



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

BRAZIL: PHASE 1
REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997
RECOMMENDATION

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 31 August 2004.

BRAZIL

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

Brazil signed the Convention on 17 December 1997 and deposited its instrument of ratification on 24 August 2000, pursuant to Legislative Decree No. 125, of 15 June 2000. Brazil enacted the implementing legislation in the form of Law No. 10,467, of 11 June 2002, which amended the Penal Code and Law No. 9,613, of March 3 1998, and came into force on 11 June 2002.

Convention as a Whole

The active bribery of a Brazilian public official is a criminal offence under Article 317 of the Brazilian Penal Code. Article 333 of the Penal Code makes it an offence for a Brazilian public official to accept a bribe. Both the offences of active and passive bribery predate the Convention. Other existing legislation relevant to the bribery of domestic public officials includes Law No. 9,034 of 3 May 1995, governing criminal organisations, and Law No. 9,613 of 3 March 1998, relating to money laundering and the concealment of assets. In order to meet the requirements of the Convention, Brazil penalised an act of bribery of a foreign public official through the enactment of the implementing legislation (Law No. 10,467, of 11 June 2002), which added to the Penal Code, Section XI, Chapter II-A entitled “Crimes committed by individuals against a foreign public administration” that contains the offence of *Active bribery in an international business transaction* and the definition of a “foreign public official”. In addition, the implementing legislation amended Article 1 of Law No. 9,613/1998 in order to include the new foreign bribery offence as a predicate offence for money laundering. Further, Brazil relies on existing legislation for the implementation of other requirements of the Convention.

The Brazilian authorities state that on 23 October 2000 (when the Convention entered into force for Brazil internationally¹), the Convention also took effect in Brazil with the status of “ordinary law”. After the passing of the ratification instrument by the National Congress (Legislative Decree 125/2000), the Convention was formally promulgated and enacted into domestic law by Decree No. 3,678, of 30 November 2000, which required that the Convention “must be executed and complied with entirely in accordance with its contents”.

Article 5, paragraph XXXIX of the Brazilian Constitution provides that “there is no crime without a previous law which defines it, nor is there any punishment without a previous legal imposition”. Therefore, despite the fact that the Convention as a whole has the force of ordinary law in Brazil, Article 1 of the Convention cannot be self-executing, and a new criminal offence had to be enacted. Thus, Article 1 cannot be relied upon where the domestic criminal law conflicts with, or is deficient with respect to the elements set forth in the Convention. While the courts are not bound to interpret the implementing

¹ See Article 15.2 of the Convention

legislation in accordance with Article 1 where the elements of the offence in the implementing legislation are not clearly defined, the Convention is, according to the Brazilian authorities, “an important source” for interpretation, and the commentaries “must be taken into account”.

The other Articles of the Convention are directly applicable without the need for implementing legislation as they do not require the creation of a criminal offence.

There was approximately one year and eight months between the entry into force of the Convention (23 October 2000) and the implementing legislation (11 June 2002) in Brazil. As to whether the Convention has any practical legal effect in Brazil, in relation to the provision of MLA/extradition with respect to an act of foreign bribery which was committed during this period, the Brazilian authorities state that the dual criminality requirement is broadly interpreted and would be satisfied if the act committed was an offence under the law of the requesting country, as the offence of bribing a domestic public official also existed under Brazilian law.

As to the legal weight given to case-law in the Brazilian system, the Brazilian authorities explained that, though the Brazilian legal system belongs to the Romano-Germanic tradition based on written law, court decisions, though not binding on other courts, have played an essential part in the building and development of legal concepts. The degree of influence depends on the competence and jurisdiction of the court in question.

1. ARTICLE 1: THE OFFENCE OF BRIBERY OF A FOREIGN PUBLIC OFFICIAL

General description of the offence

As a result of Law No. 10,467, Section XI of the Penal Code (Decree Law No. 2,848 of 7 December 1940) now contains Articles 337-B to 337-D which appear as Chapter II-A (“Crimes committed by individuals against a foreign public administration”). Article 337-B provides:

Active bribery in an international business transaction

Article 337-B: Promising, offering or giving, directly or indirectly, an improper advantage to a foreign public official or to a third person, in order for 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 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 delays or omits, or puts into practice the official act in breach of his or her functional duty.

Article 337-D provides the definition of the term “foreign public official” (see the discussion under 1.1.6)².

The General Part of Brazil’s Penal Code provides rules for the characterisation or definition of an offence, and also sets out the defences or exclusions that are generally applicable. These are available in cases of foreign official bribery. Threat of real loss or harm (ie. not merely of economic damage), coercion or intimidation exerted in order to obtain a bribe will all operate to exclude the commission of the offence

² A third provision, Article 337-C, introduced the offence of “passive” trafficking in influence in an international business transaction.

of active bribery of a foreign public official. A mere request or demand for a bribe, on the other hand, will not be sufficient to exclude the commission of the offence.

