



PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN BRAZIL

October 2014

This Phase 3 Report on Brazil by the OECD Working Group on Bribery evaluates and makes recommendations on Brazil's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 16 October 2014.

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EXECUTIVE SUMMARY

The Phase 3 report on Brazil by the OECD Working Group on Bribery evaluates and makes recommendations on Brazil's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report considers country-specific (vertical) issues arising from changes in Brazil's legislative and institutional framework, as well as progress made since Brazil's Phase 2 evaluation. The report also focuses on key Group-wide (horizontal) issues, particularly enforcement.

The Working Group commends Brazil for the enactment of its new Corporate Liability Law and will follow-up on its use in foreign bribery cases as case law develops. The Working Group is also encouraged by Brazil's first indictments of nine individuals in one foreign bribery case. However the Working Group remains concerned about the still low level of enforcement of foreign bribery in Brazil. Despite its large economy, foreign bribery investigations have been opened in only 5 cases in the 14 years since Brazil joined the Convention. Of these 5 investigations, only 3 are ongoing; 2 of which are far from reaching the prosecutorial stage. Of the 14 allegations of foreign bribery that have been identified in this report, 5 allegations were unknown to Brazil before the time of the evaluation. The Working Group remains concerned about Brazil's proactivity in detecting, investigating and prosecuting foreign bribery. The announced implementing Decree to the law must be issued as soon as possible before the law can be properly enforced. The Group further considered that Brazil's enforcement efforts may well be hampered by a statute of limitation which may result in the dismissal of lightly-sentenced foreign bribery cases and an absence of private-sector whistleblowers' protection. The Working Group recommends that Brazil promptly take steps to address these concerns. Brazil may need to reaffirm that economic considerations do not influence the investigation or prosecution of foreign bribery including as concerns its "Champion Companies".

The report identifies other areas for improvement. Training and guidance must be provided to law enforcement authorities on freezing and confiscation processes, new investigative techniques, and the use of leniency or cooperation agreements. Cooperation between law enforcement authorities must increase. Steps must be taken to ensure that legal persons cannot escape liability for money laundering. Brazil's accounting and auditing frameworks should be reviewed to ensure companies' cannot escape their obligations and false accounting is adequately sanctioned.

The report also notes positive developments. In addition to enacting the Corporate Liability Law, Brazil recently sent a request to the Secretary General of the OECD to adhere to the 2006 Export Credit Recommendation. The Brazilian government, and in particular the CGU, has undertaken broad awareness-raising efforts in relation to the Corporate Liability Law and is encouraged to continue in these endeavours. Brazil has also increased its use of mutual legal assistance in foreign bribery cases.

The report and its recommendations reflect the findings of experts from Colombia and Portugal, and were adopted by the Working Group on 17 October 2014. It is based on legislation and other materials provided by Brazil and research conducted by the evaluation team. The report is also based on information obtained by the evaluation team during its three-day on-site visit to Brasilia and São Paulo on 13–15 May 2014, during which the team met representatives of Brazil's public and private sectors, media and civil society. The Working Group requested that Brazil provide a written self-assessment report in six months (i.e. by March 2015) on the enactment and contents of the Implementing Decree on the Corporate Liability Law (covering Recommendations 2(a), 3(a), 3(d), 5(f) and 12) alongside detailed updates on its foreign bribery investigations and prosecutions. Brazil should report in writing in one year (i.e. by June 2015) on these issues if deemed necessary by the

Working Group, as well as on progress made on the implementation of recommendations 4(a), 5(a), 5(b), 5(c), 8 and 14(c). It also invited Brazil to submit a written follow-up report on its implementation of all recommendations and on all follow-up issues within two years (i.e. by October 2016).

A. INTRODUCTION

1. The On-Site Visit

1. On 13-15 May 2014, an evaluation team from the OECD Working Group on Bribery in International Business Transactions (Working Group) visited Brasilia and Sao Paulo as part of the Phase 3 evaluation of Brazil's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention); the 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation); and the 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation).

2. The evaluation team was composed of lead examiners from Colombia and Portugal as well as members of the OECD Secretariat.¹ Before the on-site visit, Brazil responded to the Phase 3 questionnaire and supplementary questions, and provided certain relevant legislation and documents. The evaluation team also referred to publicly available information. During the on-site visit, the evaluation team met representatives of the Brazilian public and private sectors, civil society, and media as well as a Parliamentarian and the Minister of State and Head of the Office of the Comptroller-General (CGU).² The evaluation team expresses its appreciation to Brazil for its efforts in the evaluation process, and to all participants for their openness during the on-site visit discussions. The evaluation team notes however, that it was unable to meet with major national business organisations and that the panels with the police had limited attendance. Following the on-site visit, Brazil made efforts to provide additional information and address questions from the evaluation team.

2. Summary of the Monitoring Steps Leading to Phase 3

3. The Working Group previously evaluated Brazil in Phase 1 (September 2004), Phase 2 (December 2007) and the Phase 2 Written Follow-up report (June 2010). As of June 2010, Brazil had fully implemented 8 out of 16 Phase 2 recommendations (see Annex 2). The outstanding recommendations cover issues such as the absence of liability of legal persons, sanctions and confiscation, awareness raising and public advantages.

3. Outline and Methodology of the Report

4. This report is structured as follows. Part B examines Brazil's efforts to implement and enforce the Convention and the 2009 Recommendations, having regard to both Group-wide and country-specific issues. Particular attention is paid to enforcement efforts and results, and weaknesses identified in previous evaluations. Part C sets out the Working Group's recommendations and issues for follow-up.

¹ Colombia was represented by: Ms. Alice Berggrun Comas from the Secretaría de Transparencia; Mr. Samuel Urueta Rojas, Advisor at the Ministry of Justice; Mr. Rodrigo Aldana, Senior prosecutor; Ms. Maria Isabel Cañon from the Superintendencia de Sociedades and Ms. Daniela Rivas from the Directorate of National Taxes and Customs. During the October Working Group meeting, Colombia was also represented by Mr. Mario Osorio from the Directorate of National Taxes and Customs. Portugal was represented by Mr. Carlos Miguel Pereira and Mr. Jorge Alberto Cardoso Pereira Lúcio, both Inspectors at the National Unit Against Corruption (UNCC). The OECD Secretariat was represented by Ms. Sandrine Hannedouche-Leric, Co-ordinator of the Phase 3 Evaluation of Brazil and Senior Legal Analyst; Ms. Liz Owen, Legal Analyst; and Ms. Lise Néé, Consultant, all from the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

² See Annex 4 for a list of participants.

4. Economic Background

5. With a GDP of USD 2.240 trillion in 2013, Brazil is among the largest economies in the Working Group and the world's seventh largest economy.³ Among the 41 Working Group members in 2013, Brazil ranked 6th in terms of GDP and 16th in terms of exports of goods and services.⁴ Brazil stresses that exports and imports account for 21,2% of Brazil's GDP.⁵ It further stresses that Brazil's economic development is driven by internal markets and services. Brazil has a number of large multinational corporations,⁶ some of which have been ranked among the largest commercial aircraft, metal and mining companies in the world. Brazil's large multinational corporations are either significant State-owned or State-controlled enterprises (SOEs), large publicly listed companies in which the government owns minority shares or companies that receive financing from the government.⁷ The government in particular finances large operations led by these companies abroad through the National Bank of Economic and Social Development (BNDES).⁸ In 2011, BNDES lent three times more than the World Bank and is now the largest lender in South America.⁹ The bank has long supported strategic sectors of the economy through financing the international expansion of Brazilian "national champions"¹⁰ (although this has decreased over the last year)¹¹ and acts as a bank, an export credit agency (see Section 11a),) and a financial institution holding shares and equity in companies operating abroad (see Section 2). Brazil indicates that more than 90% of the bank's activities support domestic investment but also states that in 2013 USD 7.1 billion related to export credit financing.

6. Brazil's major trading partners are China, the United States (US), Argentina, Japan and the Netherlands. Brazil's three major commercial partners in Latin America in 2012 were Argentina, Venezuela and Chile. Brazilian multinational companies are active in construction, energy, mining, capital goods and agribusiness. Trading relations with African countries are also becoming increasingly important, in particular with other members of the Community of Portuguese Language Countries (CPLP). Outward exports are mainly agricultural products, fuels and mining products, and manufactured products, including the aircraft and automobile industries.¹² Although Brazil remains a major recipient of foreign direct investment (FDI), it has also become an important outward investor.¹³ With an outward FDI stock of USD 293.277 million (EUR 226.498 million) in 2013, Brazil is ranked 16th among the WGB members. The strengthening of South-South cooperation in South America and the building of closer ties with Africa form part of Brazil's economic development. Brazil has the strongest outward FDI position in Latin America, the two main recipients being Argentina and

³ Economic indicators, Central Bank of Brazil; The World Bank Country Overview: Brazil, 2012.

⁴ 2012 UNCTAD Statistics, Brazil, nominal and real GDP; export flows.

⁵ Source: <http://data.worldbank.org/indicator/TG.VAL.TOTL.GD.ZS>

⁶ [New Study Ranks Brazil's Multinational Corporations](#), Colombia Law School, 2007.

⁷ ["Reinventing State Capitalism: Leviathan in Business, Brazil and Beyond"](#), Aldo Musacchio & Sergio G. Lazzarini, Harvard University Press, July 26, 2013

⁸ Ownership Oversight and Board Practices for Latin American State-Owned Enterprises, OECD 2012; ["A bank that may be too big for Brazil"](#), The Washington Post, 14 December 2013

⁹ ["Explaining the BNDES: what it is, what it does and how it works"](#) Brazilian Center for International Relations, Volume 3, Ano VII, 2012.

¹⁰ FT, ["Brazil: The creaking champions"](#), By Joe Leahy, April 21, 2013; and ["Reinventing State Capitalism: Leviathan in Business, Brazil and Beyond"](#), Aldo Musacchio & Sergio G. Lazzarini, Harvard University Press, July 26, 2013

¹¹ ["Brazil's BNDES to Pare Lending in 2014"](#), The Wall Street Journal, 3 January 2013; ["Brazil's BNDES no longer fostering national champions"](#), Reuters 22 April 2013;

¹² World Trade Organisation, Statistics, Brazil

¹³ World Investment Report 2013: Global Value Chains: Investment and Trade for Development, p.5, <http://unctad.org/>

Uruguay. The largest proportion of the investment is primarily in mining and construction.¹⁴ Brazil's FDI to Africa has been on the rise in recent years.

5. Brazil's Exposure and Approach to Corruption

7. Corruption is regarded as a serious problem in Brazil and the government is increasingly prioritising the fight against this phenomenon. A widely publicised domestic case¹⁵ has, according to some commentators, triggered a "shift in Brazil's anti-corruption enforcement, investigational and prosecutorial efforts" with the sanction of high-profile political leaders.¹⁶ According to a recent study by the Federation of Industries of the State of São Paulo (FIESP), Brazil loses 1.38% to 2.3% of its GDP in kickbacks and bribes.¹⁷ In the wake of the hosting of the 2014 FIFA World Cup, corruption allegations have surfaced.¹⁸ Brazil has experienced a large wave of demonstrations in mid-2013 reflecting in part the public demand for government action in the fight against corruption.¹⁹ Against this background Brazil has developed several anti-corruption strategies and action plans, including two National Action Plans for the OGP and recently approved important pieces of legislation: the new Corporate Liability Law (CLL),²⁰ the Freedom of Information Act (Law 12,527, of 2012), a Law of Conflict of Interests for Public Officials (Law 12,813, of 2013), the Clean Record Act (LC 135, of 2010), the Organized Crime Law (Law 12,850, of 2013), a reform of the Anti-Money Laundering Law (Law 12,683, of 2012) and a reform of the statute of limitations (Law 12,234, of 2010), most of which are discussed in this report.

6. Cases involving the Bribery of Foreign Public Officials

8. Brazil has prosecuted only 1 foreign bribery case since the entry into force of the Convention in Brazil fourteen years ago. Since 2000, 14 allegations of Brazilian individuals and/or companies bribing foreign public officials have surfaced. The number of foreign bribery allegations appears low, given the size of Brazil's economy and the high-risk countries and sectors in which its companies operate. Out of the 14 allegations, only 3 are being investigated and formal charges have been brought in only 1 case. Preliminary investigations have been discontinued in 2 cases and 9 allegations have not led to the opening of investigations. No legal persons have been investigated for foreign bribery to date. Allegations that have been reported in the media often refer to financing by BNDES; as this is a special feature of Brazil's foreign trade, the bank's involvement has been reflected in the case summaries below. The case names and the countries involved have been anonymised at the request of the Brazilian authorities.

¹⁴ Working Paper "[Brazilian Emerging Multinationals- in search of a second wind](#)", INSEAD, 2013

¹⁵ Federal Supreme Court Case, Penal Action 470/MG.

¹⁶ "[After a Year of Protests Brazil Enters 2014 Ready to Welcome the World](#)", Brazil, January 2014; "[Anti-corruption enforcement and policies in Brazil: changing times bring a host of developments](#)", Debevoise & Plimpton LLP, March 2013; "[Brazil's top court overturns some convictions in political corruption case](#)", Reuters, 27 February 2014

¹⁷ "[Brazil loses £32 billion to official corruption](#)", IBT, 11 January, 2014; "[Relatório Corrupção: custos econômicos e propostas de combate](#)"; FIESP, March 2010 ,p.27

¹⁸ "[What is behind Brazil's street protests](#)", Euronews, 11 June 2014; "[Corruption to blame for some Brazil world cup cost rises](#)", Bloomberg, 23 May 2014; "[Brazil's World Cup corruption challenge](#)", TI, 11 June 2014; "[Brazil's new anti-bribery act goes into effect in January 2014](#)", Blank Rome LLP, 13 December 2013

¹⁹ These demonstrations were initially triggered by a rise in bus fares, but rapidly expanded to include protests against high living costs, poor public services and corruption.

²⁰ Law N. 12.846/2013 of August 1, 2013

a) ***Cases under investigation and/or prosecution***

Case #1 – Aircraft Manufacturer Case: In 2007, a former director of the armed forces of a Central American country (Country D) allegedly received payments of USD 3.4 million to secure the purchase of aircrafts from a Brazilian company (Company A). The payments were allegedly made via three shell companies. Brazil confirmed that the operation (worth USD 93.6 million) was financed by BNDES which had provided “an export credit grant in the context of the purchase of [Company A’s] aircraft”. In 2011, Company A disclosed that it was under investigation in the US. In 2012, the Brazilian authorities tried to obtain information to establish territorial jurisdiction. A mutual legal assistance (MLA) request was sent to the US in March 2013. Current and former executives of Company A were interviewed and confirmed that irregular payments had been made. An investigation was reportedly opened in 2011 in Country D. Brazil reports that it sent an MLA request to the authorities in Country D in 2009 but has not received a response. In August 2014, indictments were laid against nine defendants in this case; eight held managerial positions in Company A while the ninth defendant was an intermediary hired by Company A.

Case #2 – Gas Pipeline Case: In 2005, a Brazilian company (Company B) allegedly paid commissions of up to USD 34 million via a shell company to officials from the Ministry of Public Works and a gas regulatory agency in a Latin American country which is a party to the Convention (Country A). The commissions were paid in connection with the awarding of a USD 200 million contract relating to the construction of the Southern portion of a gas pipeline in Country A. Company B then subcontracted the work to three other companies. The media reported that BNDES financed up to USD 148 million of the operation. Brazil was unable to provide details on the financing due to bank secrecy laws. Investigations into the public officials and the individuals responsible within the subcontractors were opened in Country A in 2007. The investigations were terminated in July 2013. After sending an MLA request to Country A in 2008, Brazil initiated an investigation in 2011. The Federal Police subsequently approached Company B. In 2013, Company B provided certified copies of a court ruling from Country A which dismissed the charges of overpricing to the Brazilian Federal Police. Brazil reported in August 2014 that the chance of an indictment in this case is slim because (i) the court ruling from Country A stated that “the deal was not tainted by overpricing”, and (ii) Company B “has become aware of the Brazilian investigation and is actively monitoring it through counsel”.

Case #3 – Heart Valves Case: A public official from a European Convention member (Country I) allegedly received a total of EUR 775 000 between 1992 and 2002 in exchange for awarding a contract for heart valves produced by a Brazilian company (Company C). Brazil sent a MLA request to Country I in March 2009. Upon receipt of information from Country I in September 2012, the Federal Prosecution Service (FPS) in the State of Minas Gerais started an investigation. The large number of documents received started being translated at the end of 2013 and the FPS requested that a police inquiry be initiated. In Country I, after being convicted at first instance in May 2008, the public official’s case was dismissed on appeal because it was time-barred. Media have reported that two Brazilian managers of Company C were convicted in Country I, at first instance, and received a reduced imprisonment sentence on appeal in 2011. Brazil indicates that the Brazilian Federal Police has not yet located the two Brazilian managers. Brazil did not specify what steps it intended to take in respect of the Brazilian managers, given that they have already been convicted and sentenced in Country I. At the time of the on-site visit, prosecutors stated that this case “is very old” and has “limited prospect of success” as the alleged acts date back from 2001. This was of concern given the unprecedented seriousness of this broadly-reported case which may have resulted in the death of up to 26 persons due to the use of the defective heart valves. Prior to the adoption of the report, prosecutors advised that they have obtained criminal records, information from the company registry and contact information, and intended to pursue this case.

b) *Discontinued foreign bribery investigations*

Case #4 – Oil Company Case: A Brazilian Oil Company was suspected of having paid bribes in 2006 to officials from an SOE in a South American country (Country B), in order to receive more favourable price treatment for its diesel and oil. An investigation was initiated by the FPS in November 2012, on the basis of information received from Country B. The investigation initiated in Country B was subsequently terminated, due to a lack of damage to the country. The FPS closed the preliminary investigation in May 2013 on the following grounds: (i) the investigation was opened on the basis of media allegations only without information on the individuals potentially involved; (ii) Country B closed the investigation; (iii) the information received from Country B was insufficient; and (iv) the potential criminal conduct would have taken place in 2006 and thus the prospect of a successful investigation is now markedly reduced. Brazil did not indicate whether any other measures were taken to further the case before it was closed.

Case #5 – Meat Exporters Case: Brazilian meat exporters were suspected of having paid 125 tonnes of beef in bribes to health authorities in a Convention country (Country R) to thwart a meat embargo imposed in December 2005 on Brazilian meat.²¹ Based on allegations reported in the media, an MLA request was sent to Country R in 2009 and the Ministry of Development, Industry and Commerce (MDIC) sought more information to identify the alleged bribe-payers, the recipients of the bribe, and the location of the companies. In December 2011, Country R answered the MLA request but Brazil reported that the information received was inconclusive and no additional information was sought. Brazil indicated that “it was not possible to start a viable investigation” and the FPS closed the preliminary investigation in April 2013 on the grounds that: (i) the FPS had not been able to acquire information on the individuals or companies potentially involved in the alleged bribery, nor on the date of the alleged acts; and (ii) the vagueness of the information in the news and the sheer volume of transactions reported made it impossible to start an investigation with reasonable prospects of success. According to Brazil, no other investigative measures have been taken, but this case could be reopened should new evidence arise.

c) *Foreign bribery allegations that have not led to investigations*

9. Four additional allegations involving Brazilian individuals and/or companies have surfaced since Phase 2 (allegations #1 to #4). At the time of the on-site visit, Brazil indicated that none of these allegations had led to an investigation in Brazil nor had a request for MLA been sent to the foreign officials’ countries. In addition to these four allegations, the evaluation team became aware of five additional allegations through independent research conducted after the on-site visit (allegations #5 to #9). The team was thus unable to discuss these allegations with the Brazilian authorities while in Brazil. Almost all of these allegations involve major Brazilian companies operating in countries prone to corruption; four of the allegations involve the same company (a prominent Brazilian “Champion Company”) and three occurred in the same South-West African country. Brazil has not initiated an investigation into any of these cases nor requested MLA from the foreign officials’ countries. Prior to the adoption of the report, Brazil said that the FPS had sent memoranda to the relevant State prosecution offices in relation to allegations #1, #2, #3, #5, #6 and #9. The memoranda indicated that there were grounds for opening an investigation, and drew attention to the Convention.

Allegation # 1 - Capital Avenue: Brazilian Company B allegedly paid bribes to officials in a South-West African country in order to be awarded a construction contract of USD 120 million. This allegation has not triggered any investigation to date.

²¹ In 2013, Russia was the second largest importer of Brazilian meat. See “[No Brasil brics tentam deixar de ser so uma sigla](#)”, Folha de S. Paulo, 13 July 2014

Allegation #2 - Diamond Mining: Between 2005 and 2010, Company B allegedly secured the awarding of a diamond mining licence and a concession by promising to award 10% of the share capital of the project to the relative of a very high ranking official in the same South-West African country. This allegation has not triggered an investigation.

Allegation #3 - Coal Mining Contract: Regional officials of a neighbouring Latin American Convention party allegedly received bribe payments exceeding USD 200 million in 2012 to exercise their discretion in taxation and other aspects in relation to the awarding of one of the world's largest coal mining contracts to a Brazilian company. No investigation has been initiated. Brazil later indicated that contact has been established with two prosecutors in the country.

Allegation #4 - Aircraft Acquisition: In 2009 a subsidiary of a SOE in a South American Convention party (Country A) allegedly received bribe payments to secure a USD 900 million aircraft contract from Brazilian Company A. In 2011, Company A disclosed that it was under investigation in the US for potential bribery. An investigation is also on-going in Country A. According to Brazil, the investigation in the US "will be or has been closed due to lack of sufficient ground for the investigation". Brazil later added that "there was no indication ... that corruption might have taken place" and that, for the moment, their focus was on Case #1. Brazil later advised that it was a prosecutorial decision not to open an investigation at this stage.

Allegation #5 - Biofuel Company: Between 2007 and 2008 Company B allegedly paid bribes to high level officials the same South-West African country as in allegations #1 and #2 to secure an agreement to set up a new biofuel company with a national oil company. The deal allegedly involved a USD 200 million investment in a 30 000 hectare sugar cane plantation.

Allegation #6 - Irrigation Projects: In September 2008, due to credible allegations of corruption in the project, the President of a Latin American country ordered the military to take over a hydroelectric plant and four other projects managed by Brazilian Company B. The President also ordered the opening of an investigation into loans from BNDES which had funded the operation.

Allegation #7 - Aircrafts Acquisition: In the wake of an ongoing investigation into bribe payments made to officials in a European Convention country (Country G) by several major European arms companies, the former Defence Ministry Deputy Director of Armaments in Country G testified in court that he had received a EUR 250 000 commission from Brazilian Company A in 2001 to grant contracts to the company. Upon being informed of this allegation, Brazil noted that the offending occurred prior to the enactment of Brazil's foreign bribery offence so an investigation would not be possible.

Allegation #8 - Acquisition of Mining Licenses: A company owned by an Israeli businessman (Company D) allegedly paid a total of USD 12 million in bribes to officials in a West African country (Country G), including to a prominent official and his close relatives. The bribes were allegedly paid in 2008 to obtain one of the biggest mining concessions in Country G. In 2010, a Brazilian Company (Company E) acquired 51% of the mining concession (for an amount of USD 2.5 billion) and created a joint venture with Company D. In April 2014, a government inquiry by Country G concluded that Company D had obtained the mining concessions through corrupt practices and revoked the mining licenses. At the same time, another mining company filed a complaint in the US against Company E, Company D and its CEO for their active role in obtaining the mining licences to its detriment. After being informed of the allegations, Brazil stated that an investigation was unlikely as the Brazilian company had entered the deal two years after the alleged bribery occurred and, therefore, "the media allegations that came to the attention of the FPS do not qualify as [a plausible allegation]" against the

Brazilian company. Brazil further stated that the joint liability of the successor company or consortium member set out in article 4 CLL would not be applicable in this case.

Allegation #9 - Road Construction: In 2011, a major Brazilian construction company allegedly paid bribes to secure a USD 524 million contract for a 30 year concession for road construction in a Central American country. In 2013 an investigation into the Brazilian company for illicit enrichment and trading of influence was opened in the country in which the bribe occurred.²²

Commentary

The lead examiners welcome Brazil's first nine indictments in a foreign bribery case. However, they have significant concerns regarding the extremely low number of foreign bribery enforcement actions in Brazil. In particular, the examiners are concerned by the seemingly passive approach and lack of significant investigative efforts taken by Brazil in the other existing foreign bribery investigations. Only 14 foreign bribery allegations have surfaced since Brazil became a party to the Convention in 2000, 5 of which were not reported by Brazil to the evaluation team. Investigations have been opened in only 5 of these 14 cases. Only 3 investigations are on-going and only 1 case has resulted in a prosecution; the remaining 2 investigations are unlikely to reach the prosecutorial stage. The Brazilian authorities have not been sufficiently proactive - either in detecting foreign bribery cases, in generating new investigations, in investigating existing ones, or in overcoming potential impediments to prosecution. The lead examiners note that at least 10 of the 14 allegations that have surfaced involve Brazil's "Champion Companies".

B. IMPLEMENTATION AND APPLICATION BY BRAZIL OF THE CONVENTION AND THE 2009 RECOMMENDATIONS

10. This part of the report considers the approach of Brazil in respect of key Group-wide (horizontal) issues identified by the Working Group for all Phase 3 evaluations. Consideration is also given to country-specific (vertical) issues arising from progress made by Brazil on weaknesses identified in Phase 2, or from changes in the domestic legislation or institutional framework of Brazil. With regard to weaknesses identified in Phase 2, the Phase 2 recommendations and issues for follow-up are set out as Annex 1 to this report.

1. Foreign Bribery Offence

11. No legislative changes have affected Brazil's foreign bribery offence (Penal Code (PC)²³ art. 337B) or its definition of 'foreign public official' (art. 337D PC) since Phase 2.

²² ["Contrato feito após ida de Lula à Costa Rica é investigado"](#), Folha De S. Paulo, 04/22/2013; ["Após protestos, Costa Rica cancela concessão de empresa brasileira OAS"](#), Folha De S.Paulo, 04/23/2013

²³ Decree Law N. 2.848/1940.

a) ***Issues identified in Phase 2 as needing specific monitoring by the Working Group***

12. In Phase 2, the Working Group concluded that Brazil's foreign bribery offence largely conformed to the standards of the Convention, although its scope remained untested. Consequently, the Working Group decided to monitor certain aspects of the offence (discussed below) and the application of Brazil's offence of *concessão* (follow-up issues 7e and 7f). Seven years after the Phase 2 report, in a context where only one investigation has reached the prosecution stage, the issues identified in Phase 2 remain. The evaluation team sought to further explore some of these issues during the on-site visit; however, limited information was provided in some discussions. Given Brazil's lack of prosecutions at the time of the on-site visit, this limited the ability of the evaluation team to explore the potential application of the offence.

(i) ***Intermediaries***

13. Brazil's foreign bribery offence covers bribes paid "directly or indirectly". In Phase 2, the Working Group questioned whether this would cover all uses of an intermediary, particularly where the intermediary did not follow through with the offer or payment or was unaware of the principal's intent. In Phase 3, Brazil stated that the reference to 'indirectly' covers all cases of bribery through an intermediary. Upon request of the lead examiners, Brazil provided extracts and explanations of domestic corruption cases which indicated that domestic bribes can be paid through intermediaries, including where the intermediary does not "willingly adhere to an ongoing crime" (i.e. is unaware of the principal's intent).²⁴ In *Case #1- Aircraft Manufacturer Case* and *Case #2 – Gas Pipeline Case* the bribes were allegedly paid through intermediary shell companies. An indictment has been returned against the intermediary in *Case #1 – Aircraft Manufacturer Case*.

(ii) ***Acts outside the official's authorised competence***

14. Brazil's foreign bribery offence applies to bribes paid or offered in order that the official undertake, omit, or delay "any official act". In Phase 2, the Working Group noted that it is not clear whether acts outside the official's authorised competence would be covered. At that time, Brazil explained that the foreign bribery offence applies where the act or omission related, even indirectly, to the functions of the official, even if the act itself is outside the official's authority.²⁵ Brazil's position on this point was inconsistent throughout the Phase 3 evaluation. Initially, Brazil acknowledged that "the reference to an official act might not cover the act of a foreign public official if he/she is not within his/her authorised competence". Nonetheless, Brazil considered that the courts would read the offence consistently with the Convention because the Convention has force of law in Brazil as supported by case law. Moreover, during the on-site visit a senior Judge confirmed that Article 1 of the Convention is not binding on the courts when they interpret Brazil's foreign bribery offence. Following the on-site visit, Brazil changed its position and stated that "the [foreign bribery] offence will be committed if the act bears any relationships, even indirectly, with the function of the public official". Upon request of the lead examiners, Brazil provided one case which concerned domestic solicitation of a bribe (an offence which, notably, makes an explicit reference to acts "outside the function" of the official) in which the Court found that the offence *could not apply* where the act was outside the scope of the official's authority.²⁶ This case supports Brazil's initial view that the foreign bribery offence may not apply where the act is outside the official's authorised competence.

²⁴ Article 333 PC criminalises the "offer or promise of an undue advantage". The cases referred to by Brazil were: *RT 542/323*; *Habeas Corpus 11011*; *Habeas Corpus 33535/SC*; *Criminal Action 685-DF*; *Criminal Action 470/MG*; *Habeas Corpus 33,535-SC*.

²⁵ [Phase 2 Report](#), paragraph 142.

²⁶ *Habeas Corpus Action 200900812577*.

(iii) *Definition of foreign public official*

15. In Phase 2, the Working Group expressed concern that Brazil’s definition of ‘foreign public official’ may be applied in a narrower manner than permissible under the Convention.²⁷ In particular, the Group was concerned that the Brazilian definition may not apply to officials exercising a public function for a public agency.²⁸ At the time, Brazil pointed to jurisprudence on the definition of domestic public official which has been interpreted very broadly.²⁹ However, certain differences between the two definitions gave rise to concerns that the courts may not be as generous in their interpretation of foreign public official. In particular, the definition of domestic public official explicitly covers some domestic ‘public agencies’ while there is no comparable text in the definition of foreign public official. In Phase 3, Brazil maintains that the definition of ‘foreign public official’ aligns with Article 1 of the Convention. Cases and authority provided by Brazil indicate that, in a domestic context, the notion of ‘public official’ has been interpreted broadly. However, Brazil was unable to provide case law interpreting relevant terms within the definition of ‘foreign public official’ which would have assisted the lead examiners in determining the scope of that definition. In light of this, and the absence of relevant case law or practice since Phase 2, the lead examiners remain unable to adequately assess the breadth of the definition of foreign public official.

