shall be added to the net profit of the period under investigation (Decree-law 1 598, of 1977, art. 6th, §2nd):

I – the costs, expenses, taxes, loss, allowances, participations and any other values deducted in the verification of the net profit which, in accordance with this Decree, is not deductible in the determination of the real profit; [...]

Necessary Expenses

Article 299.

It is considered operational the expenses not included in the costs, needed to the company's activities and the maintenance of the corresponding producing source (Law 4 506 of 1964, art. 47).

§1st the expenses paid or caused for carrying out the transactions or operations required by the company's activities are necessary.

§2nd the operational expenses admitted are the usual or ordinary ones, in the kind of transactions, operations or activities of the company (Law 4 506, of 1964, art. 47, § 2nd).

§ 3rd the provision in this article also applies to the bonuses paid to the employees, whatever designation they might have.

Unjustified payment or payment to an unidentified beneficiary

Article 304

It is non-deductable the income declared as paid or credited under commissions, bonuses, gratifications or the like, when it is not indicated the operation or the cause which gave rise to the income and when the payment invoice fails to single out the beneficiary of the income (Law 3 470, of 1958, art. 2nd).