1.1 The Elements of the Offence

1.1.1 any person

The Brazilian authorities describe Article 337-B as a common criminal offence that can be committed by anyone. They state that in the absence of a specific indication of what category of persons may commit an offence, it is understood that the subject may be anyone. This is a characteristic of Section XI, Chapter II-A of the Penal Code, which enumerates crimes committed by individuals against a foreign public administration.

1.1.2 intentionally

Article 337-B does not expressly set forth the mental element of the offence. According to the Brazilian authorities, “felonious intent” is presumed to be required in criminal offences where no other form of *mens rea* is specified. Intention is present by implication under Brazilian law, and does not need to be made explicit. In the Brazilian Penal Code, the intent is present when the individual wants the result, or when he/she assumes the risk of producing it, which clearly gives similar treatment both to intent (*dolus*) and to recklessness/negligence (*dolus eventualis*).

1.1.3 to offer, promise or give

Article 337-B expressly includes all three elements of “promising, offering, or giving” required by Article 1 of the Convention.

1.1.4 any undue pecuniary or other advantage

Article 337-B refers to “an improper advantage”. The Brazilian authorities confirm that this covers advantages of a material nature such as money or goods, and other advantages such as moral or sexual advantages. They state that in the criminal definition of passive and active bribery offences, Brazilian jurisprudence and doctrine deem “improper advantage” to be any advantage at all. Brazil cites doctrine to the effect that “the essential idea here is that of reward... reward that the official receives or accepts as the price of his corruption.” It cites a domestic corruption case where the loan of a car was held to be an undue advantage³. Therefore, it appears that all pecuniary and non-pecuniary advantages, whether tangible or intangible, are covered by this term.

The Brazilian authorities state that, “if the advantage is not laid down in law, in other words, if the public official has no right to it, the advantage will be deemed to be improper”. Therefore, it appears that the offence implements Commentary 8, which states that it is not an offence, if the advantage was permitted or required by the written law or regulation of the foreign public official’s country, including case law, by the interpretation of the term “improper”. Brazil explained that the law of the official’s country would be referred to in determining whether the advantage is improper. In a case where the

³ Law Courts of the State of Rio Grande do Sul, Rapporteur Luis Felipe Magalhaes, in *Jurisprudence of the Law Courts of the State of Rio Grande do Sul*, vol. 2, tome 11, p. 189.

advantage is not expressly permitted or required by the law (of the foreign public official), but is not prohibited thereby, Brazil explained that, if the other elements characterising it as criminal were present, the courts would probably consider this to be an improper advantage.

Brazil further explained that, provided the subjective element (the corrupt intent) and the objective element (the advantage) are present, the offence applies irrespective of the value of the advantage, its results, perception of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment on order to obtain or retain business or other improper advantage. Brazil makes an exception in practice, however, for small “courtesy” gifts, because there is no corrupt intent either in giving or accepting them.

1.1.5 whether directly or through intermediaries

Article 337-B provides that the offence can be committed “directly or indirectly”. While this terminology is different from that in the Convention, the Brazilian authorities explained that “indirectly” covers bribery through an intermediary. They confirm that, under Article 29 of the Penal Code, the principal and the intermediary will each be liable to the extent of their respective involvement. They explained that the briber remains criminally liable regardless of whether or not the intermediary is aware of the briber’s intent. Likewise, the principal will be liable if he or she instructs the intermediary to bribe a foreign public official, but leaves to the intermediary the choice of the individual official to be bribed.

1.1.6 to a foreign public official

The definition of “foreign public official” for the purposes of the foreign bribery offence in Brazil is contained in Article 337-D, which provides:

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

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

The Brazilian authorities explain that this definition is based on the long-established definition in Article 327 of the Penal Code of what is a Brazilian public official. That Article provides:

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

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

The Brazilian authorities state that the definition of “public official” under Article 327 has been interpreted very broadly by Brazilian courts and doctrine, to cover anyone who exercises, in any way, a public function. They further state that the definition in Article 327 covers all the spheres of activity of the State, including the executive, legislative and judicial functions, including the President of the Republic, members of the National Congress and the Federal Supreme Court, and cite leading academic authorities in

support of this⁴. Moreover, some case-law on the interpretation of Article 327 is cited, which provides that “public official” under this article covers an expert witness and a city alderman⁵.

The Brazilian authorities state that the definition in Article 337-D, which, in a large part corresponds to that in Article 327, is function-based, and broad enough to cover all agents who provide services to the State, including magistrates, members of the Public Prosecution Service, members of congress, senators and employees in senior positions in government. They point out that, in addition, the sole paragraph of Article 337-D expressly includes anyone holding a function in a state-controlled enterprise or organisation, or a public international organisation, and that this would encompass persons exercising a function “for or on behalf of” such an entity. Enterprises in de facto state control would be included within the meaning of “indirectly”, according to the Brazilian authorities. Therefore, they are of the view that the definition in Article 337-D is broad enough to encompass all the situations required by the Convention.