(iv) *Link between act and an international business transaction*

16. Brazil’s foreign bribery offence applies to bribes paid in return for “any official act relating to an international business transaction”. In Phase 2, the Working Group queried whether the explicit link between the foreign public official’s act and an international business transaction (as opposed to linking the act to obtaining or retaining a benefit in the conduct of international business) would prevent certain acts of omissions from being covered by the offence. For example, acts which provide an advantage in the conduct of international business, but are not directly related to an international business transaction (e.g. advantageous tax treatment or the lifting of customs duties). Brazil considers that its offence “basically corresponds” to the Convention in this regard. However, during the on-site visit, Brazilian officials acknowledged that it remains to be seen how the courts would interpret this. This issue may be relevant in *Case #5 – Meat Exporters Case* and *Allegation #3 – Coal Mining Contract* but the lack of progress in these cases means neither case assists in clarifying the issue at this stage.

Commentary

The lead examiners note Brazil’s acknowledgement that the foreign bribery offence may not apply to bribes in return for acts outside the official’s authorised competence. They recommend that Brazil take all appropriate steps to clarify that the foreign bribery offence applies to bribes promised, offered or paid, in return for acts outside of the official’s authorised competence. They further recommend that the Working Group continue to monitor whether the foreign bribery offence in the Penal Code: (i) covers all elements of the definition of foreign public official; and (ii) covers all bribes offered, promised or paid in return for acts which provide an advantage in the conduct of international business.

²⁷ [Phase 2 Report](#), paragraph 138 – 140.

²⁸ As required by Article 1.4(a) of the Convention and Commentary 13 on the Convention.

²⁹ Article 327 of the Penal Code defines domestic ‘official’ as “anyone who, even though temporarily or unpaid, performs a public job, position or function” and “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”.

b) *Defences*

17. In Phase 2, the Working Group decided to follow up on the offence of ‘*concessão*’ in article 316 PC (follow-up issue 7f) which applies where an official demands a bribe. In Phase 2, Brazil reported that in some instances, a briber will escape liability and as an alternative the official will be charged with *concessão*. Thus, *concessão* may be used to allow a briber to escape liability. In Phase 3, as in Phase 2, Brazil stated that the offence of *concessão* applies only to domestic officials and would not apply to foreign bribery. During the on-site visit, Brazilian authorities stated that *concessão* is not a defence and cannot be pled by a defendant. There is no case law or guidance to confirm this statement, though Brazil points out that *concessão* is found in the Penal Code section on offences against the Public Administration, whereas the foreign bribery offence is in the section on offences against *Foreign Public Administrations*. Brazil was able to point to one case where the active briber was charged in spite of the bribe being paid upon demand. However, during the on-site visit the authorities acknowledged that the debate that occurred during Phase 2 (regarding the use of *concessão* to escape liability for foreign bribery) “is still valid”.

Commentary

The lead examiners recommend that the Working Group continue to monitor Brazil’s offence of concessão to ensure it cannot be used as a basis to preclude the prosecution of a perpetrator for the offence of bribery of a foreign public official.

2. **Responsibility of Legal Persons**

18. A key concern of the Working Group during Brazil’s Phase 2 review was the lack of legislative provisions for liability of legal persons for foreign bribery offences (recommendation 4(i)). At the time of Brazil’s Phase 2 Written Follow-up, in 2010, the Working Group welcomed reports from Brazil of the recent introduction to Congress of a draft Bill on the administrative and civil liability of legal persons for acts of corruption committed against the national and foreign public administration.³⁰ The Working Group urged Brazil to pass this legislation promptly. On 12 May 2011, at the request of Brazil, a submission by the Phase 2 Evaluation Team for Brazil³¹ was presented to the Office of the Comptroller General (CGU), highlighting areas of concern in the Bill. The Evaluation Team’s Submission is annexed to this report (Annex 3).

19. After three years of further negotiations between the government and the anti-corruption community, Bill 6826 was passed into law and the Corporate Liability Law (N.12.846 of August 1, 2013 (CLL)) came into effect in January 2014, thereby introducing the first corporate liability regime for wrongful acts committed against the public administration in Brazil and putting an end to over 14 years of non-compliance with Article 2 of the Convention. This Phase 3 evaluation is the Working Group’s first formal opportunity to review this new law and to consider governmental and non-governmental views of the law. As detailed below, the vast majority of the concerns identified in the Evaluation Team’s Submission remain valid with the law that has been enacted. At the on-site visit a Parliamentarian closely involved in the legislative process was unaware of this Submission.

³⁰ Bill 6826/2010 providing for the administrative and civil liability of legal persons for acts against the national and foreign public administration and other measures, introduced before Congress in Feb. 2010.

³¹ Comprised of lead examiners from Chile and Portugal, and representatives of the OECD Secretariat.

20. At the time of drafting this report, a number of questions remained outstanding as the announced Decree, which aimed to regulate several aspects of the law, had yet to be issued. At the on-site visit, Brazil indicated that the draft Decree had been submitted to the Presidency and was awaiting final clearance. It was not provided to the lead examiners, nor was its content disclosed in the context of the discussions during the on-site visit. The Brazilian authorities were not able to provide a timeframe as to when the Decree will be signed. No legal person has yet been held liable in Brazil for the offence of foreign bribery and none of the 3 current investigations of foreign bribery allegations are targeting legal persons (these allegations relate to facts that occurred before the coming into force of the CLL).

a) A regime of administrative liability

21. Commentary 20 on the Convention clarifies that countries are not bound to establish criminal liability for legal persons where this form of liability is not applicable under their legal system. This is not quite the case in Brazil where companies can be held criminally liable for environmental offences.³² Brazil stresses that criminal liability of legal persons for environmental offences is rooted in the Constitution. Brazil further notes that the liability of legal entities “for acts performed against the economic and financial order” is also provided in the Constitution but without specifying whether this liability should be criminal, hence leaving a broader range of possibilities to the legislator to hold companies accountable.³³

22. Nonetheless, panellists almost unanimously supported Brazil’s pragmatic decision to opt for the administrative liability of legal persons for foreign bribery (and other economic offences covered by the law). The main reason invoked was that because of a number of inefficiencies in Brazil’s judicial system, including lengthy proceedings and multiple appeals (see Section 5f), holding a legal person criminally liable for foreign bribery would take significantly more time with a lower chance of success. This situation is illustrated by the almost total lack of enforcement of environmental offences with respect to legal persons.³⁴ The CGU, the prosecutors and the lawyers at the on-site visit also stressed that a standard of liability as broad as the strict liability contemplated under the CLL would not have been feasible under a criminal statute, which would have required proof of fault or intent of the legal person and afforded narrower possibilities to hold companies responsible.

23. Notwithstanding these concurring supporting statements at the on-site visit, the evaluation team became aware of a draft Bill currently under discussion in the Senate to establish the criminal liability of legal persons in the framework of the discussion of a new Penal Code in Brazil (see sub-Section d)).

³² Article 3 of law N. 9.605/98 provides for the legal entity's criminal liability, in the event of “violation committed as a result of a decision by its legal or contractual representative, its management board, either in the interest, or for the benefit, of the entity.”

³³ See respectively Article 225, paragraph 3 and Article 173, paragraph 5 of the Brazilian Constitution.

³⁴ In 2013, 15 years after the entry into force of the law, the first (and to date only) conviction was reached in the State of Sao Paulo for “noise pollution”.

b) *Legal entities subject to liability*

24. Determining whether SOEs can be held liable under the CLL both in law and in practice is all the more important in an economy like Brazil's where many SOEs are extremely large and dominant, both within Brazil and abroad,³⁵ and have long been considered instrumental to the country's economic growth.³⁶ The legal entities subject to liability under the CLL are defined under article 1 of the law which does not expressly cover SOEs. Nevertheless, the Brazilian authorities affirm that SOEs, either fully or partially owned, are liable under the CCL. They are ruled by the same laws as private sector companies under the Brazilian Law of Corporations (as provided under the Brazilian Constitution) and they would need to be expressly excluded from the scope of the law to escape liability. Prosecutors, judges, lawyers and compliance professionals at the on-site visit unanimously supported the view that SOEs are covered by the CLL. However, the Brazilian authorities conceded that there are specificities inherent to such entities that will require "some form of adaptation/adjustment" regarding the imposition of certain sanctions, such as prohibition to receive incentives, subsidies, grants, donations or loans from public agencies or to entities or from public financial institutions or government controlled entities (see Section 3).

25. Beyond its role in a number of SOEs, the Brazilian Government is also very active in the financing of private companies through BNDES,³⁷ including several of the most important publicly listed companies, which participants in the on-site visit called Brazil's "Champion Companies".³⁸ These publicly listed companies are legally covered under the CLL.

c) *Standard of corporate administrative liability and level of requirement with regard to the natural person's liability*

(i) *Legal basis for corporate administrative/civil liability*

26. The CLL provides for a strict civil and administrative liability regime for legal persons and thus does not require proof of intent of the company nor of its directors or employees. It covers a number of wrongful acts, including foreign bribery.³⁹ The liability of legal persons for foreign bribery results from the combination of a number of provisions in the CLL, which together provide that: Legal entities are strictly liable for "wrongful acts" "to the detriment of [...] foreign public assets, of public administration principles, or to Brazil's international commitments." performed "in [the legal person's] interest or for their benefit".⁴⁰ Wrongful acts are specifically listed under article 5 and include the offer, promise or giving of an "undue advantage" to a "public official", which according to the Brazilian authorities, encompasses a "foreign public official".

³⁵ See "[Ownership Oversight and Board Practices for Latin American State-Owned](#)" prepared for the Enterprises OECD/CAF Latin American Network on State Owned Enterprises 2012. The main SOEs in Brazil are federal, and operating in the oil, energy, communication and financial/bank sectors, e.g. Petrobras, Electrobras, BNDES (Brazilian Development Bank), Caixa Economica Federal and Banco de Brazil.

³⁶ "[State-owned enterprises in Brazil: history and lessons](#)", by Aldo Musacchio and Sergio G. Lazzarini, Workshop on State-Owned Enterprises in the Development Process, Paris, 4 April 2014, BNDES provides loans to over 200 publicly listed corporations, see *Ibid.*

³⁷ FT, "[Brazil: The creaking champions](#)", By Joe Leahy," April 21, 2013

³⁸ The main provision is enshrined in article 2 of the law which provides that: "*Legal entities shall be held strictly liable, in the administrative and civil spheres, for any of the wrongful acts established in this Law performed in their interest or for their benefit, exclusive or not.*"

³⁹ Article 2, article 5, introductory para., article 5,I and article 5,V. para.1 and para. 3 CLL.

- Requirement of a “wrongful act”

27. There is a concern that the definition of the wrongful acts covered is unclear as far as foreign bribery is concerned. Hence, the definition of the act of foreign bribery here again results from the combination of a number of articles and includes a number of uncertainties as different articles in the law use different terminology. Brazil stresses that under article 28 of the CLL the law “applies to wrongful acts committed by Brazilian legal entities against foreign public administration, even if such acts were committed overseas”.

28. Article 2 refers to “wrongful acts established in this law”; article 5, in its introductory paragraph, defines wrongful acts as “acts to the detriment of [...] foreign public assets or of public administration, of public administration principles or to Brazil’s international commitments”; and article 5.I. starts the list of “wrongful acts” with “to promise, offer or give, directly or indirectly, an undue advantage to a public official or to a third party related to him/her.” Neither the “foreign” element (“public officials” in general are targeted in this provision) or the purpose of the “undue advantage” are included in the definition of this wrongful act itself; instead the reader must refer back to the above quoted introductory paragraph. At the on-site visit, CGU representatives and prosecutors contended that the mere fact that a bribe was paid to a foreign official would be sufficient to characterise the undue advantage, as is the case in the domestic arena for natural persons. No damage would need to be further evidenced. However, no supporting case-law or other textual reference was provided to the evaluation team to support this assertion.

29. Brazil asserts that the lack of reference to the PC ensures the independence of the administrative, civil and criminal spheres and that had the new law made express reference to crimes of the PC, the procedures in civil and administrative spheres would have to await the final judgment of criminal actions. However, the issue is not whether the different procedures are linked, but rather whether there is a definition in line with Article 1 of the Convention for both the criminal offence in the criminal sphere and the “wrongful act” in the civil and administrative sphere.

- Coverage of an “undue advantage”

30. The coverage of an “undue advantage” under article 5.I. CLL is similarly unclear. As to whether this covers “any undue pecuniary or other advantage”, Brazil indicates that, although there is no definition in the Brazilian legislation for the term “undue advantage”, this has been interpreted in the context of domestic corruption as any incentive or advantage, pecuniary or not, received by the public agent from private agents, either to perform activities that go beyond his/her legal attributes, or to perform activities within his/her duties.

- Definition/coverage of a foreign public official under the CLL

31. None of the articles which, when combined, appear to establish the liability of a legal person for foreign bribery refer to a “foreign public official”. These rather refer to “national or foreign public administration”. Although it is not used anywhere else in the law,⁴¹ the term “foreign public official” is defined under article 5.V. para. 3 CLL. The term “public official” is not defined in the CLL, nor is it clear that it would cover foreign public officials or vice versa. It is only through the indirect reference to acts performed “to the detriment of foreign public assets [...] or to Brazil’s international commitments” (article 5, introductory paragraph) that foreign public officials may be covered but a link appears to be missing in the law.

⁴¹ Article 5.I. only refers to the offering, promising or giving of a bribe to a “public official”.

32. Regarding the scope of the definition of a “foreign public official” under article 5.V. para. 3, Brazil indicates that there is no doubt that the phrase in Portuguese used in the CLL to define foreign public agents, i.e. “*quem, ainda que transitoriamente ou sem remuneração, exerça cargo, emprego ou função pública*” covers whoever holds a judicial, legislative or executive office at all levels of the Federal Government, regional or local.

- Definition of a foreign public administration

33. The term “foreign public administration” is also not used under article 5.I. CLL. It is here again only through the indirect reference of acts performed “to the detriment of foreign public assets [...] or to Brazil’s international commitments” that foreign public administrations may indirectly be covered. This raised no doubts amongst panellists at the on-site visit. Like “foreign public officials”, the term “foreign public administration” is defined under article 5. para. 1 and article 28 CLL as encompassing public enterprises even when indirectly controlled by the government.⁴² This definition appears to ensure a broad coverage, in line with Article 1.4. of the Convention and Commentary 14.

- Requirement that the “wrongful act” be performed “in the interest or for the benefit” of the legal person

34. Brazil contends that “in [the legal persons’] interest or for their benefit, exclusive or not” refers to any type of advantage resulting from the performance of the wrongful act. Brazil emphasises that the concepts of “interest” and “benefit” are to be understood “in a broad manner” and do not require evidence of profit, but rather “any kind of advantage” or interest. CGU panellists contended that furthering the “interest” and the “benefit” of the legal person could cover situations where, for instance, a legal person bribes on behalf of a related legal person (including a subsidiary, holding company, or member of the same industrial structure) and that it would not be interpreted as a requirement that the bribe to the foreign public official benefits the legal person that gave the bribe. In the absence of case law or textual basis for this broad interpretation, the “interest” and “benefit” criteria will need to be followed-up by the Working Group.

(ii) *Relationship of liability between the legal person and a natural person*

35. Article 3., para 1. expressly specifies that “legal entities shall be held liable irrespective of the individual liability of the individuals referred to in the head provision of this article.” There is no requirement that the wrongful act be performed in the legal person’s name or through its organs and representatives. Brazil emphasizes that the hierarchical level or even the legal ties of the individual with the legal person are irrelevant to establish the liability of the legal entity. Proving that the acts are committed in the “interest” or “benefit” of the legal person is sufficient to establish the connection between the natural and the legal person and hence to establish the liability of the legal person (art. 2 CLL). The new regime thus appears to meet the requirements of the Recommendation 2009, Annex I, Part B (a).

36. Article 3 the CLL does not exclude the individual liability of the company’s directors, officers or any natural person participating in the harmful act. If both the individuals and the legal person are subject to investigation (leading to prosecution on the one hand and to the administrative procedure against legal persons on the other hand), Brazil indicates that the different procedures would be handled in parallel. At the on-site visit, both the CGU representatives and the prosecutors

⁴² Brazil indicates that the criteria for determining whether a company qualifies as “indirectly controlled” by the government are stated in the following provisions: Corporations Law N. 6.404/1976, article 243 and CVM Instruction No. 247 of 27 March 1996.

maintained that the administrative and civil proceedings could be initiated and concluded without waiting for the initiation and conclusion of the criminal proceedings against the natural person. Brazil provided case law⁴³ showing that this is the rule that applies when a natural person may be subject to both criminal and administrative proceedings.

(iii) Acts committed by parent, controlled and affiliated companies, by company's successor, and by suppliers or subcontractors, and third parties

37. Article 4, para. 2. CLL provides for the joint liability of parent, controlled and affiliated companies or consortium members although this liability triggers only certain administrative sanctions and does not include the confiscation of the profits (see section 3). Brazil holds the view that given that foreign subsidiaries are controlled companies; this joint liability extends to Brazilian parent companies for the wrongful acts of their foreign subsidiaries. It is, however, unclear whether the controlled, affiliated and subsidiary companies would need to have committed a wrongful act in the interest of the parent company and vice versa to be held liable or whether this would entail the same type of automatic liability that applies to the successor company under article 4, para. 1. The latter case would go beyond the requirement under Annex 1 C) to the 2009 Recommendation which only provides that “a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf.” Brazil holds the view that the joint liability provided for under article 4, para.2 CLL would allow Brazilian courts to hold a bank liable where the bank finances a project run by a company later held responsible for foreign bribery. At the on-site visit, the Brazilian authorities specified that the liability of the bank would be limited to the cases where the bank holds shares in the company and would thus be jointly liable.

38. Article 4, para. 1 CLL also provides for the liability of the company's successor in case of merger and acquisition but similarly restricts the sanctions available to these companies (see Section 3). This appears to infer an automatic liability of the successor “within the limit of the transferred assets”.

39. The Brazilian authorities affirm that the acts committed by suppliers or subcontractors, and third parties associated with the company can also trigger the liability of the company. This is not supported by a specific provision in the law but panellists at the on-site visit were confident that the establishment of the criteria of the interest and the benefit of the company would allow the establishment of the liability of the company.

d) Towards a possible regime of criminal liability for legal persons?

40. At the on-site visit, a Judge and later a Parliamentarian informed the evaluation team that a draft Bill is currently under discussion in the Senate to establish the criminal liability of legal persons in the context of a broader review of the Penal Code.⁴⁴ This had not formerly been mentioned by the Brazilian authorities and the evaluation team was not provided with the draft Bill prior to or during the on-site, which did not allow for detailed discussions with panellists. Brazil emphasized that there is no

⁴³ The Constitutional Court of Brazil (*Supremo Tribunal Federal - STF*) ruled that the rejection of the complaint for lack of evidence does not preclude accountability for the same cause in administrative proceedings, since the criminal and administrative instances are independent. In the case MS – 23.625 DF, the Plenary of the Supreme Court ruled that a former mayor whose complaint for embezzlement was rejected for lack of evidence could still be held responsible in a special procedure of account (*Tomada de Contas Especial*) at the Federal Court of Accounts (TCU, in its acronym in Portuguese) over the same facts.

⁴⁴ PLS (draft Bill of the Senate) 236 of 2012, aiming at reforming the Penal Code.

guarantee that the Bill will pass into law and that it may still be amended by the Senate before being sent to the Brazilian Chamber of Deputies.

41. In its current version, extracts of which were sent by Brazil after the on-site visit, the Bill raises serious concerns as it is based on the old ‘identification theory’ (also known as the *Tesco* theory) which implies that the liability of legal persons can only be triggered by the individuals in the highest position in the company who represent the “mind” of the company. It has consistently been deemed by the Working Group to not comply with the requirements under Article 2 of the Convention. It also would not take either of the two approaches recommended under the 2009 Recommendation, Annex I, B. Another concern is whether this criminal liability regime, if adopted, would supersede the current administrative and civil liability under the CLL. Panellists did not have a clear view on this issue and some mentioned the possibility that both regimes may coexist.

Commentary

The lead examiners welcome the entry into force of the Corporate Liability Law (CLL). The examiners commend Brazil for the pragmatic approach it has taken by choosing a strict administrative and civil liability regime. They are hopeful that this strict liability regime will offer a broader range of possibilities to hold companies liable. However the examiners are concerned that some vagueness and uncertainties in the law may not allow for the expected level of enforcement.

The lead examiners therefore recommend that Brazil takes appropriate steps to clarify that the CLL covers: (i) bribery of foreign public officials in international business transactions, as defined under Article 1 of the Anti-Bribery Convention; (ii) the application of the law to all legal persons, including SOEs, as well as companies receiving financing from BNDES; (iii) the coverage under “undue advantage” of any incentive or advantage, pecuniary or not, received by the public agent from private agents, either to perform activities that go beyond his/her legal attributes, or to perform activities within his/her duties; and (iv) the interpretation of the “interest” and “benefit” criteria to ensure that it covers situations where, for instance, a legal person bribes on behalf of a related legal person (including a subsidiary, holding company, or member of the same industrial structure). They also recommend that Brazil issues, as a matter of priority, the announced Decree aiming at regulating several aspects of the law.

Finally, they recommend that Brazil ensure that if the draft Bill to establish the criminal liability of legal persons passes into law, it follows one of the two approaches recommended under Annex I B) of the 2009 Recommendation and either supersedes or operates in a manner that is consistent with the administrative Corporate Liability Law.

3. Sanctions

a) *Sanctions for natural persons*

(i) *Legislative provisions*

42. Natural persons convicted of foreign bribery are liable to 1 to 8 years' imprisonment and a fine (art. 337B PC). This is equivalent to the penalty for domestic bribery. The imprisonment penalties may be increased by up to one third where the bribe was paid in order that the foreign public official act in breach of his or her duty: in such cases of aggravated bribery, imprisonment sanctions would range from 16 months to 10 years and 8 months. The penalties have not changed since Phase 2. A Bill to increase the sanctions was mentioned in Phase 2 but although not formally discontinued, now seems unlikely to progress.⁴⁵ During the on-site visit, the evaluation team learned that Brazil had introduced a Bill to review the PC. According to a senior Judge involved in the project, the review seriously considered the sanctions for foreign bribery, but no changes are included in the resulting Bill.

43. Under the PC, fines may be imposed alongside, but not in lieu of, imprisonment.⁴⁶ In accordance with the prescribed calculations, fines for foreign bribery would range from BRL 240 (EUR 80) to BRL 1 303 200 (EUR 428 000).⁴⁷ Fines may also be increased by up to three times if the defendant's economic situation renders even the maximum fine inadequate (art. 60 PC). Imprisonment sentences of less than four years are typically converted to alternative sanctions, for example, community service, confiscation of goods, or a reparation or charity payment (art. 44 PC). In foreign bribery cases the courts are unable to impose monetary penalties alone; at best, a court may be able to impose monetary penalties (e.g. a fine and reparation) alongside an alternative sanction (e.g. community service).

(ii) *Sanctions imposed in practice*

44. In Phase 2, Brazil had no convictions for foreign bribery. The Working Group decided to monitor the level of sanctions applied in practice (follow-up issue 7g). Now, fourteen years after the entry into force of the Convention, no sanctions have ever been imposed for the foreign bribery offence. This leaves the evaluation team unable to fully assess the practical effectiveness of Brazil's sanctions.

45. Concerns were raised in Phase 2 that white collar criminals were treated more leniently by the courts. A recent prominent court decision reached in a domestic corruption case⁴⁸ indicates that this is not always the case; 25 senior political figures were convicted in December 2012 of domestic corruption and other related offences. Penalties for the active or passive corruption offences ranged from 2 to 14 years' imprisonment and fines of up to EUR 419 000 (in respect of the corruption offences). The case has been described as a milestone,⁴⁹ but it is too early to determine whether it initiates a real change in practice – particularly as twelve of the individuals were granted the right to a limited retrial (despite the case being heard by Brazil's highest court, the Supreme Court), though

⁴⁵ Bill 7,710, presented to the National Congress on 1 January 2007.

⁴⁶ Except in accordance with article 60(2) PC which provides that sentences of up to 6 months' imprisonment may be replaced by a fine.

⁴⁷ Under article 49 PC, for foreign bribery the fine amount is between 10 and 360 'daily fines'. A 'daily fine' is one thirtieth to five times the highest monthly minimum wage at the time of commission of the crime. At the time of the review, the minimum wage is BRL 724 (EUR 238). Therefore, the minimum fine for foreign bribery is 10 x (1/30 x BRL 724) and the maximum is 360 x (5 x BRL 724).

⁴⁸ Federal Supreme Court Case, Penal Action 470/MG.

⁴⁹ The Economist, "[What is Brazil's 'Mensalão'?](#)" 18 November 2013

none have been acquitted of corruption-related charges.⁵⁰ During the on-site visit a senior Prosecutor stated that in cases like foreign bribery “judges tend to gravitate towards the mandatory minimum”. Brazil was unable to provide data on the sanctions imposed in domestic corruption cases which significantly limited the lead examiner’s ability to assess the sanctioning practice of the Brazilian courts.

(iii) *Sentences in the context of judicial pardon and cooperation agreements*⁵¹

46. Brazil recently enacted law N. 12.850/2013 (the Organised Crime (‘OC’) Law) which creates the potential for cooperation agreements and judicial pardon (art. 4 to 7). Where a defendant has cooperated voluntarily and been of aid in the investigation and criminal prosecution, a judge may, at the request of the parties, grant judicial pardon, reduce a sentence by up to two-thirds, or replace a custodial sentence with a lesser sentence (art. 4). Cooperation agreements may also be imposed after sentencing; these can reduce the penalty by half or alter the type of confinement (art. 4(5)). Brazil also indicated that post-conviction agreements could include a request for pardon, though this would not ordinarily be the case. Prosecutors at the on-site visit were unaware of any instances of post-sentence cooperation agreements being used, stating that individuals would rather appeal (likely due to Brazil’s lengthy appeals process and the operation of its statute of limitations (see Section 5)). Brazil further indicated that post-sentencing agreements would be very rarely applied but could be a useful tool to expand a case beyond one individual.

Commentary

Brazil has never imposed a sanction for the foreign bribery offence; this left the lead examiners unable to fully assess the effectiveness of Brazil’s sanctions regime for natural persons. The lead examiners therefore recommend that the Working Group follow up on the sanctions imposed in practice for foreign bribery.

The lead examiners welcome the new enforcement possibilities introduced by the Organised Crime Law. They recommend that the Working Group follow-up on the use of post-sentencing cooperation agreements to ensure sanctions remain effective, proportionate and dissuasive.

b) *Sanctions for legal persons*

47. The sanctions set forth in the CLL include administrative and civil (“judicial”) sanctions (in art. 6 and art. 19 respectively). While administrative sanctions for foreign bribery offences can be imposed by the CGU, civil sanctions require a court decision. The level of sanctions may be reduced based on factors detailed below; in particular for cooperative legal entities and where good internal controls and compliance programs are in place. Particular circumstances, for example, where proceedings are brought against successor companies or where companies are jointly held liable, are also taken into account in the law and allow for the imposition of a lesser range of sanctions.

(i) *Administrative sanctions*

48. Administrative sanctions are a fine in the amount of 0.1% to 20% of the gross revenue of the legal entity and the publication of the condemnatory decision (art. 6.I and II CLL). The fine “shall

⁵⁰ [‘Sem Barbosa STF Absolve Joao Paulo por Lavagem de Dinheiro’](#) Folha de S.Paulo, Motta Severino, 7 October 2014.

⁵¹ Cooperation agreements and judicial pardon are discussed in more detail in Section 5.

never be lower than the obtained advantage, when it is possible to estimate it”. However, if it is not possible to use the criteria of the value of the gross revenue of the legal entity, the fine will range from BRL 6 000 (EUR 2000) to BRL 60 000 000 (EUR 20 000 000) (art. 6, para. 4).

- Fine: calculation and effectiveness

49. During the discussion of the Bill, a report presented by the Special Commission suggested that the fines will be calculated based solely on the “revenue from the corporate line of business in which the illicit act occurred”. The text of the Bill did not in the end incorporate such reference.⁵² This method of calculation already existed for competition-related matters, under law N. 12.529/2011, where defining the line of business has been very controversial. The evaluation team was concerned that the CGU participants at the on-site visit could not provide a definitive answer as to the basis on which the fine would be calculated, and which unit, within the CGU, will be in charge of (and involved in) this calculation. At the time of finalising this report, Brazil specified that the fine will be calculated by the committee conducting the administrative proceeding (Article 10 CLL) based on the gross revenue of the company in the broadest sense.

50. Where this fine cannot be calculated, an alternative fine range is provided under article 6, para. 4 CLL. This article provides for a range of fines with a minimum that would, only in exceptional cases, meet the “effective, proportionate and dissuasive” criteria (Article 3 of the Convention), and a maximum that is broadly in line with the maximum fines available in other Parties to the Convention. However, lawyers and compliance officers at the on-site visit emphasised that the maximum fine may not pass the “effective, proportionate and dissuasive” test when it comes to Brazil’s biggest companies. Two participants indicated that fines in the alternative fine range may be part of large companies’ business models and “may be worth the investment”. Given that fines cannot be evaluated in isolation, their effectiveness would also depend on whether other sanctions are concurrently imposed and whether disgorgement of profits is concurrently pronounced and enforced. Brazil later emphasised that the adjudicating authority is expected to consider all elements necessary to guarantee that the fine suggested by the committee is dissuasive.

- Extraordinary publication of the condemnatory decision

51. If a company is found administratively liable for foreign bribery, in addition to a fine, it “shall” be subjected to the “extraordinary publication of the condemnatory decision”; a publication that involves a wide dissemination of the decision (art. 6.II). This suggests that the publication is not optional and should be systematically imposed were the legal person is liable for the wrongful act except where a leniency agreement is reached (art. 16, para. 2). This sanction should, together with other effective, proportionate and dissuasive sanctions, constitute a serious deterrent to foreign bribery while increasing awareness of the offence and the liability of legal persons for such wrongdoings.