However, the fact that the two definitions (Articles 327 and 337-D) are not identical leaves open the possibility that the court might exclude certain categories of foreign public officials, despite the existing jurisprudence on Article 327. In particular, there is a doubt whether a person exercising a public function for a foreign public agency, as required by Article 1.4.a of the Convention and Commentary 13, is covered. This issue arises not simply because of the absence of express reference thereto in Article 337-D, but because there is no definition in Article 337-D which corresponds to the definition in paragraph 1 of Article 327, which appears to cover some domestic “public agencies”.

The definition in Article 337-D uses the term “state bodies” for a person holding a position or public function, and the term “foreign country”, for a person holding a position or function in an organisation or enterprise controlled by the “Public Authorities”. The Brazilian authorities have explained that “there is no substantial difference between the two provisions”, and that the term “state” covers “the whole structure of public authority, at whatever level or subdivision.”

No definitions are given for the terms “public function”, “Public Authority”, “state bodies”, “foreign country” and “international public organizations”. However, the Convention has legal force in Brazil, both as an integral part of the law and as a source of interpretation, and the Brazilian authorities explained that the courts would use the Convention or Commentaries as interpretative tools in order to determine the scope of these terms. According to the Brazilian authorities, the statement of reasons that accompanied the enactment of Article 377-B to 377-D explicitly stated that the purpose of this amendment to the Penal Code was to implement the Convention.

1.1.7 for that official or for a third party

The offence in Article 337-B expressly provides for the advantage being intended not just for the public official but also for third parties. According to the Brazilian authorities, there is no reason why the third party in question may not be a legal person []. Because the offence is one of mere conduct, which can be consummated whether or not the bribe reaches the foreign public official, they explain that it covers the situation where the bribe is, or is intended to be, transmitted directly to a third party by the briber, without

⁴. See *Direito Penal* (Saraiva, 20th ed., 1995, v.4, p.206) by E. Magalhaes Noronha, and *The Penal Code and its Interpretation in Jurisprudence* (Vol 1, tomo II: Parte Especial. 6. ed., revised and extended – São Paulo: Editora Revista dos Tribunais, 1997) by FRANCO, Alberto Silva and others.

⁵. See, for instance, Federal Supreme Court Federal – RHC – Rap. Décio Miranda – Revista dos Tribunais 556/397 and Revista do Law Courts 100/135, and Criminal Court of Appeals of São Paulo – AC - Rap. Ercílio Sampaio – Revista do Tribunal 580/359.

the foreign public official physically receiving the bribe; and that it applies regardless of the relationship between the foreign public official and the third party.

1.1.8/1.1.10 in order that the official act or refrain from acting in relation to the performance of official duties/in the conduct of international business

Article 337-B applies to the act of giving, etc. a bribe to a foreign public official “in order for him or her to put into practice, to omit, or to delay any official act relating to an international business transaction”. The Brazilian authorities state that, for the offence to be committed, it is sufficient that the core act of an offer, promise or gift is made regardless of whether the foreign public official acted, etc. in return for the bribe. Under the sole paragraph of Article 337-B, it is an aggravated offence if the foreign public official acts, etc. in breach of his or her functional duty, as a result of the bribe. According to the Brazilian authorities, the court would probably determine the existence of a breach of duty by reference to the law of the foreign public official’s country.

The offence requires that a bribe is given, etc. to the foreign public official in order to obtain “any official act relating to an international business transaction”. This formulation appears to require that the “official act” itself be related to an international business transaction. Such a requirement could substantially restrict the scope of the offence in a way which would not be in compliance with the Convention. The language would exclude a bribe in order to obtain a foreign public official’s act not having any international implications or not connected with business transactions, but which would affect the briber’s benefits in the conduct of international business transactions or his/her ability to do business internationally. The Brazilian authorities have stated that it was not drafted with the intention to limit the scope of the offence, and that they would not expect it to be interpreted in such a way as to limit the scope of the offence. They stated that, for instance, official acts such as the granting of licenses or business permits in the official’s country, the granting of favourable tax treatment in that country, or giving permission to enter that country would be treated as falling within the scope of the offence. It remains to see whether the courts give the language a broad or restrictive interpretation.

On the other hand, there is no language equivalent to the final clause in Article 1: that the improper advantage sought must itself be “in the conduct of international business”. Thus, it would appear that Article 337-B does not require such a condition be satisfied. However, where the act sought from a official relates to an international business transaction, the advantage sought will, in most cases in practice, be in the conduct of international business.

Furthermore, since the offence uses the words “any official act”, there arises a question whether the offence is sufficiently broad to cover the case where the act/omission which the briber intends to induce is outside the authorised competence of the foreign public official but in relation thereto, as required by Article 1.4.c of the Convention. The Brazilian authorities have explained in this regard that the offence will be committed if the act “bears any relationship, even indirectly, with the functions of the public official,” and that it would be no defence that the act was outside the scope of the official’s authority.

Similarly, in the case of a bribe given to a senior government official in order that he or she use his or her office – though acting outside his or her competence – to make another official award a contract to the briber (Commentary 19), Brazil explains, on the basis of the writings of Magalhaes Noronha⁶, that the briber and the “influencing” official would probably be held to be joint offenders; or alternatively that the case would be treated as one of influence peddling under Article 337-C. In addition, it appears that the

⁶ *Criminal Law*, vol. 4, 1995, page 315.

words “put into practice” are broad enough to cover any level of acts, including those not involving an official decision, such as making oral representations favourable to the briber in a meeting.

1.1.9 in order to obtain or retain business or other improper advantage

Article 337-B of the Brazilian Penal Code does not expressly require that a bribe be offered, promised or given for the purpose of obtaining new business and retaining existing business, or of obtaining or retaining some other improper advantage. This would indicate that the offence is committed regardless of the types of advantage sought, but the Brazilian authorities nonetheless point out that the specific felonious intent derives from the official act which, as the offence is defined in Article 337-B, is associated with an international business transaction.

It is also the case that, in accordance with Commentary 4, the offence would occur even if the briber was the best qualified bidder or could otherwise properly have been awarded the business, because, as explained by the Brazilian authorities, it is irrelevant in Brazilian law “whether or not the briber’s purpose would actually be accomplished without the act of corruption.”

Further, there is no express reference in the law to small facilitation payments (Commentary 9), and there is no exception under Brazilian law for such payments because, as Brazil has explained, even if the amount is low, in crimes against the public administration “the injury to morality, the credibility, and the efficiency of the public services remains”⁷.

1.2 Complicity

Article 1.2 of the Convention requires Parties to make a criminal offence “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”.

The Brazilian authorities explain that Article 29 of the Brazilian Penal Code establishes liability for complicity, including for the foreign bribery offence. That article provides:

The penalties prescribed for the criminal offence also apply to whomever, in any way, conspires in the criminal offence, insofar as the person concerned is found guilty.

Paragraph 1. If the participation was of a lesser degree, the penalty may be reduced by from one sixth to one third.

Paragraph 2. If any of the conspiring parties wished to take part in a less serious criminal offence, the penalty for this will be applied: the penalty will be increased by up to one half in the event that the more serious consequences were predictable.

According to the Brazilian authorities, it appears that, pursuant to Brazilian jurisprudence and doctrine, the words “in any way, conspires in the criminal offence” have been interpreted to cover three essential types of criminal participation. These are: “determination” (defined as intentionally inducing another to commit a criminal offence), “instigation” (defined as encouraging, motivating or impelling someone to carry out a decision already taken to commit an offence), and “complicity” (defined as provision of material or moral help or encouragement in committing the offence).

⁷ Federal Regional Court of the 4th Region, Rapporteur Fabio Bittencourt da Rosa, in *Rivista dos Tribunais* 769, page 729.

It appears that “determination”, “instigation” and “complicity” cover the notion of incitement and aiding and abetting within the meaning of Article 1.2 of the Convention. However, none of the three appears at first sight to correspond exactly to the notion of “authorisation” under Article 1.2 the Convention. The Brazilian authorities explained that the word “authorisation” would only be used in Brazilian legal tradition to mean conferring authority on someone to do an act which was legal. The notion covered by the Convention (ie, instructing the commission of a criminal offence where the person instructing may or may not have control over its commission) was, they explained, a form of co-authorship covered by the notion of “determination”.

According to the Brazilian authorities, all those who contribute to carrying out a criminal offence commit the same criminal offence, even though in a mitigated fashion, according to the importance of the act. Brazil explains, in addition, that Article 62 of the Penal Code provides for increased penalties to be applied in relation to an offender who, *inter alia*, promotes or organises cooperation in the crime, coerces or induces others in the commission of the crime, or takes part in the crime in exchange for payment or promise of reward. The Brazilian authorities state that these aggravating circumstances could apply to accomplices, as well as to principal offenders.

Additionally, the Brazilian authorities refer to Article 286 of the Penal Code entitled “publicly inciting the commission of a crime”, but explain that this provision relates only to cases of abstract and public incitement, and is, in principle, not relevant to the crime of bribery.

1.3 Attempt and Conspiracy

Article 1.2 of the Convention requires that attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

Attempt

Attempts are governed by Article 14, clause II of the Penal Code, which applies to all criminal offences, including the offence of foreign bribery. Under this provision, a crime is attempted “when the performance is begun, but it is not carried out through circumstances foreign to the wishes of the offender”. The Brazilian authorities explain that mere intention and preparation are not sufficient, but acts done in execution of an intended offence which fall short of completion will constitute an attempt. The penalty, except where otherwise provided, is the penalty applicable to the crime which was to have been committed, reduced by between one third and two thirds.

Since the provision applies to an offence not completed because of “circumstances foreign to the wishes of the offender”, where the offender *voluntarily* breaks off performance before the offence is completed, this will not qualify as an attempt. Instead, under Article 15 of the Penal Code, the offender will only be “accountable for acts already committed”.