⁵² The Brazilian Institute of Business Law (IBRADEMP) wrote a report to the Congressman, Rapporteur on the legislation in the Chamber of Deputies, in which they emphasised that the calculation of the fine based on the corporate line of business would limit the amount of the available fines, in particular for Brazil’s largest companies (some of them ranking amongst the world’s biggest in their sector of activity, see Introduction). (See “[Lawyers warn against weakening Brazil anti-bribery bill](#)”, Thomson Reuters Foundation, Stella Dawson - Fri, 2 Nov 2012.) Another anti-corruption specialist considers that it could “result in costly and time-consuming litigation, complicating enforcement”. (See “[Brazilian Foreign Bribery Bill: Things the Brazilian Congress Might Consider](#)”, 5.25.2012, Author: Matteson Ellis.)

(ii) *Civil sanctions against legal persons decided in the “Judicial sphere”*

52. Civil sanctions provided under article 19 CLL, are: I. Loss of the assets, rights or valuables representing, directly or indirectly, the advantage or benefit gained from the infringement; II. Partial suspension or interdiction of its activities; III. Compulsory dissolution of the legal entity; and IV. Prohibition to receive incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or institutions controlled by the government, for one to five years. These sanctions may be applied “in an isolated or cumulative manner”. The sanction under I. is discussed under Section 4 on confiscation.

53. Brazilian authorities indicate that while SOEs are covered under the CLL, there are specificities inherent to such entities that will require “some form of adaptation/adjustment” regarding the application of certain sanctions, such as prohibition to receive incentives, subsidies, grants, donations or loans from public agencies or from public financial institutions or government-controlled entities. In view of the doubts expressed by panellists from the private sector, there is a concern that the same adjustments may apply to Brazil’s “Champion Companies”, which, while not SOEs, receive financing from the State, mainly through its Development Banks. At the time of finalising the report, Brazil asserted that no such adaptation/adjustment will apply to these companies and that, on the contrary, such sanctions were inserted in the law specifically for these companies.

(iii) *Lack of sanction of debarment*

54. Debarment, which was included in the draft Bill, was finally excluded from the list of available penalties. Brazil clarified that the prohibition in article 19. IV from receiving public incentives and subsidies does not entail the prohibition from taking part in public procurement, bidding processes or contracting with the government. At the on-site visit, a parliamentarian and a lawyer both indicated that the reason for excluding debarment from the CLL was that debarment was already available under procurement law and would hence have involved a risk of double jeopardy. However, the procurement law does not apply to foreign bribery offences as its scope is limited to domestic competition offences. Debarment has been noted in many Phase 3 reports as the strongest deterrent in the view of the business community. Brazilian businesses and lawyers met at the on-site visit concurred with this view.

Commentary

The lead examiners welcome the high level of fines available in principle in the Corporate Liability Law (CLL) as well as the systematic availability of the “extraordinary publication of the condemnatory decision”. The lead examiners recommend that Brazil provide regular training and clear guidance to the relevant CGU officials on the basis and method of calculation of the proceeds of the bribe. They also recommend that Brazil (i) review the CLL to clarify which sanctions are available to SOEs while ensuring that these are effective, proportionate and dissuasive, including for the largest SOEs; and (ii) re-consider including debarment as a possible administrative or civil sanction. They finally recommend that the Working Group follow-up, as case law develops, that sanctions imposed on companies which receive financing from the State, mainly through development banks, are effective, proportionate and dissuasive.

(iv) *Mitigating and aggravating factors*

55. Article 6, para. 1 provides that the sanctions will be applied according to the peculiarities of the concrete case and to the severity and nature of the perpetrated offences. Article 7 further provides that in applying the sanctions, factors listed from I to VIII will be taken into account. Brazil indicates that factors under article 7 are mitigating or aggravating factors and cannot be used as defences to avoid liability. This was confirmed by CGU representatives and prosecutors at the on-site visit. They also indicated that these factors will be taken into account in the negotiation of leniency agreements. They also clarified that these factors, although inserted in the Chapter that regulates administrative liability will be taken into consideration in judicial/civil proceedings as well.

56. The seriousness of the offence (factor I) is not defined in the law but Brazil indicates that this factor, like the other factors provided in article 7, will be further defined in the implementing Decree. Clarification will be particularly welcome regarding factors like the negative effect of the offence (factor V), which may be difficult to assess in foreign bribery cases; or the offender's economic situation (factor VII), which should not encompass considerations forbidden under Article 5 of the Convention, in particular with regard to SOEs but also companies receiving financing from the State, notably through BNDES. Pending the issuance of the Decree and given the lack of practice, the discussions of these issues in Phase 3 were largely theoretical and inconclusive. The last two factors (VIII. and IX.) are discussed under specific sub-sections below.

Commentary

The lead examiners recommend that Brazil clarifies by any appropriate means that: (i) mitigating factors, although inserted in the Chapter of the Corporate Liability Law that regulates administrative liability will be taken into consideration in determining the judicial/civil liability; and (ii) that “the offender’s economic situation” (under article 7. VII) cannot encompass considerations forbidden under Article 5 of the Convention, in particular with regard to SOEs but also companies receiving financing from the State, notably through development banks.

(v) *Possible impact of internal controls, ethics and compliance programs and companies' cooperation with the investigation (Leniency agreements)*

- Internal controls, ethics and compliance programs

57. Article 7 lists as a possible factor to be “taken into consideration” “the existence of internal mechanisms and procedures of integrity, audit and incentive for the reporting of irregularities, as well as the effective enforcement of codes of ethics and of conduct within the scope of the legal entity” (factor VIII, hereafter Internal controls, ethics and compliance programs). This is the factor that has obviously triggered the highest amount of attention and comments from the business community. It is, however, unclear how it will apply.

58. Brazil clarified that the existence and implementation of these programs by companies investigated under the CLL will be considered a mitigating factor, pursuant to article 7, but cannot be used as a defence to avoid liability. This is expected to be confirmed in the implementing Decree together with the parameters of evaluation of these programs. Brazil also indicates that these programs may be taken into account in the context of a leniency agreement. However, it is unclear whether putting into place or reinforcing such programs may be part of the agreement itself and which authority would then monitor its implementation. Likewise, the type of sanctions that may be excluded and/or the extent to which sanctions may be reduced are not set forth in the law. The fact that article 7

is placed under Chapter III “Administrative Liability” indicates that the impact of the ethics and compliance programs will be limited to the administrative sphere and will have no bearing on a possible civil action, which may be started at the initiative of a prosecutor alone. If this were to be confirmed under the Decree, it would seriously limit the impact of this provision as an incentive for companies to put into place such programs.

59. At the on-site visit, the CGU representatives were unable to provide information regarding the resources and expertise available to the CGU to assess such programs, and their implementation – an issue of a particular complexity as foreign operations and entities or subsidiary may be involved. A flow chart provided at the request of the evaluation team after the on-site visit did not shed more light on this issue. The Brazilian Authorities later indicated that the body which will analyse the compliance programs in the context of administrative proceedings is the General Coordination Office of Integrity. They emphasised that the public officials in charge of the evaluation of compliance programs have *inter alia* taken part in courses offered by the Society of Corporate Compliance and Ethics, Saint Louis University and that they have taken part in compliance projects such as the creation of the Pro-Ethics Company Register. Brazil further clarified that compliance programs will not be validated by the CGU as is the case in certain Parties to the Convention.

- Cooperation with the investigation: Leniency agreements in respect of administrative proceedings

60. A positive development introduced by the CLL is the broadening of the arsenal available to the prosecution to encourage self-reporting and uncover foreign bribery. Article 7 lists as a possible factor to be “taken into consideration”, “the cooperation of the legal entity to the investigations of the offences” (factor VII). Article 16 provides that a leniency agreement may be entered into in respect of administrative proceedings where the company self-reports and willingly cooperates in the investigation (see Section 5). As a result of the agreement, any fine will be reduced by up to two thirds, and the company will be exempt from certain sanctions, namely the extraordinary publication of the decision provided under article 6.II and the exclusion from receiving financial support from the government provided under article 19.IV (art. 16, para. 2).

61. In the absence of practice, it remains to be seen whether the sanctions available in the context of leniency agreements will be sufficiently “effective, proportionate and dissuasive”. If the applicable fine were to be in the lower range of available fines, a company, which had bribed abroad may be sentenced to, in the context of a leniency agreement, a fine of BRL 2 000 (EUR 670), absent information on the company revenues, which, even for an SME, would be far from being deterrent.

62. The provisions on leniency agreements, under Chapter V CLL, provide for an agreement in respect of administrative proceedings only, although one of the sanctions expressly excluded pertains to Chapter VI on “Judicial Liability” (the exclusion from receiving financial support from the government). Hence, a judicial/civil action in relation to the same wrongful act may still be filed and civil sanctions could be imposed on top of the sanctions agreed in the context of the leniency agreement. Confiscation of the profits of foreign bribery is achieved through a separate judicial procedure (art. 19. I on “sanctions”). The exemption from the “extraordinary publication of the decision” may in practice be of little impact in the context of a leniency agreement which, pursuant to article 16, para. 6, will “become public”.

Commentary

The lead examiners, recommend that Brazil take the necessary steps to ensure that the Decree implementing the Corporate Liability Law (CLL), to be issued by the Federal Executive Branch (i) clarifies that internal controls and compliance programs provided under article 7.VIII can only be taken into account as mitigating factors and cannot be used as a complete defence from liability by companies, (ii) provides a sufficient level of detail on “the parameters of evaluation of the mechanisms and procedures provided” to allow both the companies to anticipate what they may be able to expect from good internal controls and compliance and the CGU and the judiciary to make a consistent use of this mitigating factor; and (iii) clarifies that the impact of the ethics and compliance programs will not be limited to mitigating administrative sanctions and will also be taken into account when determining civil sanctions.

The lead examiners recommend that the Working Group follow-up: (i) on the use of leniency agreements to ensure that the sanctions imposed under such agreements are effective, proportionate and dissuasive; and (ii) the application of civil sanctions and confiscation that may result from a separate civil action.

(vi) *Limitation of sanctions available for successor companies and in case of joint liability*

63. Article 4, paras. 1 and 2 restrict the sanctions available to successor companies and companies held jointly liable (see Section 2) to the payment of fines and the compensation for damage (the latter being unlikely to be enforced for foreign bribery).⁵³ The confiscation of the profit of foreign bribery is not available in these two cases, which deprives the administration of one of the most serious deterrents to foreign bribery. In its report to the Congressman, rapporteur on the Bill, IBRADEMP indicated that “the possibility of only a fine being applied will give violating companies an ‘escape valve’ allowing corporate manoeuvres to be made in order to evade being held liable” - for example, a company could become aware of illicit acts and undertake a merger or incorporation to avoid penalties other than a fine. Moreover, this restriction appears contrary to article 227 and 228 of the Corporations Law (law N. 6.404/1976) which provides that in case of incorporation and merger operations, all rights and obligations are inherited. Additionally, the liability of the successor is limited to “the transferred assets”, which may offer another opportunity for companies to limit the amount of the fine itself. These issues raise a serious concern with regard to the availability of effective, proportionate and dissuasive sanctions in case of mergers and acquisitions and, to a lesser extent, in the case of joint liability of companies. More flexibility in the availability of sanctions would allow the imposition of sanctions which may be better adapted to each company’s situation, including, but not limited to, those acting in good faith.

Commentary

The lead examiners are concerned that the limitation of the sanctions available to successor companies and companies held jointly liable (art. 4, para. 1 and para. 2 of the Corporate Liability Law (CLL)) may give certain companies the opportunity to limit their liability. They therefore recommend that Brazil review the range of sanctions available under article 4 paragraphs 1 and 2 CLL with a view to providing more flexibility and, in particular, to allow for the confiscation of the profit of foreign bribery and to allow the imposition of sanctions

⁵³ Regarding successor companies, article 4, para. 1 provides for an exception to the restriction of sanctions available in case of simulation or evident fraud intention. In those circumstances the liability of the successor encompasses all sanctions under the CLL.

that will be better adapted to each company's situation. For similar reasons, they also recommend that the limitation of the liability of the successor companies to the "transferred assets" be removed from the law.

4. Confiscation of the Bribe and the Proceeds of Bribery

a) Relevant legislation

(i) Confiscation of the bribe

64. The Phase 2 report noted that the confiscation of the bribe itself would be extremely unlikely in the context of a foreign bribery offence in Brazil (art. 91.II.(a) PC). There is also no possibility under Brazilian law for confiscation of the monetary equivalent of the bribe.⁵⁴ In the absence of changes in this regard since Phase 2, and because the confiscation of the bribe is not contemplated for legal persons under the CLL, Brazil remains non-compliant with Article 3 of the Convention.

(ii) Confiscation of the proceeds of bribery

65. In Phase 2, the Working Group recommended that Brazil "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" (recommendation 5a). With respect to natural persons, the legislation was deemed satisfactory (art. 91.II.b. PC). However because legal persons could not be held criminally liable under the Brazilian system (except for environmental crimes), confiscation as an immediate effect of the criminal conviction was not possible. Civil sanctions in the CLL now include "Loss of the assets, rights or valuables representing, directly or indirectly, the advantage or benefit gained from the infringement" (art. 19. I), thereby implementing recommendation 5 by introducing a range of confiscation possibilities, including of both direct and indirect proceeds of the bribe payment. A serious limitation was introduced in the CLL that gave rise to a number of criticisms:⁵⁵ Confiscation of the profits under article 19.I. is excluded in cases of successor companies, companies held jointly liable and leniency agreements (see discussion above on these different types of liability and settlements).

(iii) Preventive/precautionary measures

66. With the CLL, the freezing of asset rights and values may now be requested by the FPS or the CGU (in case of foreign bribery) to the judiciary (art. 19, para. 4). This would require a mere approval by a judge as for other precautionary measures. However it is limited to guaranteeing the payment of the fine or ensuring full restitution for the damage caused. It does not provide for the freezing of the proceeds of "the benefit gained from the infringement". Regarding natural persons, a prosecutor said at the on-site visit that freezing provisions are vague but that the judges have granted the authorisation to freeze proceeds of corruption held by natural persons in the past.⁵⁶ Prior to finalising this report, Brazil indicated that precautionary measures – including the freezing of assets

⁵⁴ See para. 170 and 171 of Brazil Phase 2 Report.

⁵⁵ See Ibid IBRADEMP.

⁵⁶ In MS 102,963, the Federal Court of Appeals for the 5th Circuit granted the freezing of thousands of reais linked to a money laundering case, in the course of a police investigation (1st Panel. Judge Francisco Cavalcanti. 20 June 2013. Electronic Official Gazette, 27 June 2013, p. 206). In MS 0017381-65.2014.4.01.0000/MG, the 1st Federal Circuit decided similarly (2nd Panel. Judge Ney Bello. 9 July 2014. EOG, 4 Aug. 2014, p. 24). A similar ruling came through in the course of restitution incidental proceedings (5th Federal Circuit. IRCA 200983050002809. 1st Panel. Judge Frederico Azevedo. 28 Oct. 2010. EOG 5 Nov. 2011, p. 30)

for future confiscation – are also available in the Law of Public-interest Civil Action “*Acao Civil Publica*” (Law 7.347/85), which will be applied to civil actions brought under the CLL.

67. Regarding natural persons, Brazil indicates that it recently submitted to the National Congress (in May 2013) a Bill N. 5,681/2013, which, if passed into law, would introduce a Civil Forfeiture Action into the Brazilian system and would allow the forfeiture of assets (the instruments and proceeds pursuant to article 2 of the Bill), even in the absence of criminal conviction. This Bill may, however, be of limited effect in respect of foreign bribery as, since it is a criminal law, it would not apply to legal persons. No agenda for the adoption of this Bill was provided by Brazil.

b) Confiscation in practice

68. At the on-site visit, no clear reply was obtained regarding which person or body possesses the skills and experience necessary to determine the extent of the illicit gains and tainted assets in relation to which confiscation may be requested in the framework of the judicial/civil proceedings. Neither the prosecutor’s office nor the CGU appeared to have organised their services to provide this technical assessment. The prosecutors indicated that they would rely on the forensic expertise available within the CGU but the answers obtained from the CGU showed the absence of consideration given to the implementation of this aspect of the CLL, including the calculation of the amount to be confiscated. The flow chart sent by the CGU after the onsite-visit did not clarify where this responsibility would fit. Beyond this organisational aspect, answers from the CGU participants demonstrated a concerning lack of understanding of what constitutes the proceeds of foreign bribery. They were equally unaware of possible guidelines on the calculation of the benefits made by a company as a result of a contract obtained through bribing a foreign official, although at the end of the on-site visit a CGU representative indicated that detailed guidelines had been prepared. Brazil later indicated that the FPS and the Federal Police both have accounting experts who are able to assess illicit gains of crimes including in the context of confiscation.

69. Brazil indicated that no data or statistics on confiscation are available in Brazil either at the State or Federal level. This raises a serious concern with respect to Brazil’s ability to periodically review its laws and approach to enforcement of the foreign bribery offence (2009 Recommendation, paragraph V).

Commentary

The lead examiners urge Brazil to adopt the necessary measures to allow for the confiscation of a bribe or its monetary equivalent in cases of foreign bribery, in line with Article 3 of the Convention.

The lead examiners welcome the implementation by Brazil of Phase 2 recommendation 5 with the introduction in the Corporate Liability Law (CLL) of monetary sanctions of an effect comparable to confiscation which should allow for a broad range of confiscation possibilities, including of both direct and indirect proceeds resulting from a bribe payment. They are however concerned that these measures are not available in all cases and they recommend that Brazil review its legislation to ensure that the confiscation of the proceeds of foreign bribery is always available, including in the case of successor companies, companies held jointly liable, and when concluding leniency agreements with cooperative offenders. The lead examiners note that although no express reference is made in the CLL to precautionary measures, it is covered through article 21 of the CLL which allows for precautionary measures in general –including under the Law of Public-interest Civil Action “Acao Civil Publica” (Law 7.347/85).

The lead examiners recommend that Brazil make full use of the expertise available in the CGU and confers on a specialised unit the responsibility to calculate the proceeds of bribery and hence contribute to their forfeiture. They recommend that the guidelines that have been prepared be issued promptly to determine how the proceeds of bribery should be calculated and that the specialised unit receives training to this effect. The lead examiners recommend that Brazil take the necessary steps to ensure that data and statistics are maintained at the federal level regarding the confiscation of the proceeds of foreign bribery and other corruption and serious economic crimes.

5. Investigation and Prosecution of the Foreign Bribery Offence

a) Principles of investigation and prosecution, resources and coordination

(i) Bodies responsible for enforcing the foreign bribery offence

70. The Federal Prosecution Service (FPS) is the prosecution authority with responsibility for foreign bribery offences. The Head of the FPS is the Prosecutor General of the Republic (art. 127 to 130 of the Constitution). Regarding legal persons, the CGU has exclusive jurisdiction⁵⁷ over the administrative liability proceedings and is granted the authority to investigate, process and rule on the existence of a wrongful act against a foreign administration, i.e. foreign bribery.⁵⁸ However, the judicial/civil liability proceedings, which can also be initiated against a legal person under the CLL, will be led by the FPS.

71. Within the Police, since 2011, the Service for Investigations of the Misuse of Public Funds (SRDP) is responsible for coordinating, monitoring and regulating the activities carried out by the Department of Federal Police (DPF), which holds responsibility for investigating foreign bribery offences.⁵⁹ The SDRP is placed within the Department of Investigations of Organized Crime (DICOR/DPF), a central body located in Brasilia. DICOR will use the DPF's 15 newly-created Federal Police Stations to Fight Financial Crimes and Misuse of Public Funds (DELEFINs), which are spread across Brazil, to perform certain investigative acts as needed in the context of a foreign bribery investigation.

(ii) Specialisation, coordination and cooperation

- Recent efforts to introduce specialisation within the FPS

72. At the time of Brazil's Phase 2 Written Follow-up, the FPS was in the process of establishing a specific unit to deal with international bribery. The project did not materialise and there is thus no specialised office within the FPS which deals with foreign bribery specifically or more generally with economic and financial crimes. Nor are there any models for case prioritisation. The Prosecutor-General of the Republic and his deputies do not exercise any authority over prosecutors, because each prosecutor enjoys complete autonomy. For this reason the FPS has been described in Phase 2 as lacking internal structure. It emerged from the on-site visit discussions that the random file assignment rule prevented prosecutors from specialising and developing specific skills in international economic crime and foreign bribery in particular. After the on-site visit, corruption-fighting units (*Núcleos de*

⁵⁷ One of the most striking features of the CLL is that enforcement is decentralized for the other wrongful acts. It authorizes enforcement by "the highest executive, legislative, or judicial authority" affected by the conduct (article 8) and this enforcement authority may be delegated. This has given rise to a number of criticisms in particular with regard to the risks of inconsistency in enforcement and conflicts of interest.

⁵⁸ Articles 17 and 18 of law N. 10.683/2003 and articles 8 and 9 CLL

⁵⁹ Brazilian Constitution (article 144(1)) and law N. 10.683 of 28 May 2003

Combate à Corrupção or Corruption-Fight Cells) were established in the major FPS offices, including Rio de Janeiro, São Paulo, Brasília, Goiânia, Salvador, Curitiba, Porto Alegre and Belo Horizonte. A coordination chamber co-chaired by three senior prosecutors was also established with a view to coordinating and providing guidance to the work of these units. Brazil further indicated that the Prosecutor-General is also considering setting up a national corruption-fighting unit. It is unclear whether this unit would be granted specific powers in fighting foreign bribery specifically.

- Lack of specialisation within the police

73. At the on-site visit, the police representatives admitted that, in spite of the recent creation of the SDRP and the DELEFINs, there is no specialisation within the police to fight economic crimes and *a fortiori* foreign bribery.

- A still theoretical specialisation within the CGU

74. Brazil stresses that the expertise acquired by the CGU in the past 10 years will enable it to perform its duties under the new CLL. For example, since 2007, the CGU has carried out administrative proceedings against companies which have resulted in the debarment of 23 companies that committed fraud in bidding and contracts. While this is encouraging, the calculation of the fine and profits involved in a foreign bribery case, as well as the transnational nature of this offence, requires specific expertise and raises different challenges. The number of entities which will be involved in the administrative proceedings to establish the liability of legal persons under the CLL also raises concerns in terms of both efficiency and specialisation. These entities and proceedings are described in detail under sub-section 5c on opening and terminating investigations.

- Coordination between the FPS, the CGU and the police

75. The administrative proceedings against legal entities are independent from the criminal proceedings against individuals. However, Brazil indicated that, whenever necessary, the same evidence may be used in both spheres. The evidentiary threshold to initiate an investigation or to obtain a conviction is higher in criminal cases. However, Brazil specified that the evidence gathered for the purpose of administrative proceedings will be admissible in criminal proceedings with the exception of the privilege against self-incrimination, which does not include the same safeguards and guarantees in each jurisdiction.

76. The CGU asserted that there are no legal barriers to share with the criminal prosecution authorities the evidence acquired during the administrative proceedings and that the CGU has a long standing partnership with the FPS and the DPF. However, article 15 CLL provides that the FPS will be notified of the administrative proceedings to assess whether to open a criminal investigation “after the administrative proceeding is completed”. Given that the administrative proceeding’s term, normally 180 days, can be extended (art. 10, para. 3 and 4), the notification of the FPS may happen very late in the process. Natural persons involved in foreign bribery may be informed of the administrative proceedings before the FPS and there is a risk that evidence is destroyed. This delay may seriously jeopardize the chances of success of the criminal investigation against the natural person. The CGU representatives indicated that, in practice, more flexibility is afforded and that they will involve the FPS earlier in the process. In the absence of a special secrecy clause, nothing prevents the CGU providing the FPS with access to case information at an earlier stage.

77. The FPS representatives strongly emphasized the importance of being informed and involved in investigation as early as possible. They suggested that an MOU could be signed with the CGU in order to formalise this cooperation. They referred to another MOU with the CGU on embezzlement,

which has proven successful and they were confident that the same level of cooperation could be achieved in respect of cases against legal persons for foreign bribery. Early involvement should be reciprocal and the FPS should also inform the CGU of the beginning of investigations against natural persons to allow the CGU to initiate administrative proceedings against the related legal person. The FPS representatives stressed that cooperation with the CGU has always been excellent and that the specialist expertise of the CGU would be utilised, particularly in relation to financial crimes like foreign bribery. In contrast, prosecutors stated that cooperation with the police was more difficult, in particular given the absence of specialised expertise within both the DPF and the DELEFINs. It is notable that while the DPF has been involved in one of the three ongoing investigations, the DPF participants at the on-site visit indicated that they had never been involved in any foreign bribery investigations. Participants emphasised that the close cooperation between the prosecutors and the CGU triggered the initiation of these cases.

78. Conversely, Brazil referred to recent positive cooperation between the CGU and the DPF. The DPF works alongside the CGU when the CGU conducts investigations into fraud in procurement, embezzlement of public funds and corruption. During such investigations, CGU usually takes part in carrying out special investigative techniques (such as search and seizure) pursuant to orders issued by the judiciary and carried out by the Federal Police. For example, Brazil reports that one case involved 100 Federal Police officers and 8 CGU agents and investigations were initiated based on data collected during inspections undertaken by CGU.⁶⁰

Commentary

The lead examiners welcome the establishment of new corruption-fighting units (Núcleos de Combate à Corrupção) in the major Federal Prosecution Service (FPS) offices, as well as the coordination chamber which will coordinate and provide guidance to these units. They believe that these specialised prosecution offices should contribute to more effective investigations and prosecutions of complex economic and financial crimes, including the foreign bribery offence. They encourage Brazil to consider (i) supplementing this reform by following through with the announced creation of a national corruption-fighting unit within the FPS; and (ii) considering the development of specialised police units within the Federal Police Department (DPF). The lead examiners recommend that Brazil take steps to ensure cooperation between the prosecutors and the police as necessary for foreign bribery investigations. They also recommend that Brazil conclude an MOU between the CGU and the FPS providing a detailed framework for the enhanced cooperation between the two agencies in the context of the administrative proceedings, the judicial/civil proceedings and the criminal proceedings, including information on the initiation of proceedings against natural and legal persons.

(iii) *Training and resources of the police, the prosecutors and the CGU*

79. In February 2013, four CGU officials reportedly attended a training course on foreign bribery held by the US. The information obtained was then disseminated to Brazilian officials via a training course in November 2013; the US Securities and Exchange Commission, the Brazilian CGU, the Brazilian Ministry of Justice, and the FPS organised a Foreign Bribery and Corruption Training Conference for Investigators and Prosecutors. The training, held in Brasilia, lasted 4 days and gathered around 60 participants, mostly prosecutors and police officers. The topics covered included the foreign

⁶⁰ In the "Teto de Vidro" case, the individuals investigated had forged public procurement processes. The CGU and the Police have led 15 joint operations in 2013 <http://www.cgu.gov.br/2013>, 25 in 2012 <http://www.cgu.gov.br/2012>, 24 in 2011 <http://www.cgu.gov.br/2011> and 24 in 2010 <http://www.cgu.gov.br/2010>.

bribery offence, the new administrative and civil liability of legal persons under the CLL, as well as detection methods, and the role of national agencies. Apart from this conference, no update was provided by Brazil regarding training provided to the police, the prosecutors and the CGU since Phase 2. In particular, no information was provided on training in respect of new developments, including the administrative liability of legal persons under the CLL, or the enactment of Law N. 12.850/2013 in August 2013 (the Organised Crime (“OC”) Law). This law provides for new investigative techniques available for the investigation of criminal organisations - which encompasses foreign bribery. When asked to provide a list of training courses provided by the National Police Academy which specifically include foreign bribery, Brazil stated that such a list was not available.

80. Brazil provided no update on the resources of the FPS and the DPF, or the specialised resources to deal with international bribery, beyond the generic statement that DICOR/DPF has been expanding consistently and periodically recruits new police officers, and that the 15 newly-created DELEFINs have a wide representation across the Brazilian territory. Brazil was more specific about the CGU and explained that in 2012, the CGU was authorized to recruit 250 new civil servants through public examinations. In 2014, the CGU received authorisation to recruit another 40 new civil servants through the aforementioned examinations, 5 of which are currently working in the department responsible for evaluating compliance programmes.

Commentary

The lead examiners welcome the training efforts made by Brazil at the time of the entry into force of the new Corporate Liability Law (CLL). However, in the absence of enforcement of the foreign bribery offence to date, they recommend that Brazil intensify its efforts to train members of the Federal Police Department (DPF), the Federal Prosecution Service (FPS) and the CGU on the foreign bribery offence in general, on the CLL and, as necessary, on the new investigative techniques available under the Organised Crime Law 12.850 for the investigation of foreign bribery. They also recommend that Brazil ensure that sufficient resources are available to fight foreign bribery within the DPF, the FPS and the CGU.

b) Investigation tools and challenges in the investigation of foreign bribery

(i) General and special investigative techniques

81. General and special investigative techniques are provided for under the Code of Criminal Procedure (CCP), including cross-examination, forensics analysis, confrontations, and search and seizure. Law N. 9.296/1996 regulates the interception of telecommunications. The OC Law broadened the definition of criminal organization or “organized criminal group” (art. 1) to encompass new offences including foreign bribery and money laundering. The law has also broadened the range of investigative techniques available for these offences; including by providing for the infiltration of criminal organisations by police officers (art. 3, item VII), immunity agreements for cooperative suspects and defendants, delayed arrests for monitoring purposes, and access through administrative subpoenas to customer information on suspects and defendants held by telephone companies, financial institutions and internet service providers. The advent of the new law will, according to Brazil, create a more stable and predictable set of tools to investigate foreign bribery. In spite of this progress, prosecutors at the on-site visit indicated that Brazil is “not in tune with the best investigative techniques”. Given the limited acquaintance of the prosecutors and the police with the investigative techniques offered by the OC Law, there is a concern that these may not be fully known and utilised. Brazil later added that while the investigative techniques available under Brazilian law are numerous, the legal standards to be met to use these techniques are sometimes stringent. Furthermore, these

techniques are not available at the detection stage, where the decision to open an investigation is to be taken.