Where a bribe is offered but the foreign public official is unaware of the offer, this constitutes an attempt. Knowledge by the official of the offer or promise is essential, according to the Brazilian authorities, for the offence as defined to be completed. There is no need, however, for the foreign public official to accept the bribe in order for the offence to be completed, since the offence is one of mere conduct, and will be committed even if the bribe is refused.

Conspiracy

It appears that Brazilian law does not penalise the notion of conspiracy within the meaning of Article 1.2 of the Convention (i.e. a separate offence from the crime that is the object of an agreement).

However, Article 288 of the Penal Code provides a penalty of from three to six years' imprisonment where "more than three people associate together in a gang or band, for the purpose of committing a crime". This association is what Brazilian law means by "conspiracy".

2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

Article 2 of the Convention requires each Party to "take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official".

2.1 Criminal Responsibility

In Brazil, there is no criminal liability for legal persons for the offence of bribery of a foreign public official.

In Brazilian legal theory, a corporation or enterprise is an artificial entity which exists only by virtue of the law and under the limits the law imposes. It has no capacity for criminal liability, in principle. However, one limited exception is allowed for by Article 225, paragraph 3 of the 1998 Constitution, which provides that criminal and administrative penalties may be imposed on legal entities for conduct injurious to the environment. Law No. 9615 of 1998 (Crimes against the Environment) provides for criminal liability for legal persons. However, no such criminal penalty has ever been imposed on a corporation, and according to the Brazilian authorities, the legal theory underlying this exception remains controversial.

A different constitutional provision which could, in theory, open the way for the criminal liability of legal entities in certain specified circumstances is Article 173.V, paragraph 5, which provides:

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

As the purpose of the Convention is to combat bribery in international business transactions which "undermines good governance and economic development, and distorts international competitive conditions", the question arises whether Brazil could avail itself of the exception covering "*acts committed against the economic and financial order and against the popular economy*" to enact legislation making legal entities criminally liable for engaging in foreign bribery.

Laws have been enacted pursuant to Article 173.V, paragraph 5 of the Constitution, including Law no. 8,137 of 1990 dealing with crimes against the tax and economic system and consumer relations, the text of which acknowledges that corporate entities might be used by natural persons as vehicles for crime. However, all attempts to include criminal liability of corporate entities in the early draft bills which preceded this law were defeated. The Brazilian authorities have explained that the possibility of introducing criminal liability for corporations based on this constitutional exception remains the subject of intense academic debate, and that there is no likelihood of such legislation being enacted in the near future.

2.2 Non-criminal Responsibility

There is no non-criminal liability in Brazil for legal persons for the foreign bribery offence or for criminal offences in general.

However, enterprises in Brazil may be subject to important forms of administrative liability. In this regard, the Brazilian authorities cite administrative sanctions under Law No. 8,666 of 21 June 1993. This law allows penalties to be imposed on a corporation for certain types of conduct relating to public tenders, including being convicted of tax fraud, committing illegal acts in order to obstruct the purpose of a public tender bid, and if it is shown that the enterprise is unfit to enter into a contract with the administration on account of the commission of illegal acts from which it is found to have benefited. Offences of bribery of a foreign public official, according to the Brazilian authorities, would fall within this definition. Penalties include suspension or exclusion from all public tenders or contracts with the public administration. Considering the large volume of the economy represented by public contracts, in the view of Brazil this is a highly dissuasive penalty.

Under Law No. 6,385 of 7 December 1976, the Securities and Exchange Commission (CVM) was set up to regulate publicly-held corporations. Pursuant to Chapter 1, Article 4.IV.b, the CVM has the duty to protect securities holders and market investors against the illegal acts of officers and controlling shareholders of publicly-held corporations. Article 9 empowers it to examine and investigate “illegal acts”, through administrative proceedings, and apply the penalties provided for in Article 11. These include a fine of up to three times the amount of the economic advantage gained, and it is possible to increase the penalty by up to three times in cases where the offence is repeated. The Brazilian authorities have not cited any examples of cases where this law has been invoked in respect of an “illegal act” consisting of bribery of a public official, domestic or foreign.

There is a further administrative provision which could apply directly to offences of foreign bribery: Law No. 8,884 of 11 June 1994, on Protection of the Economic Order. According to Article 15, this law applies “to individuals, public or private companies, as well as to any individual or corporate associations, established de facto and de jure...”. Article 20.1 makes it a violation of the economic order “to limit, distort, or in any way injure open competition or free enterprise”. Article 21 enumerates examples of acts which will, “among others”, be deemed a violation of the economic order. They include such anti-competitive acts as price-fixing and selling goods below cost. Bribery is not specifically included. The list has not been amended since the Law was passed.

However, the Brazilian authorities explain that the Law has consistently been broadly interpreted as designed to protect international, not domestic, competition, and the case-law has looked to international factors when defining markets. They state that foreign official bribery is viewed as falling within the category of acts that would, by definition, distort international competition – as it is in the Preamble to the Convention -- and will thus fall clearly within the scope of the Law, though there are as yet no cases to confirm this.

Penalties for companies found to have committed a violation are set forth in Article 23.I. The basic penalty is a fine of from one to thirty percent of the company’s gross pre-tax earnings for the previous financial year, but it shall in no event be less than the amount of the illicit advantage. Fines imposed may be doubled for recurring violations. In addition, Article 24.II allows, whenever the severity of the facts or the public interest requires, for the imposition of disqualification from all public financing or bids for five years or more.

The Brazilian authorities state that civil liability is also available, including with respect to state enterprises, and results in the payment of damages to the successful claimant.

The coverage afforded by the forms of administrative and civil liability of legal persons applicable to acts of foreign bribery that currently exist in Brazil appears as a whole to be sufficient to satisfy the requirements of Articles 2 and 3 of the Convention, provided the available remedies are in fact applied to cases of foreign bribery. The question whether the penalties available provide effective, proportionate and dissuasive sanctions remains to be reviewed as practice develops.

3. ARTICLE 3: SANCTIONS

The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties”, comparable to those applicable to bribery of the Party’s own domestic officials. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are subject to “effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions”. The Convention also mandates that for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Public Official

The penalties available under Brazilian law in respect of natural persons are the same for foreign bribery as for bribery of a domestic official. Article 333 (active bribery of a domestic public official) and Article 337-B of the Penal Code (active bribery of a foreign public official) both provide, in identical terms, for deprivation of liberty of from one to eight years plus a fine. The fine is cumulative with the imprisonment, and not available as an alternative to it⁸.

For both offences, pursuant to Article 333, sole paragraph, and Article 337-B, sole paragraph, respectively, the penalty is increased by one-third if the official acts in breach of his or her functional duty as a result of the advantage or promise. This increase is applied both to the imprisonment term and the fine, and is based on the actual penalty set by the judge in a given case.

Brazilian law lays down criteria for the calculation of fines. Pursuant to Article 49 of the Penal Code, the fine will consist of a number of “daily fines”, not less than 10 and not more than 360. As to the method of calculation, Article 49 provides:

Paragraph 1 -The amount of the daily fine will be set by the judge but may not be less than one-thirtieth of the highest monthly minimum wage ruling at the time of commission of the crime, nor be more than 5 (five) times this wage⁹.

Paragraph 2 – The amount of the fine will be updated, at the time of levying it, by the monetary correction indices.

The calculation of fines is governed by Article 68 of the Penal Code, which provides for three stages. The first stage is the establishment of the basic penalty, based on the legal factors relevant to the offence.

⁸ Under Article 60, paragraph 2 of the Penal Code, sentences of imprisonment of no more than six months may in some circumstances be replaced by a fine.

⁹ The current minimum wage in Brazil is BRL 240 (Brazilian reals), and this is reviewed at least annually.

The number of daily fines is then increased or reduced (between the minimum and maximum) to take account of any mitigating or aggravating circumstances. Subjective factors such as the degree of guilt and the offender's previous record may also be considered. In the third stage, the judge must take account of the convicted person's salary and income, including goods and capital, at the time of the offence. The judge has discretion under Article 60, paragraph 1 of the Penal Code to multiply the fine by up to three times if the judge considers that, because of the defendant's financial position, the application of the maximum penalty would otherwise be ineffective. Thus, this discretion is available even if the fine has already been increased by one-third because of the presence of aggravating circumstances.

According to the Brazilian authorities, the system leaves considerable discretion to the judge, who must give grounds for the individual penalties imposed. The case-law states that "In setting the penalty, the judge must adhere to the legal criteria recommended by doctrine, in order to adjust it to its social purpose and to adapt it to the offender and to the particular case".¹⁰

While no other offences of active domestic bribery are cited by the Brazilian authorities, there are several offences in Brazil involving passive corruption. These include peculation (Article 316 of the Penal Code), which carries a penalty of from two to eight years' imprisonment plus a fine; passive bribery (Article 317), which carries a penalty of from one to eight years' imprisonment, plus a fine, and various offences of unjust enrichment by a public official under Article 9 of Law No. 8,429 of 1992, which attract administrative sanctions.

Information has been provided by the Brazilian authorities which indicates that the sanctions for other economic crimes, such as theft, fraud or embezzlement, are in a range broadly comparable to those for bribery of a foreign official. The basic offence of theft under Article 155 of the Penal Code attracts a penalty of from one to four years' imprisonment, plus a fine, though this is subject to increase for specified aggravating circumstances. Extortion involving violence or serious threat, under Article 158, is punishable by between four and ten years' imprisonment plus a fine. Obtaining an undue advantage by fraud, under Article 171, carries a penalty of between one and five years' imprisonment, plus a fine.

As noted above, there exist no criminal penalties applicable to legal persons for bribery of a foreign public official.

3.3 Penalties and Mutual Legal Assistance

Brazil does not require a certain length of imprisonment under the law of Brazil or the requesting state in order to provide mutual legal assistance (MLA) under the existing bilateral or multilateral agreements on MLA.