(ii) *Access to information*

82. With the newly enacted Law N. 12.830/2013 (Law 12.830 on Investigations), which strengthens the role of the police authority, when conducting a criminal investigation, the police authority may now directly require from any organisation any information that is not constitutionally deemed confidential. The provision of such information shall not be denied (art 2, para. 2). The police authority may request a judicial order to access confidential information (including financial and tax information). Prosecutors 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. Similarly, where the investigation requires the use of investigative powers such as search and seizure or interception of telecommunications, legal authorisation from a judge must be requested either by the police or the prosecutors.

(iii) *Investigative techniques available to the CGU in the context of the CLL*

83. In administrative proceedings against a legal person for foreign bribery, the CGU - at the request of the Committee conducting the proceeding, and “through [its] judicial representative body” - may solicit all judicial measures necessary to investigate and process the wrongdoing, including search and seizure (art. 10, para. 1 CLL). Representatives of the CGU and prosecutors specified that the CGU will solicit a judicial warrant from a judge through the Attorney General’s office. It is uncertain whether the general and special investigative techniques contained in the CCP would be available in the context of an administrative or a judicial/civil procedure, particularly in the absence of a clear legal basis in the CLL.

84. The CGU’s ability to compel the production of documents, emails and records in the context of an investigation under the CLL depends on who possesses these documents. If these documents are held by public agencies and entities, all documents required by CGU must be produced. However, in the case of sensitive data held by private companies, CGU needs to seek a judicial warrant, like any other law enforcement agency in Brazil. This would apply to the request to compel accounting books and records, which may be a key element in foreign bribery investigations.

Commentary

The lead examiners recommend that Brazil 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.

The lead examiners recommend that Brazil ensure by any appropriate means that the use of the general and special investigative techniques contained in the Code of Criminal Procedure (CCP) is available in practice in the context of the administrative and civil proceedings under the CLL.

c) *Opening and terminating foreign bribery investigations and issues concerning pro-activity*

(i) *Leads and sources of information*

85. None of Brazil's ongoing investigations has been opened on the basis of Brazilian authorities' discovery of alleged foreign bribery. This raises concerns regarding Brazil's proactivity in looking into possible sources of detection of instances of suspected foreign bribery involving Brazilian individuals and companies.

86. Brazil has not been proactive in investigating foreign bribery allegations that have been widely publicised in the media, or from the Working Group, which obtains information from international press reports. Of the 14 allegations that have surfaced since 2001, 9 were unknown to Brazil prior to this evaluation despite being reported in Brazilian national media and international press. The 3 on-going investigations were referred to Brazil by foreign authorities. The only foreign bribery allegation that has been referred by Brazilian representations abroad was reported in November 2013, two years after an investigation by the foreign country had been opened and widely publicised and after the company itself had disclosed that it was under investigation.

87. During the on-site visit, representatives of the FPS Brazil stated that opening an investigation on the basis of media allegations would be "frowned upon" by Brazilian courts and that "there is a serious risk" of having such an investigation quashed in court. In practice, Brazil justified the closing of two investigations in part by indicating that "the investigation had solely been opened on the basis of media allegation" (in Case #4 – *Oil Company Case* and Case #5 – *Meat Exporters Case*). None of the foreign bribery investigations started on the basis of a whistleblower's report.

(ii) *Initiation and conduct of investigation and prosecution with respect to natural persons*

88. Of the 5 investigations into foreign bribery that Brazil has opened in the 14 years of existence of the foreign bribery offence, not one has been initiated by the police. Of these 5 investigations, the three that are ongoing were started on the basis of allegations identified by the OECD. This indicates that Brazil makes very little use of the broad possibilities available under Brazilian law to open investigations on the initiative of the police or prosecutors.

89. With the enactment of Law 12.830 on Investigations, police authorities within the DPF enjoy full autonomy to initiate and conduct police investigations without external interference. The conduct of investigations in Brazil is based on the principle of mandatory investigation. This requires 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 the oversight of the courts. An enquiry can be opened by the prosecution on its own initiative once enough evidence is gathered.

90. To uphold the 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 395-397 CCP, 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, 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. The result of this feature of the Brazilian system, in combination with the numerous controls around the closing of cases, is that the issue of the threshold for opening or closing inquiries arises mainly at the stage of the initiation of proceedings. During the on-site visit, this was recognised as one important bottleneck in the enforcement of foreign bribery in Brazil.

91. It could reasonably be expected that foreign bribery investigations in Brazil would be initiated either by the police (which can open an investigation *ex officio*), or on request of the prosecution. Therefore, the lack of proactivity of these authorities in relation to allegations of foreign bribery involving Brazilian companies raises concerns. Fourteen serious allegations of foreign bribery involving Brazilian individuals and/or companies were brought to light in the media in the 14 years since the offence came into force. Yet, only 3 investigations are ongoing, only one of which has progressed past a preliminary stage (2 other investigations were closed before reaching the prosecution stage). Nonetheless, the issue of the evidentiary threshold required by judges in order to indict a suspect and pursue an investigation was raised as a concern by prosecutors, police representatives and lawyers.

92. Regarding the police, the DPF has been involved in only one of the three ongoing and two terminated investigations. The investigative steps taken by the FPS have so far consisted of interviews, requests for international cooperation, court warranted searches, and internet searches.

Commentary

The lead examiners are seriously concerned that Brazil has not proactively detected any instances of suspected foreign bribery involving Brazilian individuals and companies. They are also seriously concerned about the apparent lack of proactivity of the Department of Federal Police (DPF) and the Federal Public Prosecution Service (FPS) in initiating investigations of potential foreign bribery cases. They recommend that Brazil take necessary measures to: (i) ensure that all credible foreign bribery allegations are proactively investigated; and (ii) gather information from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations. Furthermore, the lead examiners recommend that the Working Group follow-up the performance of the DPF and the FPS with regard to foreign bribery allegations, including decisions not to open investigations.

(iii) Initiation and conduct of investigation and proceedings with respect to legal persons

93. Commentators on the new CLL have consistently emphasised the large number of uncertainties surrounding its provisions.⁶¹ All agree that much will depend on how the government agencies, in particular the CGU and the FPS enforce the new law, and how the judiciary will interpret and apply it.

94. During the on-site visit, only vague and confusing information could be obtained regarding how investigations will be conducted in practice and which CGU entities will be involved in the administrative and the judicial/civil proceedings. The exact role of the Committee provided for under article 10 CLL could not be clarified. Nor was any participant able to indicate which entity would be involved in the calculation of the fine or the proceeds of the bribe. In fact, the relevance of such a calculation for the purpose of confiscation was even questioned by the majority of participants. The analysis below is thus based primarily on the evaluation team's analysis of the law, clarifications obtained during the on-site visit wrap-up session, and a detailed flow chart prepared by the CGU at the request of the evaluation team and sent after the on-site visit (the process flow chart).

95. The CLL provides that administrative proceedings against a legal person are conducted by a Committee composed of 2 officials appointed by the CGU (art. 10 CLL). The process flow chart

⁶¹ See for instance: "[Brazil's Clean Company law: new risks for Companies Doing Business in Brazil](#)" or "[The unknowns of Brazil new anti-bribery Act](#)"

shows that prior to the appointment of the Committee, a preliminary investigation will be filed and processed by the General Coordination for the Liability of Legal Entities (COREP). COREP is currently made up of ten people with general legal backgrounds. They have been receiving specific training to participate in foreign bribery investigations, including experience exchange with the United States government offices including the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ). They also have around 7 years practical experience in conducting nationwide proceedings regarding domestic bribery by legal entities. In view of COREP's limited resources, it will coordinate and rely on the expertise of other CGU units throughout the investigation process. The preliminary investigation will be carried out by the General Coordination for Special Operations. This unit comprises 115 people with a range of skills, including forensic experts, who are experienced in carrying out special operations relating to procurement law, including field operations (together with the Police and the FPS). Requests for MLA with foreign countries will be made through the CGU General Coordination Office for International Cooperation (CGACI). If the preliminary investigation reveals sufficient evidence, COREP will suggest that the Committee in charge of conducting the administrative proceedings be appointed by the CGU Minister.

96. The two appointed members of the Committee will be in charge of conducting the administrative proceedings. The only skills and experience specified for these officials under the law is that they shall have had more than three years in office. Brazil specified that the Committee will preferably be composed of officials from COREP. In spite of the questions asked by the evaluation team both at the on-site visit and after, it remains unclear which entity will be the main interlocutors for companies and will negotiate the leniency agreement when companies "effectively collaborate" with the investigation. Brazil merely indicated that "communication between the Committee and the companies will be through the due procedural context and to ensure the investigated legal entities' rights of rebuttal and of full legal defense". The Committee will be responsible for producing and examining all the evidence, suggesting cautionary measures to the CGU Minister, making a final report on the liability of the legal person and proposing appropriate penalties. The Committee will use the expertise of the General Coordination Office of Integrity to assess companies' compliance programs to determine whether the standard of the program entitles the company to a reduction in sanctions under article 7 VIII CLL. The report will be transmitted to the CGU legal office for a legal opinion. For the final decision "the administrative proceeding, together with the Committee's report, will be remitted for judgment to the authority that initiated the proceeding" (art. 12 CLL). Brazil stresses that the decision taken by the CGU Minister must be based on the analysis made by the Committee and the CGU's judicial representative body. The final decision must be grounded in the elements of proof compiled during the proceeding.

97. According to the process flow chart provided by Brazil, transmission of the information to the FPS only occurs after completion of the administrative proceedings, i.e. after the Committee has completed its report and the CGU Minister has made a final decision. This is consistent with article 15 CLL although panellists indicated that, in practice, prosecutors may be involved at an earlier stage depending on the quality and consistency of the evidence gathered in the context of the administrative proceedings (see Section 5a). Both Federal prosecutors and Federal attorneys may file a judicial action in relation to the wrongful act with a view to the application of sanctions listed under article 19 CLL, which include the confiscation of the proceeds of the bribe.

98. The above description shows the complexity of the process; there are at least seven units within the CGU involved in the administrative proceeding,⁶² and that does not include the potential involvement of other entities (arts. 18-21 CLL). Brazil, however, emphasises that a similar process exists under the Public Procurement Law (law 8,666/93) and has proven effective with 40 sanctions against 38 companies decided by the CGU since the entry into force of the law.

99. Appeals are not contemplated under the CLL but CGU representatives clarified that, regarding the administrative proceedings, an appeal could be made to the Minister for reconsideration of his decision. An appeal for a judicial review of the decision could also be lodged as for all administrative decisions. Any final decision of the CGU Minister is also potentially subject to the oversight of the FPS - and thus control of the court - insofar as article 20 CLL provides that the administrative sanctions (art. 6 CLL) may also be applied in a lawsuit in case of “omission of the competent authority”, i.e. the CGU in case of foreign bribery.

Commentary

The lead examiners recommend that Brazil ensures that sufficient resources and specific skills are available within the CGU to investigate foreign operations carried out by Brazilian companies which may involve foreign bribery. The lead examiners recommend that the Working Group follow-up on whether the complexity of the administrative proceedings and the number of actors potentially involved may constitute an obstacle to the establishment of the liability of legal entities.

d) Different types of settlements

(i) Cooperation agreements and judicial pardon for natural persons

100. As discussed in Section 3, Brazil recently enacted law N. 12.850/2013 (the Organised Crime (“OC”) Law) which creates the ability for natural persons to enter into a cooperation agreement or be granted a judicial pardon. These measures are available only where the accused has “cooperated effectively and voluntarily with the investigation” (art. 4). A cooperation agreement will be concluded between the FPS and the accused and, if the agreement is reached during the investigative stage, the Police Commissioner in charge of the investigation and the FPS. The agreement is then submitted to a judge for review and approval. These agreements can be reached both before *and after* conviction and can result in a reduction in sentence by up to two thirds before conviction, and by up to one half after conviction (art. 4, intro and art. 4, para. 5). The effect of such agreements on the sanctions for foreign bribery is further discussed under Section 3. Under the OC Law, the prosecutor and the Police Commissioner can request the judge to grant judicial pardon for extraordinarily cooperative defendants (art. 4, para. 2).

101. In accordance with the OC Law, “after criminal charges are accepted, the cooperation agreement will no longer remain confidential” (art. 7, para. 3). According to Brazil, this does not mean that cooperation agreements are publicised, it means that the other parties to the proceedings are “entitled to be made aware of [the agreement’s] existence”. Brazil explained that under current Supreme Court case law, it is likely that the contents of the agreement would remain confidential. In addition, under the OC Law the accused’s “name, qualification, image and other personal information” will be kept confidential (art. 5). The OC law remains new and fairly untested; as a result its

⁶² The Minister’s office, the Committee, the General Coordination for the Liability of Legal Entities, the General Coordination for Special Operations and the Legal Office, the Coordination for Integrity and the Department for the Promotion of Integrity, International Agreements and Cooperation.

implications cannot be fully assessed. Brazil has not issued guidance on the law. This lack of guidance, coupled with the lack of publication of cooperation agreements, creates a risk that cooperation agreements may be applied in an inconsistent manner, including in foreign bribery cases.

102. During the onsite visit, Brazil referred to a further opportunity for ‘plea bargaining’ under law 9.099. This law creates a diversion system for offences with a minimum penalty of 1 year imprisonment or less (therefore including foreign bribery). Under this law a prosecutor, with the agreement of the accused and the judge, may suspend charges provided certain conditions (e.g. reparation) are fulfilled (art. 89). No guidance has been issued on the use of diversion and it is unclear if and when it would be used in foreign bribery cases. The discretionary nature of the diversion process creates a risk that it will be applied in foreign bribery cases where prosecution would be more appropriate.

(ii) *Leniency agreements for legal persons*

103. The CGU can enter into a leniency agreement with legal persons liable for foreign bribery, provided they effectively collaborate with the investigation and proceedings, and that such collaboration results in the identification of the persons involved in the wrongful act and the rapid obtaining of information and documents proving the illegal acts under investigation (art. 16 I CLL). A leniency agreement may only be executed when certain conditions provided under the CLL are met. By entering into such agreements and satisfying their conditions, legal persons can reduce the applicable fines by up to two-thirds and be exempted from certain sanctions (see Section 3).

104. A leniency agreement may be reached at any stage of the administrative proceeding until the issuance of the final report on the legal person’s liability by the Committee. Once a leniency agreement has been reached with the members of the Committee, it will need to be signed by the Minister of the CGU. A monitoring period then starts at the end of which the Minister will issue a final decision to acknowledge whether the terms and conditions of the leniency agreement have been met by the legal person. The CLL does not provide for a control or validation by a judge over the leniency agreement. The role of the FPS in the conclusion of the leniency agreement and the impact of the agreement on judicial/civil liability are not clearly stated. Because the provisions on leniency agreement are placed under Chapter V CLL, leniency agreements apply in respect of administrative proceedings only. Both the CGU representatives and the prosecutors confirmed at the on-site visit that a judicial action in relation to the same wrongful act may still be filed and that civil sanctions could be imposed on top of the sanctions agreed in the leniency agreement. Prosecutors admitted that the level of uncertainty that this entails may negatively impact the willingness of an offender to enter into these agreements. Defence lawyers accordingly indicated that they would not advise their client to enter into such an agreement, unless a prosecutor is party to the whole agreement process, thus limiting the risk that the prosecution office starts a parallel judicial proceeding to impose civil sanctions (regarding sanctions, see Section 3).

105. Regarding the availability of information on the agreement, article 16 para. 6 CLL provides for the publication of the proposed leniency agreement after the execution of the agreement “except if it is in the best interest of the investigation and of the administrative proceeding”. The CLL does not specify which elements of the proposed leniency agreement will be published, nor does it specify what will be in the best interest of the investigation. Brazil indicated that the “best interest of the investigation” will be stated in the leniency agreement. No guidelines are available to the CGU in its negotiation of leniency agreements with legal persons and the Brazilian authorities were unable to indicate whether such elements will be clarified with the Implementing Decree. Absent such guidelines, the margin of flexibility of the CGU when deciding whether to enter into a leniency agreement is unclear.

Commentary

The lead examiners recommend that the Working Group follow-up on judicial pardons applied in cases of foreign bribery, and whether they are used appropriately.

The lead examiners welcome the value and flexibility provided by the availability of cooperation agreements and leniency agreements. They are, however, concerned that without certain reassurances, notably regarding the impact of leniency agreements on judicial/civil actions against legal persons, and in a context where cases can be dismissed because of statute of limitation issues, companies and natural persons may have limited incentive to enter into such agreements (see the lead examiners recommendation in this regard under Section 3).

In order to ensure greater transparency and raise awareness of the Corporate Liability Law (CLL) and the Organised Crime Law, the lead examiners recommend that Brazil make public, where appropriate, certain elements of leniency and cooperation agreements concluded in foreign bribery cases, such as the reasons why an agreement was deemed appropriate in a specific case and the terms of the arrangement. Finally, the lead examiners recommend that Brazil take all necessary measures to ensure diversion (under Law 9.099), cooperation agreement (under the Organised Crime Law) and leniency agreements (under the CLL) are applied consistently, including by providing training to prosecutors and issuing guidance on the elements that may be taken into consideration in deciding whether to enter into such agreements.

e) Independence

(i) Independence of the bodies responsible for enforcing the foreign bribery offence

- Independence of the police

106. Brazil indicates that police authorities within the DPF enjoy full autonomy to initiate and conduct police investigations without external interference. The DPF is administratively subordinate to the Ministry of Justice, but retains full autonomy to investigate crimes falling within its remit. Brazil further emphasises that the independence of the police authority has been reinforced with the enactment of Law 12.830 on Investigations. This law strengthens the role of the police authority when conducting a criminal investigation, preventing, for instance, a Police Commissioner from being arbitrarily removed from a criminal investigation or unjustifiably removed from his/her position for the purpose of retaliation or in order to place undue pressure upon him/her.

- Independence of the prosecuting authority

107. The Head of the FPS is the Prosecutor General of the Republic. He/she is appointed by the President for two years (renewable), subject to approval by an absolute majority in the Federal Senate. He/she can be removed through the same process. The independence of the Public Prosecution is guaranteed under the Constitution through the financial and administrative autonomy of the FPS, and also to individual prosecutors who enjoy life tenure and a range of other guaranteed employment conditions.⁶³ Members of the FPS have functional independence that guarantees freedom in their decrees and in the exercise of their functions. They are not even subordinate to their superiors; they owe obedience only to the legal order. The hierarchy that exists among the members and their

⁶³ Article 127 and 128 of the Federal Constitution, and Complementary Law 75, of May 20

superiors is merely administrative. The prosecutors' independence from political pressures (that is a result of their high degree of autonomy) was unanimously emphasised by all participants as one of the strong features of the Brazilian judicial system.

- Independence of the CGU

108. In contrast, the CGU, which will be responsible for the investigation, proceedings and decision on the liability of legal persons for foreign bribery, does not enjoy guarantees of independence comparable to those of the prosecutors. Brazil stresses that the fact that the CGU is part of the executive branch and its Minister is appointed by the President does not affect the Office's independence. The CGU has its own budget and is autonomous to execute it. Moreover CGU employees are selected through specific public tender and are among the most well-remunerated in the Public Service. A specific guarantee granted under the CLL relates to the two officials appointed by the CGU to the Committee in charge of conducting the proceedings (art. 10 CLL). Brazil emphasised that the fact that these two people shall be tenured officials will ensure independence and impartiality of the decisions made by the CGU. This should, however, be nuanced by the fact that the Committee does not have the final say and that it sends its final report to the Legal Office, which is not granted the same guaranties of independence. It is concerning that the final decision lies with the Minister, a member of the Executive, who takes into account the opinion of the legal office on the Committee's report (art. 12 CLL). However, this concern is alleviated to an extent by the fact that the CGU is subject to external controls and, in particular, to the oversight of the FPS. Additionally, the Minister's decisions are subject to judicial review on matters of law and abuse of discretion.

(ii) *Consideration of national economic interest and of other factors under Article 5*

109. Regarding natural persons, as noted in Phase 2, 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,⁶⁴ nor are there general considerations of "public interest" which the prosecution may take into account to discontinue prosecution. The same applies to legal persons; none of these considerations are listed under the CLL as factors to be taken into account in initiating, conducting or closing proceedings against a legal person.

110. However, for legal persons, the fact that the authority which initiates the proceedings and is responsible for the final judgment is the CGU Minister raises concerns regarding whether such factors will be taken into account. CGU participants at the on-site visit were fully aware of the risk that they be perceived as lacking independence. While they admitted that this is theoretically true, they emphasized that the CGU's successes since 2007 demonstrate that the CGU can carry out administrative liability proceedings independently and make decisions as significant as the debarment of 23 companies that committed fraud in bidding and contracts and the dismissal of high level civil officials. Nonetheless, it was confirmed at the on-site visit that none of the 23 debarred companies was an SOE or one of the most important publicly listed Brazilian companies receiving financing from the State (one of Brazil's "Champion Companies"). Brazil later stressed that one of the debarred companies had, in 2011, received the greatest amount invested by the Government on direct spending. Brazil also added that the CGU is currently investigating one of the most important Brazilian SOE, regarding the supposed acceptance of bribes from an oil-rig supplier and for the acquisition of a refinery in a foreign country. It remains to be seen whether wrongful acts to the detriment of foreign public assets will lead to the same level of enforcement.

⁶⁴ Under Article 5 of the Anti-Bribery Convention, investigation and prosecution of the foreign bribery offence shall not be influenced by such considerations.

111. For natural persons, 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. For legal persons, no such control is in place. However, the ability for prosecutors to apply for both administrative and civil sanctions in respect of a lawsuit that they may initiate (art. 20 CLL) introduces a form of control by independent prosecutors and ultimately by the court, over the CGU's decisions. This control could be exercised not only in relation to a decision by the CGU to close an investigation against a company, but also in a case where sanctions may not have been applied, or even in case of inaction by the CGU. If this control is exercised diligently by the prosecution and the court, it could alleviate, to an extent, the concerns over the independence of the CGU and the risk that Article 5 considerations may be taken into account.

Commentary

Given that the CGU does not enjoy the same level of independence as the Federal Prosecution Service (FPS), the lead examiners recommend that the CLL implementing Decree clarify that factors forbidden under Article 5 of the Convention cannot be taken into account in the decision to initiate, conduct or close the proceedings against a legal person. They also recommend that the Working Group follows-up on whether the FPS exercises the control provided under article 20 of the CLL to apply both administrative and civil sanctions in the case of omission of the CGU.

f) Jurisdiction

(i) Jurisdiction over natural persons

112. For natural persons, jurisdiction was deemed generally in line with the Convention (art. 7 PC). However, the broad range of conditions attached to the exercise of nationality jurisdiction led the Working Group to decide to follow-up on how jurisdiction is exercised over natural and legal persons when the offence takes place in part or wholly abroad (Follow-up issue 7d). No change has since been reported. However, the establishment of jurisdiction appears to raise difficulties in practice in the context of the few allegations of foreign bribery that Brazil is currently investigating. At the on-site visit, prosecutors admitted that the establishment of nationality jurisdiction raises a number of challenges; consequently the establishment of territorial jurisdiction is preferred. This issue should continue to be followed up by the Working Group.

(ii) Jurisdiction over legal persons

113. Article 7 PC does not apply to legal persons. As noted in Phase 2, pursuant to the Civil Code, a company is considered a domestic company if it is incorporated under Brazilian law and its management is headquartered in Brazil.⁶⁵ The Working Group, in its Phase 2 report, noted that 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. This led to the Working Group's recommendation 4(iii) "that Brazil ensure that, in relation to establishing jurisdiction over legal persons, a broad interpretation of the nationality of legal persons is adopted." This recommendation was deemed unimplemented by the Working Group at the time of its Written Follow-up.

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Article 1 126 of the Civil Code - Law N. 10.406 of 10 January 2002.

114. Article 28 CLL states that “this law applies to wrongful acts committed by Brazilian legal entities against foreign administration, even if such acts were committed overseas”. This makes explicit the extraterritorial application of the foreign bribery offence to Brazilian companies that bribe abroad. However, the CLL does not provide a new standard for the determination of the nationality of a legal person and the standard under the Civil Code remains unchanged. Hence the loophole identified in Phase 2 has yet to be clarified.

Commentary

The lead examiners recommend that Brazil clarify by any appropriate means that the jurisdiction over legal persons under article 28 of the Corporate Liability Law (CLL) should be broadly interpreted and cover, in particular (i) companies not incorporated in Brazil if their main seat is in Brazil; and (ii) companies that have their main management and control situated in Brazil even if some part of this function is located outside of Brazil. The lead examiners recommend that the Working Group continue to follow-up on how jurisdiction is exercised over natural and legal persons when the offence takes place in part or wholly abroad.

g) Statute of limitations

(i) Statute of limitations for natural persons

115. In Phase 3, the evaluation team discovered that Brazil’s statute of limitations does not operate as previously understood. In fact, there are *two* relevant limitation periods. The limitation period begins on the day the crime was committed and, for foreign bribery, is reset by the complaint (in the case of a private prosecution) or the indictment, confirmation of the indictment, conviction, recidivism, and commencement of the sentence (art. 117 PC). Under article 109 PC, the statute of limitations is set as follows: 20 years for sentences of more than 12 years’ imprisonment; 16 years for sentences between 8 and 12 years’ imprisonment; 12 years for sentences between 4 and 8 years’ imprisonment; 8 years for sentences between 2 and 4 years’ imprisonment; 4 years for sentences between 1 and 2 years’ imprisonment; and 3 years for sentences of less than 1 year. Initially, the limitation period for foreign bribery is 12 years (or 16 years for aggravated foreign bribery). However, following final sentence, the limitation period is recalculated based on the actual sentence (with a lower sentence resulting in a shorter limitation period). The ‘new’ limitation period is then retrospectively applied to the period between the return of the indictment and the conviction, and the conviction and the commencement of the sentence.⁶⁶ Brazil could not provide statistics on the number of corruption cases which were retrospectively time barred.

116. Panellists at the on-site visit almost unanimously agreed that Brazil’s statute of limitations was a serious concern, particularly in light of two factors. First, as observed by prosecutors, judges are likely to award low sentences for foreign bribery, in line with their general approach to sanctioning in practice (see Section 2). Therefore, the final limitation period will likely be low; for example, if an individual is sentenced to imprisonment for 1 year for foreign bribery, the final limitation period is only 4 years. Second, Brazil’s criminal justice system is, as described by a senior judge, “very, very slow” with “an infinite number of appeals” and an excessive use by defendants of Brazil’s three instances of appeal (at least) between the court of first instance and the Supreme Court.⁶⁷ Brazil could

⁶⁶ Prior to an amendment in 2010, the ‘new’ limitation period was retrospectively applied back to the commission of the offence.

⁶⁷ At the Federal level, a case would begin in the Federal Court, before being appealed first to one of the five Federal Regional Courts (TRF), then the Superior Court of Justice (STJ), or, for constitutional issues, the Supreme Federal Court (STF). Habeas corpus applications can also be made (and appealed) in respect of

not provide data on the average length of criminal cases, but panellists stated that complex cases often take over 10 years to be heard with each of the three levels of appeal taking 2-3 years. However, a defence lawyers' association estimates that while an ordinary lawsuit discussing a breach of contract might take 6-10 years, other cases might take more than 20 years.⁶⁸ Various reasons were noted for this delay; a judge at the onsite visit pointed to a lack of training and specialisation in the judiciary and a lack of prioritisation of complex cases, an under-resourced and overwhelmed system has also been blamed.⁶⁹ These delays mean the likelihood of prosecutions becoming time-barred is worryingly high. Both police and prosecutors stated that they had "lost quite a few cases pending appeal" due to the statute of limitations. Panellists and commentators noted that this combination of factors provides an incentive for defendants, particularly "those with deep pockets",⁷⁰ to delay proceedings, which is easily done in an already slow-moving system. In a positive development, Brazil later indicated that in at least three cases, the Supreme Court dismissed appeals on the basis that the defence was attempting to abuse the statute of limitations.⁷¹ Prosecutors and one private sector lawyer stated that the statute of limitations (and the related chances of success of a case) is not a factor that is considered in deciding whether to open cases. Brazil stated that investigations were hampered or were not opened in *Case #3 – Heart Valves Case* and *Case #4 – Oil Company Case* in part due to the amount of time that had passed since the crime was committed. However, authorities later stated that this was not due to the statute of limitations, but instead due to difficulties gathering evidence in respect of historic offending.

(ii) *Statute of limitations and term of proceedings for legal persons*

117. The statute of limitations for legal persons under the CLL is 5 years from the date the investigating authority became aware of the wrongdoing (art. 25). The limitation period is interrupted by the commencement of either administrative or judicial proceedings. For judicial/civil proceedings, the 5 year time frame will restart upon commencement of proceedings. This raises concerns given the slowness and inefficiencies of Brazil's judicial process (as discussed above). It is very unlikely that in a case as complex as foreign bribery, proceedings could be completed in as little as 5 years. This is particularly concerning because confiscation of the proceeds can only be applied through the judicial/civil proceeding. For administrative proceedings, the proceedings must be concluded within six months of the creation of the administrative Committee conducting the proceeding (art.10 of the CLL). This time limit is extremely short, particularly as it includes the time taken to seek additional legal measures such as mutual legal assistance or specific investigative measures. The time limit can be extended "by means of a grounded decision" by the CGU, but the parameters of the extension are unclear, in particular, the factors taken into account, the length of the extension, whether granting a requested extension is optional or mandatory, who may request an extension, and who grants an extension. Brazil indicated that the limitation period will not be recalculated based on the actual sentence, as is the case for natural persons.

procedural errors. Brazil states that decisions of the Supreme Federal Court "cannot be appealed". Eighty percent of the appeals that reach the Supreme Court are procedural rather than substantive appeals - See International Bar Association, Brian Nicholson, '[Brazil's slow justice too appealing for some](#)'

⁶⁸ See Association of Corporate Counsel, "[Court Litigation in Brazil](#)", by Celso Caldas Martins Xavier, Partner Demarest Advogados, Lex Mundi Member firm and Adriane Costa, Senior Legal Manager, Pfizer Brazil

⁶⁹ With a record 127 500 new cases in 2006 (and still 67 000 in 2012) reaching the 11 judges in the Supreme Court (STF) and the 31 judges in the highest appellate Court for non-Constitutional matters (the STF) inundated by 300 000 cases a year - See *Ibid*

⁷⁰ See International Bar Association, Brian Nicholson, 'Brazil's slow justice too appealing for some' available at *Ibid*. Also see Bloomberg, Alexander Ragir and Michael Smith, '[Merril banker indicted with 18 in Brazil says he's scapegoat](#)' (11 November 2010)

⁷¹ See appeal on petition for habeas corpus 116,038/RJ; opinion: Luiz Fux, J; 1st panel; 25.6.2013; petition for habeas corpus 113,559/PE; opinion: Gilmar Mendes, J.; 2nd panel; 11.12.2012, petition for certiorari 839,163/DF; held by Dias Toffoli, J., ad referendum, 25.9.2014.