3.4 Penalties and Extradition

Pursuant to Article 77, clause IV of Law no. 6,815/80, which governs extradition, an extraditable offence is one for which Brazilian law imposes a penalty of imprisonment of more than one year. The foreign bribery offence under Article 337-B of the Penal Code meets this threshold.

¹⁰ Law Courts of the State of Mato Grosso, Rapporteur Shelma Lombardi de Kato, in *Revista dos Tribunais* 612, p. 353

3.5 Non-criminal Sanctions for Legal Persons

As discussed above (see 2.2 above), there exist certain administrative sanctions under Brazilian law applicable to the bribery of a foreign public official *per se*, and other administrative and civil sanctions which could have indirect application.

3.6 Seizure and Confiscation

Confiscation

Confiscation exists as a sanction under Brazilian law. Article 91 of the Penal Code provides:

The following are the effects of the sentence:

I – the obligation to make good the damage caused by the criminal offence becomes certain;

II – loss, to the Federal government, except as regards the right of an injured party or a third party in good faith:

a) of the instruments of the criminal offence, provided that they consist of things whose manufacture, sale, use, bearing or detention constitutes an illegal act

b) of the product of the criminal offence or of any good or security constituting a gain made by the offender from committing the criminal offence.”

The expression “loss, to the Federal government” appears to mean confiscation, and thus, clause II provides confiscation of instrumentalities and proceeds of a criminal offence. It provides that the “loss” (i.e. confiscation) is an “effect of the sentence”, which is imposed on the convicted offender, and does not expressly indicate that it can be imposed against a third party with the effect of depriving him/her of the possession of the instrumentality or the proceeds. The Brazilian authorities have explained that, by virtue of Article 91.II, clause a) or b), confiscation can be imposed against a third party who possesses the instrumentality or the proceeds of an offence, if that person is an accomplice or co-author of the offence. It is understood from doctrine that “confiscation can be applied only to something belonging to someone who has taken part in the crime.”¹¹ It cannot be imposed against someone who is a “third party in good faith”. Nor, apparently, can it be used against assets which are in the hands of an “injured party”, or which could be claimed by an injured party in satisfaction of a civil damages claim (because of the obligation on the offender to make good the damage).

It is also possible, according to the Brazilian authorities, for confiscation of a product or instrumentality of the crime to be imposed pursuant to Article 91 of the Penal Code against a legal person found to have benefited from a criminal act for which a natural person has been convicted. This requires a civil action to be instituted by the government as the injured party, but the findings of the court in the criminal case will be conclusive for the purposes of that civil action. There must be a finding that the legal person did not act in good faith, but benefited from the commission of the crime (for example, as the employer of the individual convicted). The Brazilian authorities stated that it was routine practice to make use of this process in bribery cases.

¹¹ Jose Frederico Marques, *Tratado de Direito Pena*, vol. 4, p. 300.

Clause II.a) provides for confiscation of instrumentalities. However, it does not allow for confiscation of a bribe in the active bribery context (i.e. confiscation of a bribe still in the briber's hand), since “manufacture, sale, use, bearing or detention” of money which had yet to be put to an unlawful use as a bribe would not constitute an illegal act. Its potential use in the commission of an offence is not sufficient.

Clause II.b) provides for confiscation of (i) “product of the criminal offence”, and (ii) “any good or security constituting a gain made by the offender from committing the criminal offence”. The Brazilian authorities explain that the “product” of a criminal offence is something obtained directly as a result of the criminal act or by means of its subsequent operation, created by the criminal offence, or acquired from the sale of stolen property. They have clarified that, in the case of foreign bribery, this could be interpreted to include something obtained as a result of the foreign public official's act done in return for the offer, promise or gift.

The term “product” covers anything directly acquired as the result of the crime, or money acquired from the disposal of something stolen, and can be any asset or security of monetary value.

As to confiscation under (ii) above, the Brazilian authorities state that “any good or security” covers any goods, including chattels, real property or security, and also any asset or security of an economic nature constituting the advantage taken by the offender from committing the criminal act. It remains unclear, however, how this would be quantified in a case where the advantage obtained is not in a monetary or tangible form.

The process for obtaining confiscation is set forth in Article 122 of the Penal Procedure Code. It provides that:

Without prejudice to the provisions of articles 120 and 133¹², when the period of 90 days following the final and unappealable sentence has elapsed, the judge will decree, if necessary, the loss to the Federal Government of the things apprehended (article 74, II, a and b of the Penal Code), and will order the things to be sold at public auction.

This provision is applicable to confiscation under Articles 91 II.a) and b), as this is the new numbering, following amendments to the General Part of the Penal Code made in 1984, of the provisions that were formerly Articles 74 II a) and b).

Article 122 of the Penal Procedural Code states that the judge will decree confiscation “if necessary”. The Brazilian authorities have explained that this does not mean that confiscation is discretionary: in all cases where there is an asset to be forfeited, the judge must order confiscation under Article 122. According to the Brazilian authorities, a judge may order confiscation at any time after a 90-day period has elapsed following the final and unappealable sentence, provided it is done “within a reasonable period”.