Commentary

The lead examiners are seriously concerned that Brazil's statute of limitations for natural and legal persons will prevent foreign bribery from being adequately sanctioned and may deter the opening of investigations. This concern is heightened when viewed alongside Brazil's lengthy judicial process and range of appeal options, and the ability for a defendant to delay the process in the hopes of causing foreign bribery cases to be time barred. The lead examiners therefore recommend that Brazil urgently take steps to ensure that the statute of limitations for natural and legal persons for foreign bribery allows adequate time for investigation, prosecution, sanctioning, and the completion of the full judicial process, including in cases where the final sentence is at the lower end of the scale.

The lead examiners further recommend that Brazil clarify its ability to extend the timeframe for administrative proceedings against legal persons.

6. Money Laundering

a) Money laundering offence and enforcement

118. Since Phase 2, Brazil has amended its money laundering legislation with law N. 12.683/2012. The predicate offences for money laundering (art. 1) have been expanded to include all crimes, including foreign bribery. Natural persons are punishable by imprisonment of 3 to 10 years and a fine, the amount of which was not specified by Brazil. In the absence of a corporate liability regime, the Phase 2 report noted that legal persons cannot be held liable for money laundering. The situation is unchanged in Phase 3 as Brazil did not seize the opportunity of the new CLL to include money laundering in the list of wrongful acts for which a legal person can be held liable. Additionally, it ensues from the "all crime approach" for predicate offences under law 12.683 that only criminal offences can constitute a predicate offence to money laundering. As an administrative wrongdoing, foreign bribery by a legal person cannot be a predicate offence to money laundering. However, under the current law, only the natural persons involved could be subject to these investigations, and if the liability of the legal person entered into play, it could most likely not be established under current legislation.

119. Of further concern is the level of enforcement of the money laundering offence. In spite of the establishment of Specialised Federal Courts of Financial Crime and Money Laundering since 2003, the number of final sentences and convictions is "low given the size of the country" according to the FATF/GAFISUD⁷² which has expressed "serious concern about the overall effectiveness of implementation, given the size of the financial system, the level of money laundering risk in the country and the sophistication of its financial system." Brazil has not provided clear statistics on the number of money laundering investigations, prosecutions and convictions predicated on corruption offences since Phase 2. The lead examiners were thus unable to assess the level of enforcement of the offence of money laundering predicated on foreign bribery.

Commentary

The lead examiners are concerned that foreign bribery committed by a legal person would not constitute a predicate offence to money laundering. They are also concerned that legal persons cannot be held liable for the laundering of the proceeds of foreign bribery under

⁷² The Financial Action Task Force (FATF)/GAFISUD; [Mutual Evaluation Report of Brazil](#); June 2010, para. 126-127

Brazil's current legislation. They recommend that Brazil take the necessary measures to ensure that offenders cannot escape liability when laundering the proceeds of foreign bribery through legal persons.

The lead examiners also note the absence of clear statistics regarding the enforcement of the money laundering offence where foreign bribery might be a predicate offence. In the absence of reported enforcement of the money laundering offence, the lead examiners are concerned that Brazil may not effectively investigate and prosecute the laundering of the proceeds of foreign bribery. They recommend that Brazil maintain statistics on investigations, prosecutions and sanctions for money laundering, including data on whether foreign bribery is the predicate offence.

b) Anti-money laundering measures: prevention, detection and reporting

120. An effective system designed to detect and deter money laundering may uncover underlying predicate offences such as foreign bribery. The Council of Control of Financial Activities, (COAF) is Brazil's Financial Intelligence Unit (FIU). Brazil's anti-money laundering regime is governed by law N. 9.613/1998 which has been amended since Phase 2 by law 12.683.

(i) Awareness and training on foreign bribery as a predicate offence to money laundering

121. At the time of Phase 2, the Working Group recommended that Brazil ensure that the institutions and professions required to report suspicious transactions, their supervisory entities, as well as COAF itself, receive appropriate directives and trainings, including typologies, on the identification and reporting of information that could be linked to foreign bribery (recommendation 2e). At the time of Brazil's Written Follow-up, steps had been taken by COAF to provide professional training on foreign bribery to professionals in financial institutions, oversight agencies and prosecutors' offices. However, these measures have not been renewed or complemented since June 2010; no training has been provided to reporting entities or to COAF's employees on the identification and reporting of information that could be linked to foreign bribery. COAF has not developed any typologies or engaged in any awareness-raising efforts which specifically address the foreign bribery offence either for its staff or for the entities required to report suspicious transactions.

(ii) Preventive measures

122. Measures taken to prevent money laundering may also be effective in detecting foreign bribery, including customer due diligences (CDD), or the identification of beneficial ownership and politically exposed persons (PEPs). Brazil indicated that regulations to financial reporting entities have been issued on PEPs and on the identification of beneficial owners in the context of the National Strategy to combat Corruption and Money laundering's (ENCCLA) activities (Action 13(2012), 7(2013) and 3(2013)). These regulations were not provided to the evaluation team.

(iii) Transaction reporting obligations

123. The reporting system for suspicious transactions in Brazil is established in law 9.613. Banks and major financial institutions in Brazil are subject to reporting obligations (art. 9). 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.* are also subject to reporting obligations. Since Phase 2, the anti-money laundering reporting regime has been extended to the legal and accounting professions with law 12.683.

124. To date, there has been no reported cases of money laundering predicated on foreign bribery even though the number of suspicious transaction reports (STRs) received by COAF has continuously increased since Phase 2. In 2012, the COAF received 312 697 STRs either through direct reporting or via the other competent authorities. Of these, 2 104 were referred to the Public Prosecutor Office. Brazil did not indicate how many of these 2 104 reports could be related to corruption in general or to foreign bribery in particular. Panellists indicated that in January 2014 a risk management assessment team was created within COAF to analyse STRs and identify predicated offences. Since January 2014, it has identified 66 STRs related to “crimes against the public administration”, which include domestic and foreign bribery. Brazil did not indicate how many of these STRs have been reported to law enforcement authorities.

Commentary

The lead examiners are concerned that Brazil’s anti-money laundering system does not effectively prevent and detect the laundering of the proceeds of foreign bribery. They therefore urge Brazil to ensure that institutions and professions required to report suspicious transactions, their supervisory authorities, as well as the Council of Control of Financial Activities receive appropriate directives, including typologies on money laundering related to foreign bribery and training on the identification and reporting of information that could be linked to foreign bribery.

7. Accounting Requirements, External Audit, and Company Compliance and Ethics Programs

a) Accounting requirements

125. There are several bodies involved in Brazil’s accounting and auditing framework. The Federal Accounting Council (CFC) regulates and supervises the accounting and auditing profession. The Accounting Pronouncements Committee (CPC) issues accounting standards which must then be endorsed by the relevant sector regulators. The Securities Commission (CVM) regulates and supervises listed companies and auditors acting in the securities market. The Ministry of Planning, Budget and Management (DEST) supervises SOEs. Unlisted companies do not have a statutory supervisor.

(i) Accounting standards

126. Since its Phase 2 evaluation, Brazil has adopted standards consistent with the International Financial Reporting Standards (IFRS).⁷³ A breach of these standards is punishable by administrative sanctions. In addition, all companies including small and medium enterprises (SMEs) must comply with law N. 10.406/2002 (the Civil Code) which contains basic bookkeeping provisions including a daily journal and a balance sheet signed by a qualified accountant.⁷⁴ There is no penalty for breach of these provisions, though such a breach may result in an offence under another law (e.g. the PC).

127. Listed companies, large companies, and SOEs must comply with law N. 6.404/1976 (the Corporations Law) which requires companies to prepare and publish annual financial statements, and disclose contingent liabilities.⁷⁵ For companies supervised by the CVM (i.e. listed companies), failure to comply with these obligations can result in a fine of up to BRL 500 000 (EUR 165 700), 50% of the value of the irregular operation, or three times the amount of the benefit obtained. For unsupervised

⁷³ PKF report, *Brazilian GAAP vs IFRS Overview*.

⁷⁴ Law N 10.406/2002, articles 1,179, 1,180 and 1,184.

⁷⁵ Law N. 6.404/1976, article 133, 176 and 289.

companies, no penalty exists. This is particularly concerning given that up to three of the companies involved in Brazil's cases and allegations are unlisted. The requirements in the Corporations Law were extended to 'large' companies in 2007, although such companies remain unsupervised unless they are listed. Large companies are those with more than BRL 240 million (EUR 77,5 million) in assets, or more than BRL 300 million (EUR 96,9 million) in gross revenues in the last fiscal year.⁷⁶ SOEs are also required to keep and publish records of available financial resources, expenditures and commitments, and joint and individual transactions.⁷⁷ Panellists at the on-site visit raised concerns about the enforcement of accounting obligations for unsupervised companies. Of the 5.2 million companies in Brazil, only 643 are listed (and therefore fully supervised by the CVM). Panellists estimated that there were 3 350 large, unlisted companies, as well as many economically significant companies that do not qualify as 'large', which are not sufficiently supervised.⁷⁸

Commentary

The lead examiners are concerned about the lack of supervision of a large number of Brazilian companies' accounting practices, including large companies and companies involved in foreign bribery cases and allegations. There is a risk that the oversight of unlisted Brazilian companies' accounting standards and practice is insufficient to prevent and detect foreign bribery committed by such companies, especially those which do not qualify as 'large'.

(ii) *False accounting offence*

128. Brazil does not have a standalone false accounting offence. Instead, Brazil states that it has a range of offences which work alongside its accounting standards to prohibit false accounting. In Phase 2, the Working Group decided to follow-up on this issue (follow-up issue 7i). The legislative framework has not changed since Phase 2. Brazil pointed to 'false accounting' provisions within eight different pieces of legislation; however, several of these apply only to financial institutions,⁷⁹ or only where false accounting is committed for the purpose of illegally avoiding tax (which may not always be the case in a foreign bribery related case).⁸⁰ The complexity of Brazil's false accounting framework caused significant confusion at the on-site visit. Auditors and accountants could not identify Brazil's specific false accounting provisions, nor identify which Article 8 conduct was covered by which provision. Of the offences identified by Brazil, the most relevant offences of general application are contained in the PC. The PC criminalises falsifying or altering a public or private document (including financial statements) (arts. 297 and 298). It also prohibits omitting relevant declarations or including false declarations in a document in order to alter a legally relevant fact (art. 299). These offences are punishable by 1 to 6 years' imprisonment (depending on the type of document) and a fine. Directors may also be sentenced to 1 to 4 years' imprisonment and a fine for making a false statement or omitting a relevant fact from a public financial statement (art. 177). One prosecutor stated that the PC provisions are broad, but was unable to confirm whether they would cover all conduct prohibited by

⁷⁶ Law N. 11.638/2007, article 3.

⁷⁷ Supplementary Law N. 101/2000, articles 49 and 50.

⁷⁸ Oversight of large, unlisted companies is achieved only through the requirement that such companies publish their financial statements and submit to an external audit. Companies which do not qualify as 'large' need not comply with these requirements and are supervised solely through the tax system.

⁷⁹ Article 11 of law N. 7.492 (the Financial Crimes Act) creates an offence where a financial institution transfers resources or values in parallel to the legal accounting requirements.

⁸⁰ Article 1 of law N. 8.137 (the Tax Crimes Act) creates an offence punishable by imprisonment of 2-5 years and a fine for avoiding or reducing tax or social contributions by providing a false declaration to tax authorities or entering inaccurate elements or omitting transactions in books or documents required by tax law. Article 2 creates an offence punishable by imprisonment of 6 months to 2 years and a fine for making a false statement or omitting a statement of income, assets or facts for the purpose of evading tax.

Article 8(1) of the Convention. Due to a lack of consolidated statistics, Brazil was not sure how many false accounting cases had been brought in Brazil. Accountants at the on-site visit were unaware of any cases of false accounting. Of the case excerpts provided by Brazil, all but one related to tax evasion. In light of the number of domestic bribery cases, it is surprising that Brazil does not appear to actively detect and sanction false accounting. This may suggest that like accountants and auditors, law enforcement authorities lack understanding of the false accounting framework.

129. Legal persons cannot be held liable for false accounting in Brazil. The PC false accounting offences apply only to natural persons and panellists at the on-site visit confirmed that companies are not held liable for this conduct. The CLL does not encompass false accounting offences amongst the “wrongful acts” likely to trigger the liability of legal persons.

Commentary

The lead examiners are seriously concerned by the lack of clarity in Brazil’s false accounting framework. They recommend that Brazil ensure that the full range of conduct described in Art. 8(1) of the Convention is prohibited; and that both natural and legal persons can be held liable for false accounting.

The lead examiners also note the low level of enforcement of the false accounting offence. They recommend that Brazil raise awareness of the false accounting offence amongst accounting professionals and law enforcement, and vigorously investigate and prosecute false accounting where appropriate.

b) External audit requirements

(i) External audit requirements and independence

130. At the time of Phase 2, only listed companies were subject to an annual external audit. The Working Group recommended that Brazil consider extending this requirement to large companies (recommendation 2d(iv)). In 2007 Brazil amended the law to extend the external audit requirement to all ‘large’ companies. However, by virtue of the high threshold a company must meet to qualify as ‘large’, there are likely to remain companies of an economically significant size that are not required to undergo an external audit. Auditors at the on-site visit also noted that a lack of supervision of large companies results in a lack of enforcement of the auditing obligation. SOEs are also subject to an annual external audit. For listed companies, auditors’ independence is ensured through a registration, rotation, and publication policy; these auditors must be registered with the CVM,⁸¹ the auditor and firm must rotate every five years, and the name of the auditor is publicised.⁸² No such policies apply to unlisted companies, regardless of their size, however, from 2014, the name of all auditors will be publicised.

Commentary

The lead examiners welcome Brazil’s amendment to its law to require all ‘large’ companies to submit to an external audit. The lead examiners recommend that the Working Group follow-up whether (i) requirements on companies to submit to external audits are adequate and (ii) the independence of auditors is sufficiently ensured, particularly for companies which are economically significant but are not listed.

⁸¹ Law N. 6.385/1976, article 26; CVM Instruction 308/1999, article 1.

⁸² CVM Instruction 308/1999, article 31.

(ii) *Awareness and detection of foreign bribery by auditors*

131. In Phase 3, the accounting profession lacks awareness of foreign bribery, although they are aware of domestic corruption. Brazil did not point to any awareness-raising targeting the accounting and auditing profession, contrary to the statements made by Brazil in this regard in Phase 2. Auditors at the on-site visit stated that no training had been provided on foreign bribery.

132. In 2010, Brazil issued the Brazilian Technical Accounting Standards for Independent Audits (NBC TA) which are broadly consistent with the International Standards on Auditing (ISA). NBC TA 240 requires auditors to identify the company's risk of material misstatements due to fraud and its response to this risk (paras. 10 and 17). Auditors at the on-site visit confirmed that general corruption 'red flags' would be considered although the focus appeared to be on domestic corruption rather than foreign bribery. One auditor confirmed that foreign bribery could lead to a material misstatement depending on the circumstances (e.g. the persons involved, the internal controls, the amounts involved). NBC TA 250 requires auditors to detect material misstatements due to non-compliance with relevant laws and regulations (paras. 2 and 10). The standard advises auditors to look for certain bribery red-flags.⁸³ A Brazilian auditor confirmed that the foreign bribery offence could qualify as a 'relevant law', however, auditors' general lack of awareness of this offence calls into question the extent to which NBC TA 250 can be effectively applied. Panellists could not recall any cases of foreign bribery being detected by auditors in practice.

(iii) *Reporting by auditors*

133. In Phase 2 the Working Group recommended that Brazil require auditors to report possible foreign bribery to company management or corporate monitoring bodies and to consider requiring reporting to law enforcement (recommendation 2d(ii) and (iii)). While Brazil has adopted the ISA standards, in practice the situation is largely unchanged since Phase 2. Auditors at the on-site visit stated that suspicions of foreign bribery must be reported to management.⁸⁴ Where management does not act, the auditor can resign. Under NBC TA 240 para. 38A and NBC TA 250 para. A19 "in some cases" an auditor may be obliged to report suspicions of fraud or non-compliance with relevant laws to the regulatory authorities. One auditor indicated that this obligation applied only where auditors were under a statutory duty to report offending; in other instances the duty of confidentiality applies. There does not appear to be a specific statutory or regulatory duty to report suspicions of foreign bribery. Auditors are not required to report suspected foreign bribery to law enforcement, although they are now required to report suspicions of money laundering.⁸⁵ Panellists during the on-site visit stated that there was "no black and white answer" on reporting foreign bribery to law enforcement, but they were aware of the requirement to report money laundering.

Commentary

The lead examiners note that no foreign bribery cases to date have been detected or, at least, reported by auditors. Given the critical role the profession can play in detecting foreign bribery, the lead examiners recommend Brazil raise awareness of foreign bribery among accountants and auditors, including by providing training on foreign bribery indicators and auditors' reporting obligations in respect of foreign bribery.

⁸³ Namely "payments for unspecified service or loans to consultants, related parties, employees, or government employees" and "sales commissions or agent's fees that appear excessive in relation to those ordinarily paid by the entity or in its industry or to the service actually received" (NBC TA, para A13).

⁸⁴ NBC TA 240 para 40; NBC TA 250 para 22.

⁸⁵ Law 9,613/1998, Arts 9(XIV) and 11, and CFC Resolution 1,445/13, Art 9.

The lead examiners recommend that Brazil require auditors to report suspicions of foreign bribery to corporate monitoring bodies, where appropriate, and consider requiring them to report to the competent law enforcement authorities.

c) *Company internal controls, ethics and compliance programs or measures*

134. In Phase 2, the Working Group recommended that Brazil encourage companies to implement internal company controls and to develop monitoring bodies (recommendation 2c). During Phase 3, the evaluation team was unable to fully assess companies' internal controls due to a disappointing lack of representation from major business organisations during the on-site visit, despite a well-attended panel of companies.

(i) *Compliance programs and internal controls*

135. At the time of Phase 2, an increasing number of companies appeared to be adopting corporate codes of conducts, although these rarely covered foreign bribery. This trend does not appear to have continued. An annual study by the Brazilian Institute of Business Ethics (IBEN) indicates that the number of large Brazilian companies who have, and publish, a corporate code of ethics was the same in 2014 as it was in 2009 (approximately 36%), although the study also theorised that the number would increase in light of the adoption of the Corporate Liability Law (CLL).⁸⁶ A review of 27 companies operating in major Brazilian sectors shows that only nine have a specific, publicised policy on corruption and none refer to foreign bribery. All companies at the on-site visit had compliance programs. This is a positive sign, although all but one of the companies were subsidiaries of major foreign companies or Brazilian companies listed on the US stock exchange and indicated that these programs were implemented to comply with foreign legislation; this makes it difficult to measure the effect of Brazil's laws independently.

136. Auditors are required to assess and report on "the deficiencies or ineffectiveness of the audited entity's internal controls".⁸⁷ Auditors at the on-site visit stated that the quality of companies' internal controls varies significantly. The adoption of the CLL may lead to an increase in compliance programs because it provides for reduced sanctions where a company has adequate internal controls. The CGU has held a large number of seminars to help companies understand the law and the incentives for adopting a compliance program.⁸⁸ Divergent views were expressed at the on-site visit on whether the CLL will have an effect on companies' compliance programs with several panellists observing a lack of follow-through of companies, despite good intentions.⁸⁹ Other panellists noted that the mitigating effect of compliance programs under the CLL should provide a clear incentive for companies to develop such programs. One auditor noted, however, that doubts exist as to how the CLL will apply in practice and what might constitute a good compliance program. Brazil indicated that the expertise of the General Coordination Office of Integrity (STPC/CGINT) will be used to determine whether a compliance program is adequate, based upon criteria set out in the Decree to the CLL. At the time of drafting the Decree had yet to be finalised, but Brazil reported that this criteria includes the buy-in and commitment of senior management, the adoption and implementation of

⁸⁶ IBEN, "Pesquisa Código de Ética Corporativo 2014" (March 2014), available at <http://www.pesquisacodigodeetica.org.br/2014/pdf/Pesquisa2014.pdf>.

⁸⁷ CVM Order 308, article 25; NBC TA 265, para A12-18.

⁸⁸ Examples include a seminar on *Compliance: The challenge of compliance in new Brazilian Anti-Corruption Law* (October 31 2013, Sao Paulo); a seminar on *Preventing and Combating Corruption and the Decree of Law N. 12.846/2013* (December 3 2013, Sao Paulo); a lecture on *The Impact of the New Law N. 12.846/2013 in Compliance Systems* (December 3 2013, Sao Paulo).

⁸⁹ This view has been echoed by media commentators. See, for example, Alexandre Lira de Oliveira, quoted in Dawn Lomer, '[Brazil's New Anti-Bribery Laws to Usher in Change](#)'

relevant standards and codes applicable to all levels and types of company employee (including agents), the availability of periodical training, the undertaking of periodical risk analysis, and the existence of reporting channels amongst other things. According to Brazil, the Implementing Decree will contain this information, and detail the extent to which a good compliance program will mitigate sentences under the CLL. The content of the Decree is therefore imperative to determining whether the CLL will act as a real incentive for companies to develop compliance programs. Even if developed and implemented, it is questionable whether compliance programs will cover foreign bribery; several panellists noted that companies were more concerned with domestic corruption.

137. Other efforts have been made by Brazil. The CGU and the Ethos Institute have developed a Pro-Ethics Company Register which evaluates and publicises the names of companies with good ethics practices.⁹⁰ This initiative is positive but appears under-utilised (there are currently only 17 companies on the list). Brazil considers the low number of companies included on the list illustrates the stringency of the evaluation process, however; only 153 companies have applied for inclusion which is an extremely low proportion of Brazil's 5.2 million companies. Brazil reports that changes are currently being made to "make it easier for companies to understand the evaluation process and apply for it." Brazil's National Contact Point on the OECD Guidelines for Multinational Enterprises has translated the Guidelines into Portuguese and distributed them to 500 stakeholders across the business community. The CGU also stated that it has partnered with the Brazilian Support Service for SMEs (SEBRAE) to encourage SMEs develop compliance programs. According to a representative of SEBRAE, this program is primarily focused on domestic corruption but will include a module on foreign bribery.

(ii) *Corporate monitoring bodies*

138. Little appears to have been done by Brazil since Phase 2 to encourage companies to develop monitoring bodies. Brazil initially stated that "public companies ... must have an audit committee". However, the law on audit committees does not appear to have changed since Phase 2 and does not require companies to have an audit committee. As explained in Phase 2, under law N. 6.404/1976 (the Corporations Law), listed and 'large' companies must have a *conselho fiscal* (finance committee) which supervises management and reviews financial statements (art. 161 – 165A). Auditors confirmed that the role of the *conselho fiscal* is not the same as an audit committee.⁹¹

Commentary

The lead examiners are encouraged that Brazil, and particularly the CGU, has recently taken steps to encourage companies to develop and implement corporate compliance programs, including through the new Corporate Liability Law (CLL). They recommend that Brazil continue to encourage companies, particularly unlisted companies and SMEs, to develop and adopt adequate internal controls, ethics and compliance systems to prevent and detect foreign bribery, including by providing guidance in the context of the implementing Decree to the CLL and by promoting the OECD Good Practice Guidance. The lead examiners also recommend that Brazil encourage companies to develop monitoring bodies.

⁹⁰

www.cgu.gov.br/empresaproetica/joined-pro-ethics/empresas.asp

⁹¹

There is no requirement that the members of the *conselho fiscal* are qualified accountants or auditors, nor does the committee have any role in reviewing internal controls and risk management systems.

8. Tax Measures for Combating Bribery

a) *Non-deductibility of bribes*

139. At the time of Phase 2, the Working Group was concerned that Brazil's tax legislation did not explicitly prohibit tax deductibility of bribes to foreign public officials as recommended under the 2009 Tax Recommendation. Consequently, the Working Group urged Brazil to introduce an express denial of the deductibility of bribes in its tax legislation or through another appropriate bidding mechanism (recommendation 6a). In October 2009 Brazil's Federal Revenue Secretariat (RFB) published an Interpretative Declaratory Act 32 (ADI 32), to clarify "the non-deductibility of payments intended for the commission of illicit acts, in particular those prescribed in article 1 of the Convention". However, Brazilian authorities stated that "the legal and regulatory aspects remain unchanged since Phase 2". Despite some awareness raising efforts made at the time of the release of ADI 32, neither the Brazilian authorities nor the tax auditors at the on-site visit were aware of its existence. Tax auditors were more generally unable to point to any specific legal ground - although they strongly asserted that bribe payments are not deductible. The ADI 32 also does not clarify whether the denial of tax deductibility of bribes is contingent on the opening of an investigation by the law enforcement authorities or of court proceedings.

140. Within five years after a tax return is initially filed, tax authorities may examine the return to verify whether bribes have been deducted. In the case of a criminal investigation, the period for examination is extended to 6 years. It is unclear whether the RFB is always informed by the Federal Public Prosecutors' Office that a taxpayer has been convicted of bribery and whether the RFB routinely re-examine filed tax returns of persons convicted of serious economic crimes.

Commentary

The lead examiners recommend that Brazil raise awareness of the ADI 32 among tax authorities. They also recommend that Brazil take measures to ensure that the denial of tax deductibility is not contingent on the opening of an investigation by the law enforcement authorities or on court proceedings. The Working Group should also follow up the enforcement of the non-tax deductibility of foreign bribes, particularly whether Brazilian courts promptly inform the tax authorities of convictions related to foreign bribery, and whether tax authorities examine the tax returns of taxpayers convicted of foreign bribery.

b) *Awareness raising and detection*

141. At the time of Phase 2, the low level of awareness among tax auditors triggered Phase 2 recommendation 6b that Brazil raise awareness of tax auditors through the issuance of guidelines and training programs on the non-tax deductibility of foreign bribery and on the need to be attentive to any outflow of money that could represent bribes to foreign public officials, including commissions, bonuses and gratuities. Since its Written Follow-up, Brazil has not taken any measures to raise awareness of the foreign bribery offence or to train tax auditors to detect bribes in tax declarations. Tax auditors at the on-site visit showed a worryingly low level of awareness of their role in detecting foreign bribery through tax audits. Brazil has indicated that in general, tax auditors are trained to detect all kinds of non-deductible expenses in the course of tax audits, with a focus on money laundering. However, there are no specific guidelines for tax auditors or guidance for taxpayers as to the type of expenses that constitute bribes to foreign public officials. Brazil has indicated that "there is no need to provide guidance to taxpayers". The OECD Bribery Awareness Handbook for Tax Examiners is not used in Brazil and has not been incorporated into training programs for tax auditors.

142. To date the RFB has not detected any foreign bribery cases during tax examinations. The low level of awareness shown by tax auditors at the on-site visit raises concerns over the measures taken by tax auditors to verify the nature of expenses submitted for tax deduction. Participants at the on-site visit did not identify any cases in which suspicious transactions have resulted in an investigation into foreign bribery by tax or law enforcement authorities.

Commentary

The lead examiners recommend that Brazil provide adequate guidelines and training to tax auditors on the types of expenses that constitute bribes to foreign public officials, including through disseminating the OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors,⁹² and extend such dissemination to relevant taxpayers.

c) Reporting foreign bribery and sharing tax information with law enforcement

(i) With law enforcement authorities

143. The general obligation on all Brazilian public officials to report crimes (see Section 10b) applies to tax authorities.⁹³ Reports are made to the head of the official's department or, when there is a suspicion that the head of the department is involved, to another competent authority. The head of the RFB Department then reports to the FPS. Brazil indicated after the on-site visit that for tax authorities, the procedure for reporting crimes is regulated in RFB Act n°2.419 of 2010. Pursuant to this procedure, all reports of suspicions of crimes are sent to the FPS or to the competent government authorities. The procedure does not specifically point to the offence of foreign bribery. From 2008 to October 2013, the RFB has sent a total of 38 599 reports to the FPS. None of these reports were for foreign bribery.

144. Article 198 of the Brazilian Tax Code (TC) imposes a general prohibition on the RFB to divulge any information obtained through tax assessment purposes. However, there are exceptions pursuant to which tax information can be "requisitioned" by judicial authorities (art. 198(1)I TC) and requested by the FPS (art. 8(2) of Complementary law 75/93).⁹⁴ The CGU can also request tax information after proving the initiation of administrative proceedings against legal persons (art. 198(1)II TC). Tax information can be shared with the police either upon demand by a judicial authority or following a request by an administrative authority (art. 198(1) TC).

Commentary

The lead examiners are concerned that tax auditors do not report foreign bribery suspicions to law enforcement authorities. They recommend that Brazil remind tax auditors of their obligation to report to law enforcement authorities any instances of bribery of foreign public officials that come to their knowledge in the performance of their functions. They further recommend that the Working Group follow-up whether tax information can effectively be shared in the course of foreign bribery investigations and prosecutions.

⁹² http://www.keepeek.com/Digital-Asset-Management/oced/taxation/bribery-and-corruption-awareness-handbook-for-tax-examiners-and-tax-auditors_9789264205376-en#page1

⁹³ Law N. 8.112/1990, article 116.VI.

⁹⁴ [Phase 2 Report](#), para 60

(ii) *With other countries*

145. As in Phase 2, Brazilian authorities may exchange information with other tax authorities for tax purposes only and only on the basis of an international instrument providing for mutual assistance (Double Tax Convention, Tax Information Exchange Agreement (TIEAS), multilateral Convention, etc.). Brazil has signed 30 bilateral tax treaties and 7 TIEAS. None of these treaties contain the language in paragraph 2 of Article 26 of the OECD Model Tax Convention, as amended in 2012. This could seriously hinder Brazil's ability to detect foreign bribery. However, Brazil has signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters⁹⁵ developed by the OECD and the Council of Europe.⁹⁶ The Convention will permit Brazil to achieve the same aim as that contemplated by the revised wording of Article 26 of the OECD Model Tax Convention. However, the Convention is yet to be ratified by Brazil.

Commentary

The lead examiners recommend that Brazil consider ratifying the Convention on Mutual Administrative Assistance in Tax Matters. They also recommend that Brazil consider systematically including the language of Article 26 of the OECD Model Tax Convention (on the use of information for non-tax purposes) in all future bilateral tax treaties with countries that are not signatories to the Convention on Mutual Administrative Assistance in Tax Matters.

9. International Cooperation

a) Mutual legal assistance (MLA)

146. As in Phase 2, Brazil is able to provide MLA on the basis of a bilateral treaty, a multilateral treaty, or reciprocity. Brazil's data indicates that the majority of requests are made and received on the basis of multilateral treaties.⁹⁷ Thirteen bilateral MLA treaties have been ratified since Phase 2 (including six with Convention parties) bringing the total number to 22.⁹⁸ The Central Authority for MLA is the Department of Assets Recovery and International Cooperation (DRCI) in the Ministry of Justice, though in practice requests are prepared by the police, prosecutors, or the CGU.

147. During Phase 2, the lead examiners were not informed of any serious problems with Brazil's MLA framework.⁹⁹ However, due to a lack of experience, the Working Group decided to follow-up on Brazil's ability to provide MLA for foreign bribery, and its ability to provide and obtain MLA in respect of legal persons (follow-up issue 7b). Conflicting reports were given on Brazil's use of informal cooperation and international and regional law enforcement networks. Brazil initially stated that it has not cooperated with any such networks in respect of foreign bribery, though during the on-

⁹⁵ The status of the Convention is available at http://www.oecd.org/ctp/exchange-of-tax-information/Status_of_convention.pdf

⁹⁶ Article 22.4 of this Convention and Article 26 of the Model Tax Convention allow a country's tax authorities to share tax information received from foreign counterparts with its national law enforcement authorities for use in criminal corruption cases if certain conditions are met.

⁹⁷ Brazil provided data on fourteen requests relating to foreign bribery which had been sent or received since Phase 2 (December 2007). Of these requests, eleven were made on the basis of multilateral treaties (either the OECD Convention or the United Nations Convention Against Corruption).

⁹⁸ Brazil had nine MLA treaties at the time of Phase 2, six with Convention partners (Argentina, Colombia, France, Italy, Portugal, and the USA) and three with non-Convention partners (Paraguay, Peru, and Uruguay). Brazil's thirteen new MLA treaties are with Canada, Korea, Mexico, Spain, Switzerland, and the UK (Convention partners) and China, Cuba, Honduras, Nigeria, Panama, Suriname, and the Ukraine (non-Convention partners).

⁹⁹ Phase 2 report, paragraph 122.

site visit police representatives stated that Brazil is active in terms of regional cooperation. This suggests that this resource may be underutilised in respect of foreign bribery.

(i) *Incoming requests*

148. Since Phase 2, Brazil has received 38 MLA requests relating to corruption and other economic offences, but only three relate to foreign bribery. Statistics and consolidated information on Brazil's MLA requests were not provided until after the on-site visit, which prevented the evaluation team from fully assessing this issue through discussions at the on-site visit. Several panellists commented that Brazil's system was much improved. All three of Brazil's requests were received from Convention countries. The first request was received in April 2010 and requested hearings, searches and bank information. The second request was a request for oral testimony and was received in July 2013. The third request was for documents and information and was received in April 2014. Brazil reported that its average response time for most MLA requests is 8-10 months, but where the request relates to bank secrecy or asset restraint or confiscation, the timeframe for response may be "substantially enlarged". Only one of the three foreign bribery related requests had been partially fulfilled at the time of writing this report. The request received in 2010 was for bank information and, more than four years later, has only been partially fulfilled.

149. Article 9(3) of the Convention prohibits parties from declining MLA on the basis of bank secrecy. Bank secrecy is a constitutional guarantee in Brazil,¹⁰⁰ but can be overridden by a court order.¹⁰¹ Contrary to Brazil's experience and earlier statements on the amount of time taken to provide MLA on bank information, prosecutors at the onsite visit stated that orders to lift bank secrecy can generally be obtained quickly and easily. One prosecutor stated that BNDES was particularly strict when it came to bank secrecy. This view is substantiated by recent reports of the Bank declining "requests by prosecutors and lawmakers" for bank information.¹⁰² This has led government opposition to call for the removal of bank secrecy for development banks.¹⁰³ Upon signing the Convention, Brazil made a declaration that "mutual legal assistance may not be refused on the ground of bank secrecy, but [Article 9(3) of the Convention] may not preclude the refusal to grant mutual legal assistance in pursuance of other applicable legal norms, within the framework of the Brazilian legal system, and the interpretation thereof set down by the courts." Brazil explained that this declaration was necessary "only to make clear that the Brazilian Constitution requires a judicial decision to lift bank secrecy." This explanation accords with the lead examiners' understanding of the Brazilian system, though on its face the declaration could be interpreted more broadly.

Commentary

The lead examiners are concerned by the length of time taken to respond to MLA requests. They recommend that the Working Group follow-up on Brazil's ability to promptly and effectively respond to foreign bribery-related MLA requests.

¹⁰⁰ Brazil Federal Constitution, article 5.x. and XII; Complementary Law N. 105/2001; ROMS 10097/DF Rapporteur Minister Vicente Leal, 6th Court, DJ: 15 May 2000.

¹⁰¹ Complementary Law N. 105/2001, article 1.4. Brazil reports that such an order will be granted where it is in the public interest and a prima facie case exists.

¹⁰² Blake Schmidt, ['Batista Collapse has Prosecutors at BNDES's Door: Brazil Credit'](#), ['Chefe do BNDES vai a Comissão do Senado explicar negócios com Eike'](#); ['Case Eike Batista põe em xeque apoio do BNDES'](#)

¹⁰³ Blake Schmidt, ['Batista Collapse has Prosecutors at BNDES's Door: Brazil Credit'](#); ['Chefe do BNDES vai a Comissão do Senado explicar negócios com Eike'](#); ["Oposição quer convocar Luciano Coutinho e instaurar "CPI do BNDES"](#)

The lead examiners are concerned that the rules and practice regarding bank secrecy prevent Brazil from providing prompt and effective mutual legal assistance. They therefore recommend that Brazil take steps to ensure bank secrecy does not cause unnecessary delays in providing MLA in foreign bribery cases. In addition, they recommend that the Working Group follow-up on the declaration made by Brazil on Article 9(3) to ensure it is not applied in a broad manner to allow Brazil to decline MLA requests relating to foreign bribery.

(ii) *Outgoing requests*

150. Data provided by Brazil shows it has made six MLA requests relating to Brazilian foreign bribery investigations or proceedings.¹⁰⁴ Four have been granted and two are pending response. Brazil followed up regularly on one outstanding request made in 2009. Brazil has made requests in relation to all but one of its open or terminated investigations. Requests have not been made in relation to any of the allegations, likely because requests cannot always be made prior to the opening of a formal investigation (depending on the law of the foreign country). Given that some countries require a formal investigation to be opened prior to the sending of an MLA request and Brazilian authorities have difficulty opening investigations due to the applicable standards (see Section 5c), an alternative might be to use informal cooperation and law enforcement networks in these cases. However, Brazil reports that it has yet to use such processes in respect of foreign bribery.

Commentary

The lead examiners note Brazil's increased use of MLA since Phase 2. Brazil may also benefit from increasing its use of informal cooperation and international and regional law enforcement networks, where appropriate, in foreign bribery cases.

(iii) *Requests relating to legal persons*

151. At the time of Phase 2, Brazil had not made or received any requests relating to legal persons.¹⁰⁵ Since this time, it is encouraging to hear that two of the foreign bribery MLA requests Brazil has received from Convention countries relate to legal persons. However, over four years after the first request was received, it remains only partially fulfilled. This raises serious concerns about Brazil's ability to provide assistance relating to legal persons. The lead examiners queried whether this delay was a result of the lack of corporate liability in Brazil prior to January 2014 (when the CLL came into force). Brazil stated that this was not the case. As in Phase 2, Brazil considers that requests for confiscation relating to legal persons are theoretically possible, but this has never been tested.

152. In June 2014 Brazil made its first MLA request relating to legal persons, though this was in a passive bribery case. No such requests have been made in respect of foreign bribery. The CGU advised that it could request MLA for investigations under the CLL on the basis of Article 9 of the Convention. Here, as above, the ability to request MLA in the context of administrative and civil proceedings is not clearly grounded in the law.

Commentary

The lead examiners are encouraged by the increase in MLA requests relating to legal persons that have been received by Brazil. They also commend Brazil for making its first MLA request relating to legal persons so soon after the enactment of its Corporate Liability Law

¹⁰⁴ Brazil initially reported it had made 11 requests, but five related to passive foreign bribery.

¹⁰⁵ Phase 2 report, paragraph 127.

(CLL) and hope this measure will also be used in foreign bribery cases. The lead examiners note with concern that one request remains outstanding. Consequently, they recommend that the Working Group follow-up on Brazil's ability to seek and provide prompt and effective MLA in foreign bribery related cases against a legal person.

b) Extradition

153. Brazil can provide extradition on the basis of a bilateral treaty, a multilateral treaty, or reciprocity.¹⁰⁶ Procedurally, requests are received by the Executive, examined by the Federal Supreme Court, then granted or denied by the Executive in a three stages process.¹⁰⁷

154. In Phase 2 the Working Group decided to follow up on the denial of extradition for political reasons (follow-up issue 7c(i)). In Phase 3, Brazil stated that extradition cannot be denied on political or economic grounds. The statutory grounds for refusing extradition do not include economic or political considerations, or the identity of the person involved, but nor do they expressly forbid these considerations, and it is unclear whether the listed statutory grounds are exhaustive.¹⁰⁸ The law does prohibit the extradition of a Brazilian national,¹⁰⁹ but if this occurs, Decree Law 394 states that the individual “will be tried in Brazil, if the facts of which he is accused also constitute an offence under Brazilian law.”¹¹⁰ However, this provision and practice does not appear to be widely known as judges at the on-site visit stated that there is the “possibility” for these cases to be referred to the domestic authorities. The judges were unaware of any cases in which a person had been convicted in Brazil following the denial of extradition. Prior to the adoption of the report, Brazil provided summaries of several relevant cases of Brazilian nationals that could not be extradited and were tried in Brazil for the facts that justified the extradition request.

155. In October 2013 Brazil granted the extradition of an individual to the United Kingdom for corruption-related charges.¹¹¹ While the charges do not include foreign bribery, this case indicates that Brazil is capable of granting extradition for corruption-related offences. However, it remains to be seen whether extradition would be granted on equal terms where the requested person was of economic importance to Brazil, or where other Article 5 factors were at play.

Commentary

The lead examiners recommend that the Working Group continue to follow-up on Brazil's extradition practices to ensure that the consideration of Article 5 factors does not impede Brazil's ability to provide extradition in foreign bribery cases.

¹⁰⁶ Law N. 6.815, article 76. Also see Phase 2 report, paragraph 129 and the cases referred to in footnote 59.

¹⁰⁷ Law N. 6.815. Also see the Phase 2 report, paragraph 130.

¹⁰⁸ Article 77 of law N. 6.815.

¹⁰⁹ Article 77.I of law N. 6.815.

¹¹⁰ Article 1(2), decree-law N. 394.

¹¹¹ Miami Herald, [‘Former Turks and Caicos premier to be extradited from Brazil’](#), 29 October 2013

10. Public Awareness and the Reporting of Foreign Bribery

156. This section addresses awareness-raising efforts, reporting of foreign bribery, and whistleblowing. The reporting obligations of accounting and auditing professionals, tax officials, and officials involved in the disbursement of public advantages are respectively addressed under Sections 7, 8 and 11.

a) Awareness of the Convention and of the foreign bribery offence

(i) Public sector awareness

157. In Phase 2, the Working Group recommended that Brazil do more to raise awareness and provide training in the public sector (recommendation 1a). This recommendation was partially implemented at the time of Brazil's Written Follow-up following increased activity by foreign representations staff and law enforcement. Since Phase 2, Brazil has taken steps to raise awareness of the foreign bribery offence in the public sector. The Ministry of External Relations (MER) takes a leading role in informing overseas diplomatic representations of issues relating to foreign bribery. Since Phase 2 MER has reminded overseas representations of their reporting obligations, and provided information on Brazil's Phase 3 evaluation and the newly-enacted Corporate Liability Law (CLL). The most recent communication was in November 2013.

(ii) Private sector awareness

158. In Phase 2, the Working Group recommended that Brazil work with business organisations and civil society to raise awareness of foreign bribery in the private sector, particularly amongst SMEs (recommendation 1b). Since Phase 2, Brazil has taken some steps, although more could be done. The lead examiners felt that they could not fully assess private sector awareness due to a disappointing lack of representation of major national business organisations at the on-site visit, despite a well-represented companies panel.

159. The CGU maintains a website dedicated to foreign bribery which includes information for private-sector stakeholders.¹¹² Other agencies' websites, including BNDES, provide a link to the CGU website. The CGU has also held or taken part in seminars and events including the Latin America Ethics Summit (July 2013 in São Paulo),¹¹³ the Latin Lawyers Anti-Corruption Conference (October 2013 in São Paulo), and the Annual Seminar of the Business Pact for Integrity and Against Corruption which was attended by 225 private sector representatives (December 2013 in São Paulo). Brazil reports that foreign bribery was covered at these events, although agendas were not provided to the evaluation team. One publicly available agenda indicates foreign bribery was covered, and company representatives at the on-site visit confirmed that the events they attended covered foreign bribery. During the on-site visit, one company representative noted that there was "a lack of cascading of federal-level behaviour down to the states". The CGU has worked to raise awareness of the CLL, which has also received media attention. As a result, most panellists across the private sector were aware of the law although not all were aware of the foreign bribery element.

160. Brazil has done some work to target SMEs, but stated that this work is not an immediate priority as not many SMEs export. This does not accord with the views of a panellist from an SME-focused organisation who stated that SMEs are increasingly becoming involved in exporting. No SMEs were represented at the on-site visit, but representatives from large companies indicated that

¹¹² Accessible from www.cgu.gov.br. Information is available in both English and Portuguese.

¹¹³ Agenda available at <http://www.latinamericaethicssummit2013.com/agenda/>.

SMEs received little targeted awareness-raising. CGU is partnering with the Brazilian Service of Support for Micro and Small Enterprises (Sebrae) to raise awareness of the CLL and compliance programs for SMEs. A Sebrae representative confirmed that this work will include a module on foreign bribery. Brazil has made few specific efforts to target companies operating in sensitive sectors and regions. Foreign representations were instructed to circulate information about the Convention to Brazilian individuals and companies in their jurisdiction. Brazil reports that as a result information has been made available on relevant websites and disseminated through newsletters and direct contact. The website of the Ministry of Development, Industry and Foreign Trade (DEST) includes information for exporters, but nothing on foreign bribery.¹¹⁴ Another government-run website, ‘Learning to Export’,¹¹⁵ also lacks any information on foreign bribery.

161. Brazil’s awareness-raising efforts were significantly undermined by the lack of awareness exhibited by members of civil society and the media. Representatives of civil society were entirely unaware of the foreign bribery offence. Several expressed an outdated perception that this type of offending was not Brazil’s responsibility and, even more importantly, not in Brazil’s economic interest. Other panellists commented that Brazil is more focused on domestic corruption and that there is a lack of political will in combatting foreign bribery, although this is gradually changing. The low levels of detection and enforcement of foreign bribery in Brazil seem to further reinforce the view that awareness-raising measures are not yielding results.

Commentary

The lead examiners acknowledge the efforts made by Brazil, and in particular the CGU, to increase awareness of the foreign bribery offence. However, they are disappointed by the exceedingly low level of awareness displayed by civil society and some other panellists. They urge Brazil to increase civil society’s awareness of foreign bribery, and continue its foreign bribery awareness-raising efforts within the public and private sectors, across all states, and particularly amongst SMEs.

b) Reporting suspected acts of foreign bribery

162. In Phase 2, the Working Group recommended that Brazil regularly remind public officials of their reporting obligations (recommendation 2b). Brazil did not provide any information on specific measures taken to raise public officials’ awareness of their reporting obligations, although most officials at the on-site visit appeared generally aware of their obligations. As in Phase 2, all public officials are required to report to their superior all “irregularities” that they become aware of as a result of their position.¹¹⁶ It is unclear whether these reports are systematically transmitted from the government agency to the ombudsmen within the CGU or to the law enforcement authorities. In 2011, Brazil amended the law to provide that where the official suspects his superior might be involved, the official is allowed to report directly to the “competent authority”¹¹⁷ (i.e. to the ombudsmen or the police). Failure to report can result in disciplinary sanctions.¹¹⁸

163. These reporting obligations apply equally to officials in foreign representations. During the on-site visit, a MER representative confirmed that officials posted abroad were instructed to report allegations of foreign bribery back to the MER which then transmits the reports to the CGU. This is a standing instruction to officials in foreign representations. However in response to a November 2013

¹¹⁴ Available at www.mdic.gov.br

¹¹⁵ Available at www.aprendendoaexportar.gov.br

¹¹⁶ Law N. 8.112/1990, article 116.VI.

¹¹⁷ Law N. 12.527/2011 (the Access to Information Law).

¹¹⁸ Law N. 8.112/1990, article 127.

circular on foreign bribery, the MER received only three reports all of which related to *Case #1 – Aircraft Manufacturer Case* and *Allegation #4 – Aircraft acquisition*. The low number of reports suggests that the effectiveness of this reporting system may need to be reassessed: first, these cases were widely publicised yet there was a significant delay in information being reported to MER. Secondly, no reports were received on any other foreign bribery-related allegations despite some cases being widely publicised and even resulting in formal proceedings in the foreign country.¹¹⁹

164. Brazil has not made any changes or undertaken any activity in respect of reporting by private persons since Phase 2. The Federal Police operate an anonymous hotline for reporting, and the CGU has a reporting mechanism on its website.¹²⁰ Brazil indicated that it received few reports from private individuals; panellists at the on-site visit stated that this could be, in part, due to a lack of trust and confidence in the government and the police which may hamper individuals' willingness to report. A lack of whistleblower protection (discussed below) is also likely to be a contributing factor. The CLL includes provisions that encourage self-reporting by companies (e.g. leniency agreements and reduced sanctions, see Section 3) but it is too early to assess their effectiveness.

Commentary

Given the low number of reports that have been received from foreign representations, the lead examiners recommend that Brazil continue to systematically provide clear guidance to officials in foreign representations on their reporting obligations in respect of foreign bribery and take steps to increase detection efforts.

The lead examiners are also concerned by the lack of reports from private individuals. The number of foreign bribery reports from the public could be increased by improving public confidence in law enforcement authorities, and raising public awareness of the available reporting channels and the importance of reporting suspicions of foreign bribery.

c) Whistleblower protection

165. In light of a complete lack of whistleblower protection at the time of Phase 2, the Working Group recommended that Brazil adopt measures to protect public and private sector whistleblowers (recommendation 2a). At the time of its Written Follow-up, Brazil referred to two Bills on whistleblower protection, one relating to the private sector, and one relating to the public sector.

166. The first Bill, which proposed whistleblower protection for the private sector, was discontinued. Brazil still does not offer any protection for private sector whistleblowers. Brazil stated that information on whistleblowers will be kept confidential. However, panellists at the on-site visit clarified that complainants' information could only be confidential where the individual makes a formal statement (thereby becoming a witness), and even then confidentiality can only be guaranteed until indictment. The lack of whistleblower protection was raised as an issue in almost all panels. This is concerning given that one law enforcement official said that for foreign bribery investigations a whistleblower or auditor is generally required because the offending "occurs within four walls". Panellists stated that few reports were received from whistleblowers. There may be several reasons for this. One panellist noted that "coming forward presents a cultural problem" in Brazil. Panellists also stated that the public lacked trust in the government and the police. This, in conjunction with a lack of whistleblower protection, likely deters reporting. In addition, several panellists spoke of cases in

¹¹⁹ For example, *Case #3 – Heart Valves Case* was reported in several local media outlets. See *Corriere del Veneto*, [‘Quattro milioni e mezzo per anticipare il risarcimento alle vittime delle Tri tech’](#); *Ansa.it*, [‘Valvole killer, zoia assolto da falsa perizia’](#); *La Stampa* [‘Valvole cardiache difettose la beffa dopo il dolore’](#).

¹²⁰ [Phase 2 Report](#), paragraph 33 – 34.

which leniency or confidentiality agreements had been entered into but not fulfilled, leading to a lack of confidence in authorities. Particularly concerning is the fact that panellists across the public and private sector showed a complete lack of understanding of whistleblower protection. Almost all confused it with witness protection, or incentive programs. The breadth of this confusion calls into question the ability for Brazilian companies to develop effective internal whistleblower programs. Under the CLL the existence of internal whistleblower protection may act as a mitigating factor in sentencing. This may result in an increase in the number of internal whistleblower protection, although indications are that most companies do not currently have such regimes.¹²¹

167. The second Bill discussed in Brazil's Written Follow-up (on whistleblower protection for public officials) has now passed into law.¹²² The law protects officials from criminal, civil, and administrative liability where they report "irregularities" in accordance with their reporting obligations.¹²³ Little publicity has been given to this change; officials at the on-site visit seemed unaware of the existence of this new provision, and certainly did not point to any instances in which the new protections had been applied in practice. Brazil did not refer to any awareness-raising on this particular provision (instead discussing awareness-raising relating to other aspects of the law).

Commentary

The lead examiners are seriously concerned by Brazil's lack of private sector whistleblower protection and the widespread misunderstanding of whistleblower protection across all sectors in Brazil. They consider that this is a major impediment to the prevention and detection of foreign bribery. The lead examiners recommend that Brazil put in place appropriate measures to ensure that private sector employees who report in good faith and on reasonable grounds suspected acts of foreign bribery to competent authorities are protected from discriminatory or disciplinary action.

11. Public Advantages

a) Officially supported export credits

168. Brazil's officially supported export credit and insurance agencies (ECAs) are the Bank of Brazil, BNDES, and the Brazilian Fund and Guarantee Agency (ABGF) (which replaced the Brazilian Export Credit Insurance Agency (SBCE) on July 2014 after the on-site visit). All these agencies are members of the Committee for Export Finance and Guarantee (COFIG) and provide officially supported export credit through different programs: the Bank of Brazil manages the Export Financing Program (PROEX); ABGF manages the Export Guarantee Fund (FGE); and BNDES manages its own export financing program. Brazil has provided limited information on measures taken by the newly-created ABGF when granting export credit insurance.

169. Prior to finalizing this report, Brazil indicated that on 24 September 2014, an official request to adhere to the 2006 Recommendation was sent to the Secretary General of the OECD. Brazil has hence implement Phase 2 recommendation 1c. and the 2009 Recommendation that "Countries Party to the OECD Anti-Bribery Convention that are not OECD Members should adhere to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits" (hereafter the 2006

¹²¹ A review of 27 major Brazilian companies shows that only seven companies have publicly available codes of conduct which cover whistleblowing. The 2013 study by the Brazilian Institute of Business Ethics (IBEN) found that of 360 publicly available codes of conduct, only 43% contained a policy on whistleblowing.

¹²² Law N. 12.527/2011 (the Access to Information Law) which amended law N. 8.112/1990.

¹²³ Law N. 8.112/1990, article 126A.

Recommendation). Brazil is already a full participant to the 2007 and 2011 Sector Understanding on Export Credits for Civil Aircraft (ASU). Within this framework, Brazil has signed a Joint Statement on the Fight against Bribery (the 2007 Joint Statement) which endorses the 2006 Recommendation in the field of civil aircraft.

170. Since Phase 2, Brazil has taken positive steps to inform exporters and applicants requesting support about the legal consequences of foreign bribery and to encourage them to develop, apply and document appropriate management control systems. In 2010, COFIG issued the “Statement of Commitment for Exporters”¹²⁴ which requires exporters to comply with anti-corruption laws and regulations. The statement was revised in September 2014 and now refers to the wrongful acts committed by legal persons provided in the CLL.¹²⁵ Applicants further commit to disclose information on charges or convictions for bribery offences (IV) as well as on the use of agents and commission fees (VIII) and are required to implement internal control systems (IX). The granting of official export credits by the three export credits agencies is conditioned on the signing of this statement. This statement, however, only refers to the foreign bribery offence in article 337B PC.

171. Regarding the measures taken by export credit agencies when deciding to grant support to a company, participants at the on-site visit stated that BNDES gives due consideration to foreign bribery convictions and sanctions imposed on legal persons in their contracting decision. Brazil did not specify when in the process and based on what source of information this verification is made. BNDES and Bank of Brazil representatives indicated that they routinely check the World Bank and other Development Banks’ debarment lists. After the on-site visit, Brazil indicated that, for BNDES, this verification procedure is required by BNDES Board of Directors Resolution 2299/2012. The Brazilian authorities did not point to any specific document requiring such procedures for Bank of Brazil, and no due diligence procedures are in place in ABGF. Participants at the on-site visit were unable to indicate whether these verification measures would be made systematically. Similarly, they could not confirm whether enhanced due diligence measures would be taken where applicants were listed on debarment lists, or where applicants had been previously convicted of foreign bribery. It is thus unclear whether such considerations will have any effect on the ECAs’ decision to grant export credits.

172. Regarding the measures that export credit agencies can take *after* support has been granted, participants indicated that support can be revoked when an exporter is held liable for foreign bribery in a final judgment. In this respect, the 2010 “Statement of Commitment for Exporters” provides that if an exporter or any of its employees or representatives are held liable for foreign bribery, the exporter will be subject “to loss of export financing” for 5 years from the date of the conviction. After the on-site visit Brazil further indicated that disbursement of the loans would also be suspended, but did not indicate whether ECAs could ask for the reimbursement of the funds incurred. While the Statement encourages exporters to “immediately communicate” any indication that foreign bribery has been committed (V), there are concerns that, should credible foreign bribery allegations surface, no measures will be taken by ECAs to report to law enforcement authorities or to conduct enhanced due diligence. In fact, credible allegations have surfaced on projects which benefitted from official export credit from BNDES (*Case #1 – Aircraft Manufacturer Case* and *Case #2 – Gas Pipeline Case*). After the on-site visit, Brazil indicated that the FPS received a Court authorisation to notify BNDES of the charges laid against 9 defendants in *Case #1 – Aircraft Manufacturer Case* but did not indicate whether any measures have been taken by BNDES. At the on-site visit, one participant indicated that BNDES recently identified a potential foreign bribery case and started an internal investigation but

¹²⁴ Resolution CAMEX 62/2010

¹²⁵ Resolution CAMEX 81/2014 revoked Resolution CAMEX 62/2010.

had not yet reported the case to law enforcement authorities. Brazil did not provide any further information on the status of this internal investigation.

173. With regard to awareness-raising, Brazil was specifically asked in Phase 2 to raise awareness and provide training on the foreign bribery offence among export credit agencies (recommendation 1a). At the time of the Phase 2 Written Follow-up, the Working Group considered that export credit agencies had not sufficiently fulfilled their role in terms of awareness-raising. References to the Convention are available on BNDES websites for exporters and applicants. However, no training on the foreign bribery offence or the CLL has been provided to ECAs' employees by COFIG or the export credit agencies. Participants at the on-site visit concurred that no awareness raising initiatives have been taken by COFIG.

174. BNDES's employees are not public officials and are not subject to public official's reporting obligations (see Section 10). They are, however, subject to an obligation to report the wrongful use of public resources granted by the Bank.¹²⁶ As indicated above, credible foreign bribery allegations in projects which benefitted from official export credit from BNDES have not been reported to law enforcement authorities. No reporting procedure has been formalised. According to Brazil, BNDES is currently developing a procedure for its employees to report to the FPS all criminal acts allegedly committed in contracts funded by the Bank, but this is still at a very early stage. Brazil has, however, not provided any information on Bank of Brazil and ABGF's employees' reporting obligations. In Phase 2, the Working Group recommended that employees of export credit agencies be regularly reminded of their obligation to report instances of foreign bribery, and that Brazil encourage and facilitate such reporting (recommendation 2b). Since its Written Follow-up in June 2010, Brazil has not taken any measures to continue raising awareness of employees working in export credit agencies and ensure that they are able to detect instances of foreign bribery committed by applicant and exporters.

Commentary

The lead examiners welcome the steps taken by Brazil to adhere to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits, hence implementing Phase 2 recommendation 1c. in this regard.

The lead examiners are seriously concerned that no measures have been taken by export credit agencies when credible allegations of foreign bribery arose. This is particularly concerning given that BNDES finances large Brazilian companies operating in areas recognised as having high risk of foreign bribery, and credible corruption allegations have surfaced in operations for which the companies have benefited from official export credit from the Bank. The lead examiners urge Brazil to establish formal guidelines for all three export credits agencies addressing (i) the conduct of due diligence of potential exporters and applicants; (ii) the consequences of a client or applicant being the subject of credible allegations or convictions of bribery, either before or after approving support; and (iii) the disclosure of credible evidence of bribery to law enforcement authorities.

¹²⁶

Item 5.1(f) of the Guidelines for Personnel and Resolution 773/91 of 25 November 1991. Also see Phase 2 Report para.49.

b) Public procurement

175. Public procurement policies are set by the Ministry of Planning, Budget and Management (MPOG) and are governed by law N. 8.666/1993, and law N. 10.520/2000. However, these two pieces of legislation only govern the exclusion from public tender of legal persons (i) convicted of tax fraud, (ii) that have committed illicit acts with a view to thwarting the objectives of the bidding process or (iii) have demonstrated they are unfit to enter into a contract with the Public Administration as a result of the illicit acts committed. As indicated under Sections 2 and 3, debarment of companies from public procurement is not available for foreign bribery under either the PC or the CLL

176. However a Registry of Ineligible and Suspended Companies (CEIS) is provided by the Federal Government.¹²⁷ Potential contracting public agencies can consult the CEIS which is accessible to everyone online. This Registry is maintained by the CGU and lists the legal persons that have been held liable for certain offences. However, the relevant offences do not include foreign bribery. It is unclear whether the CEIS would constitute a basis to exclude companies from public procurement and whether all procuring entities systematically verify whether a company is listed on the Registry.

177. Internal controls, ethics and compliance programs are not taken into account by procuring authorities in their decisions to grant public procurement contracts. BNDES requires entrepreneurs requesting export credit to commit to implement internal control systems, but only when signing the Statement of Commitment for Exporters and thus after the decision to grant financing has been taken.

Commentary

The lead examiners recommend that Brazil extend its Registry of Ineligible and Suspended Companies to cover enterprises that are determined under Brazilian law to have committed foreign bribery. The lead examiners further encourage Public contracting authorities to consider, as appropriate, internal controls, ethics and compliance programs in their decisions to grant public procurement contracts.

c) Official development assistance

178. Debarment of companies convicted of foreign bribery from contracts funded by official development assistance (ODA) is currently of limited relevance in Brazil. Brazil does not fund development projects that are implemented by private sector companies but provides development cooperation to other developing countries (referred as “South-South cooperation”) through exchange of technical knowledge, capacity building and sending experts in other countries.¹²⁸ No direct cash transfers to the countries are involved and the other modalities are implemented through channelling funds through multilateral organisations. Therefore, there is no need for public procurement in Brazil’s development co-operation and the 1996 Recommendation of the Development Assistance Committee on Anti-Corruption Proposal for Bilateral Aid Procurement (the DAC Recommendation) does not apply. Brazil prioritises cooperation with countries in South America, Central America and the Caribbean, and Africa.¹²⁹ In 2010 Brazil cooperation amounted to USD 923 million of which 81.4%, accounted for expenditures in multilateral cooperation.¹³⁰ Recently, Brazil along with the other BRICs countries has agreed to establish a new BRICS’s Multilateral Development Bank. The New Development Bank is intended to finance infrastructure projects and sustainable development projects

¹²⁷ See : <http://www.portaldatransparencia.gov.br/ceis/Consulta.seam>

¹²⁸ “*Brazil as an emerging actor in international development cooperation: a good partner for European donors?*”, DIE, 2010

¹²⁹ OECD (forthcoming), Development Co-operation Report 2014

¹³⁰ Source: IPEA. COBRADI Report 2010

in the founding members (Brazil, Russia, India, China and South Africa) as well as in other emerging economies and developing countries.¹³¹

Commentary

The lead examiners recommend that the Working Group follow up whether Brazil engages the private sector in future development aid projects including through BNDES or a future BRICS's Multilateral Development Bank. If such engagement materialises, Brazil should adopt measures to prevent, detect and report foreign bribery, and consider excluding companies convicted of this crime from development projects.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

While the Working Group on Bribery welcomes the return of Brazil's first indictment of 9 individuals in a foreign bribery case, it remains seriously concerned about the extremely low level of enforcement of the foreign bribery offence. Only 14 allegations of foreign bribery have surfaced since Brazil became a party to the Convention in 2000 and only three investigations are ongoing. Brazil needs to be much more proactive in detecting and investigating foreign bribery, while taking concrete steps to increase awareness, reporting and detection. While the Working Group commends Brazil for the enactment of its new Corporate Liability Law, it is concerned that some aspects of the law are unclear and might hamper enforcement.

Regarding outstanding recommendations from previous evaluations, since its Phase 2 Written Follow-up Brazil has partially implemented recommendations 1(a), 2(a), 2(c), 2(e), 4 and 5(a), and has not implemented recommendations 1(c) and 5(b).

Based on the findings in this report on Brazil's implementation of the Convention, the 2009 Recommendation and related instruments, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow-up the issues identified in Part 2. The Working Group requests that Brazil provide a written self-assessment report in six months (i.e. by March 2015) on the enactment and contents of the Implementing Decree on the Corporate Liability Law (covering Recommendations 2(a), 3(a), 3(d), 5(f) and 12) alongside detailed updates on its foreign bribery investigations and prosecutions. Brazil should report in writing in one year (i.e. by October 2015) on these issues if deemed necessary by the Working Group, as well as on progress made on the implementation of recommendations 4(a), 5(a), 5(b), 5(c), 8 and 14(c) and to submit a written report in two years (i.e., October 2016) on its implementation of all recommendations and follow-up issues.

¹³¹ “[BRICS agree to base Development Bank in Shanghai](#)”, WSJ, 15 July 2014; “[What the new bank of-BRICS is all about](#)”, Washington Post, 17 July 2014; “[The BRICS try to bank](#)”, US News, 18 July 2014

1. Recommendations of the Working Group

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

1. Regarding the foreign bribery offence, the Working Group recommends that Brazil take all appropriate steps to clarify that the foreign bribery offence applies to bribes promised, offered or paid, in return for acts outside of the official's authorised competence. [Convention, Article 1]
2. Regarding the liability of legal persons, the Working Group recommends that Brazil:
 - (a) Issue, as a matter of priority, the announced Decree aiming at regulating several aspects of the Corporate Liability Law (CLL); [Convention Article 2; 2009 Recommendation III ii), V, Annex 1B]
 - (b) Take appropriate steps to clarify: (i) whether, in practice, the CLL covers bribery of foreign public officials in international business transactions, as defined under Article 1 of the Anti-Bribery Convention; (ii) the application of the law to all legal persons, including SOEs, as well as companies receiving financing from BNDES; (iii) the coverage under "undue advantage" of any incentive or advantage, pecuniary or not, received by the public agent from private agents, either to perform activities that go beyond his/her legal attributes, or to perform activities within his/her duties; and (iv) the interpretation of the "interest" and "benefit" criteria to ensure that it covers situations where, for instance, a legal person bribes on behalf of a related legal person (including a subsidiary, holding company, or member of the same industrial structure); [Convention Article 2; 2009 Recommendation III ii), V, Annex 1B]
 - (c) Ensure that if the draft Bill to establish the criminal liability of legal persons passes into law, it follows one of the two approaches recommended under Annex I B) of the 2009 Recommendation and either supersedes or operates in a manner that is consistent with the administrative CLL. [Convention Article 2; 2009 Recommendation III ii), V, Annex 1B]
3. With respect to sanctions, the Working Group recommends that Brazil:
 - (a) Review the CLL to clarify which sanctions are available to SOEs while ensuring that these are effective, proportionate and dissuasive, including for the largest SOEs; [Convention Article 3; 2009 Recommendation III (ii) and V]
 - (b) Re-consider including debarment as a possible administrative or civil sanction; [Convention Article 3; 2009 Recommendation III (ii) and V]
 - (c) Clarify by any appropriate means that: (i) mitigating factors, although inserted in the Chapter of the CLL that regulates administrative liability, will be taken into consideration in determining the judicial/civil liability; and (ii) that "the offender's economic situation" (under article 7. VII) cannot encompass considerations forbidden under Article 5 of the Convention, in particular with regard to SOEs but also companies receiving financing from the State, notably through development banks; [Convention Article 3 and Article 5; 2009 Recommendation III (ii) and V]

- (d) Take the necessary steps to ensure that the Decree implementing the CLL, to be issued by the Federal Executive Branch (i) clarifies that internal controls and compliance programs provided under article 7.VIII can only be taken into account as mitigating factors and cannot be used as a complete defence from liability by companies; (ii) provides a sufficient level of detail on “the parameters of evaluation of the mechanisms and procedures provided” to allow both the companies to anticipate what they may be able to expect from good internal controls and compliance and the CGU and the judiciary to make a consistent use of this mitigating factor; and (iii) clarifies that the impact of the ethics and compliance programs will not be limited to mitigating administrative sanctions and will also be taken into account when determining civil sanctions; [Convention Article 3; 2009 Recommendation III (ii) and V]
 - (e) (i) Review the range of sanctions available for successor companies and in case of joint liability under article 4 paragraphs 1 and 2 of the CLL with a view to providing more flexibility and, in particular, to allow for the confiscation of the profit of foreign bribery and the imposition of sanctions that will be better adapted to each company’s situation; and (ii) remove the limitation of the liability of the successor companies to the “transferred assets”. [Convention Article 3; 2009 Recommendation III (ii) and V]
4. Regarding confiscation, the Working Group recommends that Brazil:
- (a) Adopt necessary measures, including reviewing its legislation as necessary: (i) to allow for the confiscation of a bribe or its monetary equivalent in cases of foreign bribery; (ii) to ensure that confiscation of the proceeds of foreign bribery is always available, including in the case of successor companies, companies held jointly liable, and when concluding leniency agreements with cooperative offenders; [Convention Article 3; 2009 Recommendation III (ii) and V]
 - (b) Make full use of the expertise available in the CGU by conferring on a specialised unit the responsibility for calculating the proceeds of bribery; and ensure this unit is promptly issued with the guidelines that have been prepared to determine how the proceeds of bribery should be calculated and that the unit receives training to this effect; [Convention Article 3; 2009 Recommendation III (ii) and V]
 - (c) Take the necessary steps to ensure that data and statistics are maintained at the federal level regarding the confiscation of the proceeds of foreign bribery and other corruption and serious economic crimes. [Convention Article 3; 2009 Recommendation III (ii) and V]
5. Regarding the investigation and prosecution of foreign bribery, the Working Group recommends that Brazil:
- (a) Ensure cooperation between the prosecutors and the police as necessary for foreign bribery investigations and conclude an MOU between the CGU and the Federal Prosecution Service (FPS) providing a detailed framework for the enhanced cooperation between the two agencies in the context of the administrative proceedings, the judicial/civil proceedings and the criminal proceedings, including information on the initiation of proceedings against natural and legal persons; [Convention Article 5; 2009 Recommendation XIII and Annex I D]

- (b) Intensify efforts to provide guidance and regular training to the Federal Police Department (DPF), the FPS, and the CGU on the foreign bribery offence, the CLL, the basis and method of calculation of the proceeds of the bribe, and, as necessary, the new investigative techniques available under the Organised Crime Law; [Convention Article 5; 2009 Recommendation XIII and Annex I D]
 - (c) Ensure that sufficient resources and skills are available within the DPF, the FPS, and the CGU in order to fight foreign bribery; and consider creating a national corruption-fighting unit within the Federal Prosecution Service and specialised police units within the Federal Police Department; [Convention Article 5; 2009 Recommendation XIII and Annex I D]
 - (d) Encourage law enforcement authorities to make full use of the broad range of investigative measures available in foreign bribery investigations, including special investigative techniques and access to financial information; and ensure by any appropriate means that the use of the general and special investigative techniques contained in the Code of Criminal Procedure is available in practice in the context of the administrative and civil proceedings under the CLL; [Convention Article 5; 2009 Recommendation XIII and Annex I D]
 - (e) Take necessary measures to: (i) ensure that all credible foreign bribery allegations are proactively investigated; and (ii) gather information from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations; [Convention Article 5; 2009 Recommendation XIII and Annex I D]
 - (f) Clarify in the implementing Decree to the CLL that factors forbidden under Article 5 of the Convention cannot be taken into account in the decision to initiate, conduct or close the proceedings against a legal person. [Convention Article 5]
6. Regarding cooperation agreements and leniency agreements, the Working Group recommends that Brazil: (i) make public, where appropriate, certain elements of leniency and cooperation agreements concluded in foreign bribery cases, such as the reasons why an agreement was deemed appropriate in a specific case and the terms of the arrangement; and (ii) take all necessary measures to ensure diversion (under Law 9.099), cooperation agreement (under the Organised Crime Law) and leniency agreements (under the CLL) are applied consistently, including by providing training to prosecutors and issuing guidance on the elements that may be taken into consideration in deciding whether to enter into such agreements. [Convention Articles 3 and 5; Commentary 27; 2009 Recommendation Annex I.D]
 7. Regarding jurisdiction, the Working Group recommends that Brazil clarify by any appropriate means that the jurisdiction over legal persons under article 28 of the CLL should be broadly interpreted and cover, in particular (i) companies not incorporated in Brazil if their main seat is in Brazil; and (ii) companies that have their main management and control situated in Brazil even if some part of this function is located outside of Brazil. [Convention Article 4]
 8. Regarding the statute of limitations, the Working Group recommends that Brazil (i) urgently take steps to ensure that the statute of limitations for natural and legal persons for foreign bribery allows adequate time for investigation, prosecution, sanctioning, and the completion of the full judicial process, including in cases where the final sentence is at the

lower end of the scale; and (ii) clarify its ability to extend the timeframe for administrative proceedings against legal persons. [Convention Article 6]

9. With respect to mutual legal assistance, the Working Group recommends that Brazil take steps to ensure bank secrecy does not cause unnecessary delays in providing MLA in foreign bribery cases. [Convention Article 9; 2009 Recommendation XIII.i]

Recommendations for ensuring effective prevention, detection and reporting of foreign bribery

10. Regarding money laundering, the Working Group recommends that Brazil:

- (a) Take the necessary measures to ensure that offenders cannot escape liability when laundering the proceeds of foreign bribery through legal persons; [Convention, Article 7; 2009 Recommendation V]
- (b) Maintain statistics on investigations, prosecutions and sanctions for money laundering, including data on whether foreign bribery is the predicate offence; [Convention, Article 7 and 2009 Recommendation, III (i)];
- (c) Ensure that institutions and professions required to report suspicious transactions, their supervisory authorities, as well as the Council of Control of Financial Activities receive appropriate directives, including typologies on money laundering related to foreign bribery and training on the identification and reporting of information that could be linked to foreign bribery. [Convention, Article 7; 2009 Recommendation III.i]

11. Regarding accounting and auditing, the Working Group recommends that Brazil:

- (a) In regards to false accounting (i) ensure that the full range of conduct described in Article 8(1) of the Convention is prohibited; (ii) ensure that both natural and legal persons can be held liable for false accounting; (iii) raise awareness of the false accounting offence among accounting professionals and law enforcement; and (iv) ensure false accounting is vigorously investigated and prosecuted, where appropriate; [Convention Article 8(1); 2009 Recommendation X.A.i]
- (b) Raise awareness of foreign bribery among accountants and auditors, including by providing training on foreign bribery indicators and auditors' reporting obligations in respect of foreign bribery; [2009 Recommendation X]
- (c) Require auditors to report all suspicions of foreign bribery to corporate monitoring bodies, where appropriate, and consider requiring them to report to the competent law enforcement authorities. [2009 Recommendation X.B.iii and v]

12. Regarding corporate compliance, internal controls and ethics, the Working Group recommends that Brazil continue to encourage companies, particularly unlisted companies and SMEs, to (i) develop, and adopt adequate internal controls, ethics and compliance systems to prevent and detect foreign bribery, including by providing guidance in the context of the implementing Decree to the CLL and by promoting the OECD Good Practice Guidance, and (ii) to develop monitoring bodies. [2009 Recommendation X.C.i]
13. In respect of tax measures to combat bribery of foreign public officials, the Working Group recommends that Brazil:
 - (a) Take appropriate measures to ensure that the denial of tax deductibility is not contingent on the opening of an investigation by law enforcement authorities or on court proceedings; [2009 Recommendation III. iii, VIII; 2009 Tax Recommendation I]
 - (b) Provide adequate guidelines and training on the types of expenses that constitute bribes to foreign public officials, including through disseminating the OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors, and extend such dissemination to relevant taxpayers; [2009 Recommendation VIII; 2009 Tax Recommendation I]
 - (c) Remind tax auditors of their obligation to report to law enforcement authorities any instances of bribery of foreign public officials that come to their knowledge in the performance of their functions; [2009 Recommendation III. iii, VIII; 2009 Tax Recommendation II]
 - (d) Consider ratifying the Convention on Mutual Administrative Assistance in Tax Matters and consider systematically including the language of Article 26 of the OECD Model Tax Convention in all future bilateral tax treaties with countries that are not signatories to the Convention on Mutual Administrative Assistance in Tax Matters. [2009 Recommendation VIII; 2009 Tax Recommendation I].
14. With respect to awareness-raising and reporting of foreign bribery, the Working Group recommends that Brazil:
 - (a) Increase civil society's awareness of foreign bribery, and continue its foreign bribery awareness-raising efforts within the public and private sectors, across all states, and particularly amongst SMEs; [2009 Recommendation VIII, IX.i and ii; 2009 Tax Recommendation II]
 - (b) Continue to systematically provide clear guidance to officials in foreign representations on their reporting obligations in respect of foreign bribery and take steps to increase detection efforts; [2009 Recommendation VIII, IX.i and ii]
 - (c) Regarding whistleblowing, put in place appropriate measures to ensure that private sector employees who report in good faith and on reasonable grounds suspected acts of foreign bribery to competent authorities are protected from discriminatory or disciplinary action [2009 Recommendation IX.iii and Annex I.A]

15. Regarding public advantages, the Working Group recommends that Brazil:

- (a) Establish formal guidelines for all three export credits agencies addressing (i) the conduct of due diligence of potential exporters and applicants; (ii) the consequences of a client or applicant being the subject of credible allegations or convictions of foreign bribery, either before or after approving support; and (iii) the disclosure of credible evidence of foreign bribery to law enforcement authorities; [2009 Recommendation XII.ii; 2006 Export Credit Recommendation]
- (b) Extend its Registry of Ineligible and Suspended Companies to cover enterprises that are determined under Brazilian law to have committed foreign bribery; [2009 Recommendation III.vii; XII.ii]
- (c) Encourage public contracting authorities to consider, as appropriate, internal controls, ethics and compliance programs in their decisions to grant public procurement contracts. [2009 Recommendation X.C]

2. Follow-up by the Working Group

16. The Working Group will follow up on the issues below as case law and practice develops:

- (a) Whether the foreign bribery offence in the Penal Code (i) covers all elements of the definition of foreign public official; and (ii) covers all bribes offered, promised or paid in return for acts which provide an advantage in the conduct of international business.
- (b) Brazil's offence of concussão to ensure it cannot be used as a basis to preclude the prosecution of a perpetrator for the offence of bribery of a foreign public official.
- (c) Whether the sanctions imposed in practice for foreign bribery are effective, proportionate and dissuasive, including with regard to (i) the use of post-sentencing cooperation agreements; (ii) the sanctions imposed on companies which receive financing from the State, mainly through development banks; (iii) the use of leniency agreements under the CLL; and (ii) the application of civil sanctions and confiscation that may result from a separate civil action.
- (d) The performance of the DPF and the FPS with regard to foreign bribery allegations, including decisions not to open investigations.
- (e) Whether the complexity of the administrative proceedings and the number of actors potentially involved may constitute an obstacle to the establishment of the liability of legal entities.
- (f) The application of judicial pardons in cases of foreign bribery, and whether they are used appropriately.
- (g) Whether the FPS exercises the control provided under article 20 of the CLL to apply both administrative and civil sanctions in the case of omission of the CGU.
- (h) How jurisdiction is exercised over natural and legal persons when the offence takes place in part or wholly abroad.

- (i) Whether requirements on companies to submit to external audits are adequate; and whether the independence of auditors is sufficiently ensured, particularly for companies which are economically significant but are not listed.
- (j) The enforcement of the non-tax deductibility of foreign bribes, particularly whether Brazilian courts promptly inform the tax authorities of convictions related to foreign bribery, and whether tax authorities examine the tax returns of taxpayers convicted of foreign bribery.
- (k) Whether tax information can effectively be shared in the course of foreign bribery investigations and prosecutions.
- (l) Brazil's ability to promptly and effectively respond to foreign bribery-related MLA requests, including those related to legal persons, and those related to Brazil's declaration on Article 9(3).
- (m) Brazil's extradition practices to ensure that the consideration of Article 5 factors does not impede Brazil's ability to provide extradition in foreign bribery cases.
- (n) Whether Brazil engages the private sector in future development aid projects including through BNDES or a future BRICS's Multilateral Development Bank.

**ANNEX 1 PHASE 2 RECOMMENDATIONS TO BRAZIL AND
ASSESSMENT OF IMPLEMENTATION BY THE WORKING GROUP ON BRIBERY**

	RECOMMENDATIONS	WRITTEN FOLLOW-UP
<i>Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials</i>		
1.	With respect to 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); and,	Partially implemented
	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);	Satisfactorily implemented
	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).	Not implemented
2.	With respect to the detection and reporting of the offence of bribing a foreign public official 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);	Partially implemented
	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	Satisfactorily implemented

	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);	Partially implemented
	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,	Satisfactorily implemented
	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).	Partially implemented
<i>Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery and related offences</i>		
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 Federal Public Prosecutor's Office, 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);	Satisfactorily implemented
	b) Take necessary measures to ensure that all credible foreign bribery allegations are proactively investigated, and remind the Federal Police and the Federal Public Prosecutor's Office 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,	Satisfactorily implemented
	c) Encourage law enforcement authorities to make full use of the broad	Satisfactorily

	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).	implemented
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).	Not implemented
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,	Not implemented
	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).	Not implemented
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,	Satisfactorily implemented
	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).	Satisfactorily implemented

ANNEX 2 LEGISLATIVE EXTRACTS

[Unofficial English translation]

CONSTITUTION: FEDERATIVE REPUBLIC OF BRAZIL 1988

Article 173

[...]

§ 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.

DECREE LAW 2 848 OF 7 DECEMBER 1940 – PENAL CODE

Extraterritoriality

Article 7

The following are subject to Brazilian law, even if committed abroad: [...]

II. the offences:

- (a) that, under treaty or convention, Brazil has undertaken to control;
- (b) practices by Brazilian national;
- (c) Practiced in Brazilian aircraft or boats, whether commercial or private, when in foreign territory and not tried there.

§ 1- in the case set out in clause I, the agent is punished according to Brazilian law, regardless of being acquitted or convicted 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) The offender enters Brazilian territory;
- (b) The act is also punishable in the country where it was committed;
- (c) The criminal offence 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.

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)

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.

Article 110

Once the sentence can no longer be subject to any appeal, the statute of limitation is calculated using the penalty applied by the judge, and the period of the statute of limitation is obtained using the previous article. The period will be increased of one third if the offender is a recidivist.

§ 1 – The statute of limitation, once the sentence is res judicata for the prosecution or after its appeal is not received, shall be governed by the sentence imposed and cannot, under any circumstances, have the initial term preceding the date of the petition or complaint.

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.

§ 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.

§ 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.

§ 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. (Included by the Law 9 983 of 2000)

§ 2 – 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:

Penalty - 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.

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.

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.

DECREE LAW 3 689 OF 3 OCTOBER 1941 - CODE OF CRIMINAL PROCEDURE

Art. 395

The complaint or grievance will be rejected when: (Amended by Law No. 11,719, 2008).

- I. it is manifestly inept; (Included by Law No. 11,719, 2008).
- II. it is missing a procedural assumption or condition required for the exercise of criminal action; or (Included by Law No. 11,719, 2008).
- III. there is no just cause to pursue the prosecution. (Included by Law No. 11,719, 2008).

Art. 396

In ordinary and summary proceedings, the judge will be provided with the complaint or grievance, and if the complaint or grievance is not rejected outright, the judge will receive it and will order the summons of the accused to answer the charge in writing within 10 (ten) days. (Amended by Law No. 11,719, 2008).

Sole paragraph - In the case of summons by publication, the deadline for the defence will begin to flow from the date of the personal attendance of the accused or the defender. (Amended by Law No. 11,719, 2008).

Art. 396-A

In response, the defendant can argue preliminaries and claim all that interest to his defence; offer documents and justifications; specify the required evidence and call witnesses; and call witnesses by requesting a subpoena when needed. (Included by Law No. 11,719, 2008).

§ 1 - An exception will be processed in separate, under arts. 95-112 of this Code. (Included by Law No. 11,719, 2008).

§ 2 - If no answer is submitted within the statutory period, or if the accused does not cite a defender, the judge shall appoint counsel to offer it, allowing him to examine the records for 10 (ten) days. (Included by Law No. 11,719, 2008)

Art. 397

After compliance with the provisions of art. 396-A, and subparagraphs, of this Code, the judge should summarily acquit the accused based on: (6.30.1995 by Law no. 11,719, 2008).

- I. the clear existence of a cause notwithstanding the illegality of the facts; (Included by Law no. 11,719, 2008).
- II. the clear existence of a cause notwithstanding the guilt of the offender except where not attributable; (Included by Law no. 11,719, 2008).
- III. the fact narrated obviously does not constitute a criminal offense; or (Included by Law no. 11,719, 2008).
- IV. the punishment of the offender has become extinct. (Included by Law no. 11,719, 2008).

LAW 12,850 OF 2 AUGUST 2013 - ORGANISED CRIME

Article 1

[...]

§ 2 – This Law shall also apply to:

- I criminal offenses provided for in international treaties or conventions, when such actions originate in the country and the criminal result occurs or should have occurred abroad, or vice versa;

Means for obtaining evidence

Article 3

At any stage of the criminal prosecution, without prejudice to other means already established by law, the following means of obtaining evidence are allowed:

- I conclusion of plea agreements;
- II monitoring of electromagnetic, acoustic or optical signals;
- III controlled response;
- IV access to phone and computer records, data contained in public or private databases and commercial and electoral information;
- V interception of telephone and computer communications, according to the terms established in specific legislation;
- VI waiver of right to financial, banking and tax secrecy, according to the terms established in specific legislation;
- VII infiltration of police officers during the course of an investigation, as established in Article 11;
- VIII cooperation among federal, district, state and municipal government institutions for the purpose of obtaining evidence and information relevant to the investigation or finding of facts.

Plea agreements

Article 4

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

- I identification of joint principals and accessories that integrate a criminal organization and of the criminal offenses committed by them;
- II the disclosure of the hierarchical structure and the division of tasks within a criminal organization;
- III prevention of criminal offenses arising from the activities performed by a criminal organization;
- IV full or partial recovery of the products or proceeds derived from criminal offenses committed by a criminal organization;
- V location of any victims of a criminal organization provided their physical integrity is preserved.

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

Paragraph 2 - depending on the relevance of the collaboration, the Prosecution Office, at any time, and the chief of police, in the records of the police investigation with the manifestation of the Prosecution Office, both may require or ask the judge to grant judicial pardon to the collaborator of Justice, even if such benefit has not been provided for in the initial proposition, subject to the provisions established in Article 28 of Decree Law n. 3,689, of October 3, 1941 (Code of Criminal Procedure) where applicable.

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

Paragraph 4 - in the event of the circumstances referred to in the head provision of this Article, the Prosecution Office may refrain from filing criminal charges against the collaborator of Justice if he or she: [...]

II is the first person to effectively collaborate with investigations pursuant to the terms and conditions established in this Article.

Paragraph 5 - in the event of collaboration rendered after the entering of a judgment, the penalty may be reduced by half or the system of imprisonment may be changed even if the objective requirements have not been met. [...]

Article 5

The collaborator of Justice is granted the right to:

- I benefit from protection measures provided for in specific legislation;
- II keep his/her name, qualification, image and other personal information preserved;
- III be individually taken to court, separated from other joint principals and accessories;
- IV attend hearings without keeping visual contact with other criminal defendants;
- V keep his/her identity undisclosed to the media and refuse to be photographed or filmed without prior written consent;
- VI serve the sentence in a correctional facility that has not been designated to other joint defendants or convicted offenders.

LAW 12 846 OF 1 AUGUST 2013 - ADMINISTRATIVE LIABILITY OF LEGAL PERSONS (CORPORATE LIABILITY LAW)

CHAPTER I - GENERAL PROVISIONS

Article 1

This Law provides for the strict civil and administrative liability of legal entities for acts committed against national or foreign public administration.

Sole paragraph - the provisions set forth in this Law shall apply to companies and general partnerships, either incorporated or not, regardless of their business organization or corporate model, as well as to foundations,

associations of entities or individuals, or foreign companies that have set up their main office, a branch or representative office in the Brazilian territory, however organized, even if on a temporary basis.

Article 2

Legal entities shall be held strictly liable, in the administrative and civil spheres, for any of the wrongful acts established in this Law performed in their interest or for their benefit, exclusive or not

Article 3

The liability of legal entities does not exclude the individual liability of their directors or officers, or any other individual who is the offender, co-offender or participant of the wrongful act.

Paragraph 1 - legal entities shall be held liable irrespective of the individual liability of the individuals referred to in the head provision of this Article.

Paragraph 2 - the directors or officers shall be held liable for illegal acts solely to the extent of their culpability.

Article 4

The liability of legal entities remains in the event of amendments to their articles of incorporation, corporate changes, mergers, acquisitions or spin-offs.

Paragraph 1 - in the event of mergers and acquisitions, the liability of the successor shall be restricted to the payment of applicable fines and to the full compensation for occasional damages, within the limit of the transferred assets, not being subject to the application of other sanctions provided for in this Law related to acts and facts that occurred before the date of the said merger or acquisition, except in case of simulation or evident fraud intention, which must be duly proved.

Paragraph 2 - parent, controlled or affiliated companies or consortium members, within the scope of their respective consortium agreement, shall be held jointly liable for the perpetration of acts provided for in this Law, being such liability restricted to the payment of applicable fines and to the full compensation for occasional damages.

CHAPTER II - WRONGFUL ACTS AGAINST NATIONAL OR FOREIGN PUBLIC ADMINISTRATION BODIES

Article 5

For the purposes of this Law, wrongful acts against national or foreign public administration bodies are acts performed by the legal entities referred to in the Sole paragraph of Article 1 to the detriment of national or foreign public assets, of public administration principles, or to Brazil's international commitments, and are defined as follows:

- I to promise, offer or give, directly or indirectly, an undue advantage to a public official or to a third party related to him/her;
- II to demonstrably finance, defray, sponsor or in any way subsidize the performance of the wrongful acts established in this Law;
- III to demonstrably make use of a third party, either an individual or a legal entity, in order to conceal or dissimulate the entities' actual interests or the identity of those who benefited from the performed acts;
- IV with respect to public bidding and government procurement:
 - (a) to thwart or defraud, through an adjustment, arrangement or any other means, the competitive nature of public bidding processes;
 - (b) to prevent, disturb or defraud the execution of any act related to a public bidding process;
 - (c) to remove or try to remove a bidder by means of fraud or by the offering of any type of advantage;
 - (d) to defraud public bidding processes or bidding-related contracts;
 - (e) to create, in a fraudulent or irregular manner, a legal entity with the purpose of participating in a public bidding process or of entering into a contract with the public administration;
 - (f) to gain undue advantage or benefit, in a fraudulent manner, from amendments or extensions of contracts executed with the public administration without authorization in the Law, in the notice of the public bidding or in the respective contractual instruments; or
 - (g) to manipulate or defraud the economic and financial balance of the contracts executed with the public administration;

- V to hinder investigations or inspections carried out by public agencies, entities or officials, or to interfere with their work, including the activities performed by regulatory agencies and by inspection bodies of the national financial system .
- Paragraph 1 - public agencies and entities, or diplomatic representations of a foreign country, at any government level or scope, as well as legal entities directly or indirectly controlled by the government of a foreign country are all considered foreign public administration.
- Paragraph 2 - for the purposes of this Law, international public organizations will be considered equivalent to foreign public administration bodies.
- Paragraph 3 - for the purposes of this Law, those who, even transitorily or without compensation, hold a public position, job or office in government agencies and entities, or in diplomatic representations of a foreign country, as well as in legal entities directly or indirectly controlled by the government of a foreign country, or in international public organizations, will be considered foreign public agents.

CHAPTER III - ADMINISTRATIVE LIABILITY

Article 6

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

- I a fine in the amount of 0.1% (zero point one percent) to 20% (twenty percent) of the gross revenues earned during the fiscal year prior to the filing of administrative proceedings, excluding taxes, which shall never be lower than the obtained advantage, when it is possible to estimate it; and
- II extraordinary publication of the condemnatory decision.
- Paragraph 1 - the sanctions will be applied on a grounded manner on an isolated or cumulative basis, according to the peculiarities of the concrete case and to the severity and nature of the perpetrated offenses.
- Paragraph 2 - the application of the sanctions set forth in this Article shall be preceded by a legal opinion prepared by the Public Advocacy Office or the body of legal assistance, or its equivalent, of the public entity..
- Paragraph 3 - the application of the sanctions set forth in this Article does not exclude, in any case, the obligation of full restitution for the damage caused.
- Paragraph 4 - in the event of item I of the head provision, in case it is not possible to adopt the criterion regarding the value of the legal entity's gross earning, the applicable fine will range from BRL 6,000.00 (six thousand Brazilian reais) to BRL 60,000,000.00 (sixty million Brazilian reais).
- Paragraph 5 - the extraordinary publication of the condemnatory decision will be made as a summary of the decision at the legal entity's expenses, through a means of communication widely circulated in the area where the violation was committed and the legal entity has business or, in its absence, in a nationally circulated publication, as well as by fixing a public notice, for the minimum term of 30 days, at the establishment or at the place where the activity is conducted, in a manner visible to the public, and at an electronic site in the world wide web.

Article 7

In applying the sanctions, the following will be taken into consideration:

- I the seriousness of the offense;
 - II the advantage obtained or intended by the offender;
 - III whether the offense was consummated or not;
 - IV the degree of damage or risk of damage;
 - V the negative effect produced by the offense;
 - VI the offender's economic situation;
 - VII the cooperation of the legal entity to the investigations of the offenses;
 - VIII the existence of internal mechanisms and procedures of integrity, audit and incentive for the reporting of irregularities, as well as the effective enforcement of codes of ethics and of conduct within the scope of the legal entity;
 - IX the value of the contracts held by the legal entity with the damaged public agency or entity; and
- Sole paragraph - the parameters of evaluation of the mechanisms and procedures provided for in item VIII of the head provision shall be established in a regulation to be issued by the Federal Executive Branch.

CHAPTER IV - ADMINISTRATIVE LIABILITY PROCEEDINGS

Article 8

The filing and decision of an administrative proceeding to determine the liability of legal entities shall be carried out by the highest authority within each agency or entity of the Executive, Legislative or Judicial Branches, which shall act ex officio or upon request, in compliance with the due process and full defense principles.

Paragraph 1 - the jurisdiction to initiate and decide on administrative proceedings to determine the liability of legal entities may be delegated, while sub-delegation is prohibited.

Paragraph 2 - within the scope of the Federal Executive Branch, the Office of the Comptroller General (CGU) has concurrent jurisdiction to commence administrative proceedings to determine the liability of legal entities, or to arrogate the proceedings initiated based on this Law, for the examination of their regularity or to correct their progress.

Article 9

The Office of the Comptroller General (CGU) is responsible for the investigation, the proceeding of and the decision on the wrongful acts provided for in this Law committed against the foreign public administration, subject to the provision set forth in Article 4 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, enacted by Decree N. 3,678, of November 30, 2000.

Article 10

The administrative proceeding to determine the liability of legal entities will be conducted by a committee appointed by the authority that initiated the proceeding and will be formed by 2 (two) officials with more than 3 years in office.

Paragraph 1 - at the request of the committee referred to in the head provision of this Article, public entities may request, through their judicial representative body or equivalent division the necessary judicial measures for the due investigation and prosecution of the wrongdoing, including search and seizure procedures.

Paragraph 2 - the committee, in a precautionary manner, may suggest the authority that initiated the proceeding to suspend the effects of acts or process that are the subject of the investigation.

Paragraph 3 - the committee shall conclude the proceeding within 180 (one-hundred and eighty) days as of the date of the publication of the act that creates the committee, and shall present reports on the investigated facts and on the possible liability of the legal entity, suggesting, in a motivated manner, the sanctions to be applied.

Paragraph 4 - the term provided for in Paragraph 3 may be extended by means of a grounded decision by the authority that initiated the case.

Article 11

With respect to the administrative proceeding to determine the liability of the legal entity, the legal entity will have a term of 30 (thirty) days to present its defense, to be counted from the date of service.

Article 12

The administrative proceeding, together with the committee's report, will be remitted for judgment to the authority that initiated the proceeding, pursuant to Article ten.

Article 13

The filing of a specific administrative proceeding for the full restitution of damages does not affect the immediate application of the sanctions established in this Law.

Sole paragraph - once the proceeding is concluded and no payment is made, the appraised credit will be registered at the public treasury as an overdue tax liability.

Article 14

The corporate personality may be disregarded whenever it is used with abuse of right to ease, conceal or dissimulate the performance of the wrongful acts provided for in this Law or to cause property confusion, and all effects of the sanctions applicable to the legal entity shall be extended to its managers and shareholders with management powers, in compliance with the due process and full defense principles.

Article 15

After the administrative proceeding is completed, the committee appointed to determine the liability of the legal entity shall give notice of its existence to the Public Prosecution Office in order for it to proceed with the investigation of possible offenses.

CHAPTER V - LENIENCY AGREEMENT

Article 16

The highest authority of each public body or entity may enter into a leniency agreements with the legal entity liable for the performance of the acts provided for in this Law that effectively collaborate with the investigations and with the administrative proceeding provided that such collaboration results in:

- I the identification of the ones involved in the offense, whenever applicable; and
- II rapidly obtaining information and documents that prove the wrongful acts under investigation.

Paragraph 1 - the agreement referred to in the head provision of this Article may only be executed if the requirements listed below are fulfilled cumulatively:

- I the legal entity is the first one to come forward and demonstrate its willingness to cooperate with the investigation of the wrongful act;
- II the legal entity completely ceases its involvement in the investigated offense as of the date the agreement is proposed;
- III the legal entity admits its participation in the wrongful act and fully and permanently cooperates with the investigations and administrative proceedings, always attending, at its expense and whenever requested, to all procedural acts until the end of the case.

Paragraph 2 - the execution of the leniency agreement will exempt the legal entity from the sanctions provided for in item II of Article 6 and in item IV of Article 19 and will reduce the amount of the applicable fine by up to 2/3 (two-thirds).

Paragraph 3 - the leniency agreement does not exempt the legal entity from its obligation to make full restitution for the damages caused.

Paragraph 4 - the leniency agreement will establish the necessary conditions to ensure the effectiveness of legal entity's collaboration and the useful result of the proceeding.

Paragraph 5 - the effects of the leniency agreement will be extended to legal entities that are part of the same economic group, in fact or by law, provided that they jointly execute the agreement, respected the conditions therein established.

Paragraph 6 - the proposal of the leniency agreement will only become public after the execution of the respective agreement, except if in the best interest of the investigations and of the administrative proceeding.

Paragraph 7 - the denial of a proposed leniency agreement will not result in the confession of the wrongful act under investigation.

Paragraph 8 - in the event of breach of the leniency agreement, the legal entity will be prohibited from entering into a new agreement for 3 (three) years starting on the date that the public administration becomes aware of the said breach.

Paragraph 9 - the execution of a leniency agreement interrupts the statute of limitation of the wrongful acts provided for in this Law.

Paragraph 10- the Office of the Comptroller General (CGU) is the competent authority to enter into leniency agreements in the federal Executive Branch, as well as on cases of wrongful acts committed against the foreign public administration.

[...]

CHAPTER VI - JUDICIAL LIABILITY

Article 18

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

Article 19

The Federal Government, the States, the Federal District and the Municipalities, through their respective Public Advocacy Offices or legal representation bodies, or their equivalent, and the Public Prosecution Office may file

a judicial action in relation to the wrongful acts set forth in Article 5 of this Law, with a view to the application of the following sanctions to the responsible legal entities:

- I loss of the assets, rights or valuables representing the advantage or profit directly or indirectly obtained from the wrongdoing, except for the right of the damaged party or of third parties in good faith;
- II partial suspension or interdiction of its activities;
- III compulsory dissolution of the legal entity;
- IV prohibition from receiving incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or government-controlled entities from 1 (one) to 5 (five) years.

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

- I the corporate personality was used on a regular basis to facilitate or promote the performance of wrongful acts; or
- II the legal entity was organized to conceal or dissimulate illegal interests or the identity of the beneficiaries of the acts performed.

[...]

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

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

Article 20

The sanctions set forth in Article 6 may be applied in the lawsuits files by the Public Prosecution Office, without prejudice to the sanctions set forth in this Chapter, provided that an omission of the competent authority to provide the administrative liability is verified.

[...]

CHAPTER VII - FINAL PROVISIONS

[...]

Article 25

The wrongful acts set forth in this Law are time-barred in 5 (five) years, as of the date of the awareness of the wrongdoing or, in case of permanent or continued violation, as of the date in which it is ceased.

Sole paragraph - the statute of limitation will be interrupted, in the administrative or judicial sphere, by the commencement of the proceeding aimed at investigating the wrongdoing.

[...]

Article 28

This Law applies to wrongful acts committed by Brazilian legal entities against foreign public administration, even if such acts were committed overseas.

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.

LAW 8 112 OF 11 DECEMBER 1990 – CIVIL SERVICE

Article 116

The duties of a public official: [...]

- VI to inform the irregularities that they have knowledge due to its post to a higher authority or, when there is a suspicion of involvement of such authority in the irregularity, to other competent authority able to start an investigation.

Article 126-A

No public official shall be civil, criminal or administrative liable by informing a higher authority, or when there is suspicion of involvement of such higher authority in the irregularity, another authority competent for the verification of the information concerning the practice of crimes or misconduct of which it has knowledge, even if such knowledge arises through the exercise of office, employment or public office.

LAW 6 404 OF 15 DECEMBER 1976 – CORPORATIONS LAW

Article 243

The annual management report shall indicate the company's investments in its affiliates and subsidiaries and mention changes during exercise. [...]

- § 2 - a company is considered controlled when the controlling company, directly or through other subsidiaries, owns enough partnership rights that permanently assure its predominance over corporate resolutions of said controlled company, as well as the power to elect the majority of its directors.

Accounting requirements

Article 176

At the end of each fiscal year, the board shall prepare, based on the bookkeeping of the company, the following financial statements, which should clearly express the situation of the company's assets and the changes which occurred in the year:

- I balance sheet
- II statement of retained earnings
- III statement of income
- IV statement of cash flows; and (Amended by Law No. 11,638, 2007)
- V if the company is a publicly held company, the value added statement. (Included by Law No. 11,638, 2007)

- § 1 The statements for each financial year will be published indicating the corresponding values of the statements from the previous year. [...]

Article 177

The Company will maintain permanent records, in compliance with the precepts of commercial law and this Act and generally accepted accounting principles, observing uniform accounting methods or criteria in time and recording the equity changes according to the accrual method.

LAW 11 638 OF 28 DECEMBER 2007 – AMENDMENT TO LAW 6 404

Article 3

The provisions of Law No. 6404 of December 15, 1976 on bookkeeping and preparation of financial statements and mandatory audit by an independent auditor registered with the Securities and Exchange Commission apply to large-sized companies, even though they are not incorporated in the form of a joint stock company.

Single paragraph – for the exclusive purposes of this Law, a company or group of companies under a common control is considered large when it has, at the previous fiscal year, assets exceeding R\$ 240,000,000.00 (two hundred forty million Reals) or annual gross revenues in excess of R \$ 300,000,000.00 (three hundred million Reals).

LAW 9613 OF – MONEY LAUNDERING

Money laundering offence

Article 1

To conceal or disguise the nature, origin, location, disposition, movement, or ownership of assets, rights or valuables, which result directly or indirectly from any criminal offense.

[...]

Penalty – incarceration for a period of 3 (three) to 10 (ten) years and a fine.

Suspicious transaction detection and reporting

Article 9

The obligations set forth in articles 10 and 11 herein shall apply to natural or legal persons who engage, on a permanent or occasional basis, as a principal or secondary activity, cumulatively or not:

- I The reception, brokerage, and investment of third parties' funds in Brazilian or foreign currency;
- II The purchase and sale of foreign currency or gold as a financial asset;
- III The custody, issuance, distribution, clearing, negotiation, brokerage or management of securities;

Sole paragraph – The same obligations shall apply to the following:

- I Stock, commodities and futures exchanges and organized over-the-counter market systems;
- II Insurance companies, insurance brokers, and institutions involved with private pension plans or social security;
- III Payment or credit card administrators and consortia (consumer funds commonly held and managed for the acquisition of consumer goods); [...]
- X. The natural or legal persons who carry out real-estate promotion activities or the sale and purchase of real estate;
- XI Individuals or legal entities that engage in the commerce of jewelry, precious stones and metals, works of art, and antiques;
- XII The natural or legal persons who trade or mediate the trading of luxury or valuable goods, or perform any activity that involves a great amount of funds in cash; [...]
- XIV The natural or legal persons who provide, even occasionally, advisory, consulting, accounting, auditing, counseling or assistance services of any nature [...]

Article 10

The legal entities referred to in article 9 hereof shall:

- I Identify their customers and maintain updated records in compliance with the provisions set forth by the competent authorities;
- II Keep up-to-date records of all transactions, in Brazilian and foreign currency, involving securities, bonds, credit instruments, metals, or any asset that may be converted into cash that exceed the amount set forth

by the competent authorities, and which shall be in accordance with the instructions issued by these authorities;

- III Shall adopt policies, procedures and internal control mechanisms, compatible with their size and volume of operations, which enable them to comply with the provisions of this article and of article 11, in the manner of the instructions issued by the competent authorities;
- IV Shall register and keep their registry updated with the competent regulatory or supervisory authority, or, in the absence of such an authority, with the Council for Financial Activities Control (COAF);
- V Shall comply with the requests made by COAF, in the frequency, manner and conditions set forth by said Council, and said Council shall preserve the secrecy of information provided, under applicable law.

Paragraph 1 – If the customer is a legal entity, the identification mentioned in item I of this article shall include the individuals who are legally authorized to represent it, as well as its owners.

Paragraph 2 – The records mentioned in items I and II of this article shall be kept during a minimum period of five years, beginning on the date the account is closed or the date the transaction is concluded. However, the competent authorities may decide, at their own discretion, to extend this period. [...]

Article 11

The legal entities referred to in article 9 hereof:

- I Shall pay special attention to any transaction that, in view of the provisions set forth by the competent authorities, may represent serious indications of or be related to the crimes referred to in this law;
- II Shall report to COAF, refraining from informing any person, including any to whom the information refers, within 24 hours, the proposal or performing:
 - (a) of any transaction referred to in item II of article 10, including the identification referred to in item I of the same article; and;
 - (b) of operations referred to in item I.
- III Shall report to the competent regulatory or supervisory authority, or, in the absence of such an authority, to the Council for Financial Activities Control (COAF), in the frequency, manner and conditions set forth by them, the non-occurrence of the proposals, transactions or operations which are reportable under the terms of item II.

Paragraph 1 – The competent authorities referred to in item I hereof shall establish a list of transactions that could characterize the kind of operations mentioned herein, in regard to their basic features, the parties and amounts involved, the implementation, the means of execution, or the lack of economic or legal grounds for them.

Paragraph 2 – Information provided in good faith, pursuant to the provisions set forth in this article, shall not generate any civil or administrative liability.

Paragraph 3 – COAF shall make any reports received based on item II of this article available to the competent authorities for regulating and supervising the persons referred to in article 9.

**ANNEX 3 SUBMISSION BY THE OECD EVALUATION TEAM ON
BILL 6826/2010 PROVIDING FOR THE ADMINISTRATIVE AND CIVIL LIABILITY OF
LEGAL PERSONS FOR ACTS AGAINST THE NATIONAL AND FOREIGN PUBLIC
ADMINISTRATION AND OTHER MEASURES**

12 MAY 2011

Further to the stated interest of Brazil, the OECD Phase 2 Evaluation Team for Brazil – comprised of lead examiners from Chile and Portugal, and representatives of the OECD Secretariat – is pleased to share its views on Bill 6826/2010 providing for the administrative and civil liability of legal persons for acts against the national and foreign public administration and other measures (hereafter: Bill 6826).

The opinions expressed in this paper represent the views of the members of the Evaluation Team alone, and the views and recommendations of the OECD Working Group on Bribery (hereinafter the WGB) on Bill 6826 will not be available until the next peer review carried out by the WGB, normally scheduled for June 2014 in the context of the Phase 3 Review of Brazil.

179. The Evaluation Team expresses its sincere appreciation for the Brazilian Government's efforts to bring its law into compliance with Article 2 of the OECD Anti-Bribery Convention, which requires State Parties to establish the liability of legal persons for the bribery of foreign public officials, and Article 3, which requires that legal persons are subject to effective, proportionate and dissuasive sanctions for such bribery.

180. The Evaluation Team notes that the Bill was submitted to Congress a year ago, in February 2010 and that it passed the Chamber of Deputies and is currently under examination by four specialised commissions. It understands that, given the general elections which took place in Brazil in the third quarter of 2010, discussions and adoption of this Bill in Congress was delayed. The Evaluation Team hopes that Congress can now promptly complete the procedure for adopting Bill 6826.

181. The Evaluation Team considers that Bill 6826 is a general improvement over the current situation in Brazil for liability of legal persons for foreign bribery. However, the Evaluation Team has certain reservations, and considers that the Bill could be substantially improved by addressing the principal following elements:

1. It could be clarified that this Bill applies to all legal persons, including **state-owned and state-controlled enterprises**.
2. The notion of “**agent**” (article 2 and article 3, paragraph 2 of the Bill) raises questions among the Evaluation Team. Article 2 of the bill sets out ‘any agent [...] representing such legal persons’ as the trigger for administrative and civil liability for legal persons, and article 3(2) provides that legal persons shall be held objectively liable for illicit acts committed in their interest or for their benefit by any ‘agents’. The term ‘agent’ is not further defined in the Bill. Preliminary research by the evaluation team indicates that article 710 of the Brazilian Civil Code, for instance, provides that “By the agency agreement, a person assumes, on a non-occasional basis and without an employment relationship the obligation of promoting, on behalf of another, subject to remuneration, the conduct of certain

transactions, in a determinate zone.” The Evaluation Team is concerned that the reference to an agent in the absence of further definition could invoke this narrow Civil Code definition of agency agreements and may considerably restrict the category of persons whose acts may trigger the liability of the legal person, thus making this law not fully in compliance with the standards set by the WGB. In this respect, the 2009 Anti-Bribery Recommendation adopted by the 38 State Parties to the OECD Anti-Bribery Convention clearly lays out the categories of natural persons whose acts trigger the liability if the legal person.¹³²

3. Bill 6826 also does not define the concept of “**entity representing the legal person**” (article 2 of the Bill), and this could also be clarified. For memory, the WGB clarified in 2009 that “a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer promise or give a bribe to a foreign public official on its behalf.”¹³³ In addition, while article 2 specifies that acts by “an entity representing the legal person” may trigger corporate liability, article 3(2) only refers to agents. There therefore appears to be inconsistencies in the triggering factors in each article.
4. The **definition of the acts covered** is unclear as far a foreign bribery is concerned. Reference is never made to the definition of offences in article 337 et seq. of the Brazilian Penal Code, and different articles in the bill use different terminology. Article 1 uses the term “acts committed against the [...] foreign public administration” (“*atos contra a administração pública [...] estrangeira*”), which is the same term used in the Brazilian Penal Code (although no direct reference to the Code is ever made). Several other articles (articles 3(2), 6(VII), 9(VII)) refer more generally to “illicit acts”, but no definition of this term is provided in the Bill. Article 6 refers to “acts prejudicial to the (...) foreign public administration” (“*atos lesivos à administração (...) estrangeira*”), which include “any act committed against public (...) international property” (“*que atentem contra o patrimônio público*”); which seem to imply that some sort of prejudice or damage must have been caused to the foreign public administration or to public international property for the law to apply. This

¹³² For memory, in Annex I to the 2009 Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions, the WGB clarified that:

Member countries’ systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should take one of the following approaches:

- a. *the level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons; or*
- b. *the approach is functionally equivalent to the foregoing even though it is only triggered by acts of persons with the highest level managerial authority, because the following cases are covered:*
 - *A person with the highest level managerial authority offers, promises or gives a bribe to a foreign public official;*
 - *A person with the highest level managerial authority directs or authorises a lower level person to offer, promise or give a bribe to a foreign public official; and*
 - *A person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her or through a failure to implement adequate internal controls, ethics and compliance programmes or measures.*

¹³³ See the 2009 Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions, Annex I, paragraph C.

may not always occur in a foreign bribery case, and would be contrary to the letter and spirit of the OECD Anti-Bribery Convention.¹³⁴ The Bill should be clarified to explicitly cover bribery of foreign public officials in international business transactions, as defined under Article 1 of the Anti-Bribery Convention, and in the Brazilian Penal Code.

5. The Evaluation Team notes that the term “**foreign public official**” is defined under article 6, paragraph 3, in language similar to that of article 337-D of the Brazilian Penal Code, but is not used anywhere else in the Bill. Article 6-I only refers to the offering, promising or giving of a bribe to a “*public official*”. The term “public official” is not defined anywhere in the Bill, nor is it clear that it would cover foreign public officials. Indeed, if reference is made to the Brazilian Penal Code the definition of public officials in article 327 does not include foreign public officials (which are defined in article 337-D). The evaluation team suggests that the Bill make explicit that article 6-I also applies to bribing a foreign public official.
6. The **extraterritorial application** (i.e. application based on nationality jurisdiction) of corporate liability for Brazilian companies engaging in foreign bribery is not clear in the Bill.¹³⁵ The WGB, in its Phase 2 report on Brazil, had clearly noted 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, is established.”¹³⁶ The Evaluation Team notes that article 12 of the Bill contains a reference to Article 4 of the Anti-Bribery Convention. However, article 12 is focused on conveying authority to the Office of the Comptroller General in foreign bribery cases, and merely specifies that this authority should be exercised “in accordance with Article 4 of the Convention.” The evaluation team considers the Bill should make explicit the extraterritorial application of the foreign bribery offence to Brazilian companies that bribe abroad.
7. Article 13, paragraph 3 provides for an **investigation period of 180 days** from the date of publication of the public notice establishing the proceedings against the legal person. This appears very short, especially where foreign bribery cases are concerned. Indeed, such cases may often involve investigations into complex corporate structures and financial documentation, as well as almost systematic reliance on mutual legal assistance requests. While the Bill provides, in article 13, paragraph 4, for extension of the investigation period through a ‘duly justified act of the establishing authority’, it is not clear how long the period can be extended, or how many times it can be extended, and whether the extension is optional or compulsory. It is also not clear what a ‘duly justified act’ is. Brazil should ensure

¹³⁴ For instance, commentary 4 of the Convention provides that a foreign bribery offence still exists even if the company was the best qualified bidder.

¹³⁵ For memory, Article 4.2 of the Anti-Bribery Convention provides that:

Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

¹³⁶ See paragraph 135 of the [Phase 2 review of Brazil](#) under the OECD Anti-Bribery Convention.

that sufficient time is allowed for the effective investigation and prosecution of legal persons for foreign bribery offences.

8. Article 13, paragraph 1 provides for search and seizure powers for the investigative committee, “in addition to any other **applicable legal measures of interest to the related investigation and administrative proceeding.**” The legal basis for the use of special investigative techniques, including search and seizure powers and ‘other applicable legal measures’ is unclear. The evaluation team suggests that the Bill be amended so that the legal basis for the use of these measures is clear, such as by making the general and special investigative techniques contained in the Code of Criminal Procedure available to the various bodies in the public administration that have the power to open and conduct investigations under the Bill, in particular the Office of the Comptroller General where foreign bribery is concerned, as appropriate under Brazilian law. Brazil should also ensure that the Office of the Comptroller General has the requisite authority, resources and competence to carry out these administrative proceedings.

182. If the Brazilian authorities deem it appropriate and expedient, the Evaluation Team would be honoured to further explain its views on Bill 6826 in greater detail and to respond to any questions.

ANNEX 4 LIST OF PARTICIPANTS IN THE ON-SITE VISIT

Government Ministries and Agencies

- Brazil Cooperation Agency (ABC)
- Committee for Export Finance and Guarantee (COFIG)
- Export Credit Insurance Agency (SBCE)
- Federal Public Prosecutor Office (MPF)
- Federal Revenue Service (RFB)
- Ministry of Development, Industry and Foreign Trade (MDIC)
- Ministry of External Relations (MRE)
- Ministry of Justice (MJ)
- National Contact Point OECD MNE Guidelines (PCN)
- Office of the Comptroller General (CGU)
- Office of the General Counsel to the Federal Government (AGU)
- Secretariat de Direitos Humanos (SDH)

Parliamentarian

- Worker's Party (PT)

Law enforcement authorities and Judiciary

- Federal Public Prosecutors' Service (FPS)
- Federal Police (PF)
- National Council of Justice (CNJ)
- National Police Academy (ANP)
- Regional Federal Court (TRF 4th Region)
- Superior Court of Justice (STJ)

Private Sector

Private enterprises

- Ambev
- Braskem
- Electrobras
- Embraer
- Nokia Do Brasil
- Odebrecht
- Siemens
- Philips
- Wal-Mart

Business associations

- BM&FBovespa
- SEBRAE
- National Confederation of Financial Institutions (*Confederação Nacional das Instituições Financeiras* – CNF)

Financial institutions

- Bradesco Bank
- Bank of Brazil
- Brazilian Development Bank (BNDES)
- Caixa Economica
- Central Bank of Brazil (BACEN)
- Council of Control of Financial Activities (COAF- FIU)
- Securities and Exchange Commission (CVM)

Legal profession and academics

- Barbosa, Mussnich e Aragão
- Pinheiro Neto Advogados

- Control Risks
- Felsberg, Pedretti e Mannrich
- Machado Meyer Advogados

- Trench, Rossie e Watanabe Advogados
- Tozzini Freire Advogados

Accounting and auditing profession

- Accounting firm (BDO)
- Deloitte Brasil
- Ernst and Young
- Federal Accounting Council (Conselho Federal de Contabilida - CFC)
- Institute of Independent Audotirs (IBRACON)

- KPMG Brasil
- PricewaterhouseCoopers
-

Civil Society

- Amarrigo Brasil
- Brazilian Institute for Ethics in Competition (ETCO)
- Ethos

- Estadão de São Paulo
- Instituto brasileiro de Governança Corporativa (IBGC)

ANNEX 5 LIST OF ABBREVIATIONS, TERMS AND ACRONYMS

Acronyms

ABC	Brazilian Cooperation Agency
ABGF	Brazilian Fund and Guarantee Management Agency
ADI	Interpretative Declaratory Act 32
BNDES	National Bank of Economic and Social Development
BRL	Brazilian Real (currency)
CCP	Code of Criminal Procedure
CDD	Customer Due Diligence
CFC	Federal Accounting Council
CLL	Corporate Liability Law
COAF	<i>Conselho de Controle de Atividades Financeiras</i> (Council of Control of Financial Activities, Brazilian Financial Intelligence Unit)
COFIG	Committee for Export Finance and Guarantee
CPC	Brazilian Accounting Pronouncements Committee
CPLP	Community of Portuguese Language Countries
CVM	Securities and Exchange Commission
CGU	Controladoria-Geral da União (Office of the Comptroller General)
DEST	Ministry of Planning, Budget and Management
DNFBPs	Designated non-financial businesses and professions
DOJ	US Department of Justice
DPF	Federal Police Department
DRCI	Department of Assets Recovery and International Co-operation (within the Ministry of Justice)
ECA	Export Credit Agencies
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)
EU	European Union
EUR	Euro
FATF	Financial Action Task Force
FCPA	Foreign Corrupt Practices Act
FDI	Foreign direct investment
FIESP	Federation of Industries of Sao Paulo State
FPS	Federal Prosecutor's Service
GDP	Gross Domestic Product
GPA	WTO Agreement on Government Procurement
IBEN	Brazilian Institute of Business Ethics
IBGC	Brazilian Institute of Corporate Governance
IBRACON	Brazilian Institute of Independent Auditors
IFRS	International Financial Report Standards
ISA	International Standards on Auditing

LP	Legal person
MDIC	Ministry of Development, Industry and Commerce
MER	Mutual Evaluation Report by the FATF
MERCOSUR	Common Market of the South
MLA	Mutual legal assistance
NBC TA	New Brazilian auditing standards
NGO	Non-governmental organisation
NP	Natural person
OAS	Organisation of American States
OECD	Organisation for Economic Cooperation and Development
ODA	Official development assistance
PC	Penal Code
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)
RFB	Federal Revenue Secretariat
SBCE	Brazilian Export Credit Insurance Agency
SEBRAE	Brazilian Support Service for SMEs
SEC	US Securities and Exchange Commission
SME	Small and medium sized enterprises
STR	Suspicious transaction report
SOE	State owned enterprise
TIEA	Tax Information Exchange Agreement
US	United States
USD	United States Dollar

Abbreviations

Convention	Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
The Registry	Registry of Ineligible and Suspended (<i>Companies Cadastro de Empresas Inidôneas e Suspensas – CEIS</i>)
Revised Recommendation	OECD Revised Recommendation on Combating Bribery in International Business Transactions (1997)
Working Group	OECD Working Group on Bribery in International Business Transactions