The Brazilian authorities have confirmed that there exist no other monetary sanctions of comparable effect which could be applied in cases where confiscation is not available.

In addition, the Brazilian authorities explain that confiscation under Article 91 of the Penal Code is available “even though the intended punishment is prescribed under the statute of limitations, in other words, if the penalty is prescribed before serving the penalty of deprivation of liberty”. This refers to the

¹² Article 120 provides for an order to be made for restitution to an injured party; and Article 133 allows an order to be made for the sale of assets at public auction from the proceeds of which the claim of an injured party can be satisfied.

limitations period for the execution of the sentence. Confiscation is only available where a penalty has been handed down, but it is not necessary for this to be a sentence of imprisonment.

Pre-trial seizure

The Brazilian authorities have explained that the possibility exists under Article 125 of the Penal Procedure Code of interim measures including pre-trial seizure of assets, but only for the purpose of securing and preserving evidence. They further explained that, under Article 126, seizure can be ordered by a judge at any stage of a criminal proceeding provided there is a clear indication of the illicit origin of the goods in question. It cannot be used post-conviction to secure the payment of a fine or for the purposes of confiscation.

3.7/3.8 Additional Civil and Administrative Sanctions

By virtue of Law No. 8,666 of 21 June 1993, which governs public procurement, penalties including suspension or exclusion from public tenders or contracts with the public administration are available (see 2.2 above) with respect to both natural and legal persons.

Under Article 92.I of the Penal Code, “the loss of position, public function or term of office” may apply to convicted natural persons, but only if specifically ordered by the court, where an imprisonment sentence of one year or more is ordered in cases of crimes of abuse of power or breach of duty with regard to the public administration, and, in all other cases, when a prison sentence of four years or more is imposed.

Furthermore, final and unappealable criminal sentences have effects in non-criminal spheres. Pursuant to Article 63 of the Penal Procedural Code and Article 584.II of the Civil Procedural Code, a criminal sentence may order civil remedies in favour of an injured party. This will be a valid basis for its execution through a civil lawsuit, once the sentence becomes final and unappealable.

4. ARTICLE 4: JURISDICTION

4.1 Territorial Jurisdiction

Article 4.1 of the Convention requires each Party to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.” Commentary 25 clarifies that “an extensive physical connection to the bribery act” is not required.

Brazilian criminal law applies to offences – including foreign bribery – committed within its territory because the Penal Code adopts the principle of territoriality. Article 5 of the Penal Code provides:

Brazilian law applies, without prejudice to conventions, treaties and rules under international law, to criminal offences committed within Brazilian territory.

The concept of territory, according to the explanation provided by the Brazilian authorities, includes not only the land within Brazil’s borders, but also, by extension, the state’s aircraft or ships, or those in the service of the Brazilian government, wherever they may be, and privately-owned ships or aircraft when on

the high seas or in international airspace. Brazilian criminal law also applies to offences committed on foreign ships or aircraft when in Brazilian territory.

The place where an offence is committed is determined according to Article 6 of the Penal Code:

The criminal offence is deemed to have occurred in the place where the act or omission, in whole or in part, occurred, as well as where the result was produced or planned to be produced.

For jurisdiction to be exercised, the Brazilian authorities explain that it is enough for the offence to have “touched” Brazilian territory, and that for this purpose it suffices if part of the criminal conduct has taken place in Brazilian territory, or if the result has taken place in Brazilian territory.

The Brazilian authorities do not provide any examples from case-law to illustrate how substantial such a “partial” link would have to be for jurisdiction to be exercised in a case of bribery. They have, however, confirmed that a telephone call, fax or email emanating from Brazil would be sufficient to establish jurisdiction over an offence of foreign bribery which mostly takes place elsewhere. The use of these means in Brazil to commit a crime which is consummated abroad is enough to found territorial jurisdiction, because part of the act will have taken place in Brazil.

4.2 Nationality Jurisdiction/Extraterritorial jurisdiction

Brazil’s Penal Code provides for extraterritorial jurisdiction, including nationality jurisdiction, in a broad range of cases. Article 7 lists a number of criminal offences over which the Brazilian courts have jurisdiction, even though they are committed abroad¹³. These include criminal offences committed by Brazilians, pursuant to clause II.b). Thus, Brazil has jurisdiction over its nationals who commit the offence of foreign bribery abroad. However, the expression “committed by Brazilians” does not include permanent residents of Brazil, who, unlike Brazilian nationals, are subject to extradition.

The conditions for establishing nationality jurisdiction are set forth in Article 7, clause II, paragraph 2, which states:

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 authorises 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 favourable law.*

The Brazilian authorities have explained that the manner in which the offender enters Brazil, whether voluntarily or through extradition, is not relevant for the purpose of subparagraph a).

Paragraph 2.b) imposes the requirement that the act must be “punishable” in the country where it was committed. According to Commentary 26, “the requirement of dual criminality should be deemed to be

¹³. Article 7, clause II paragraph 3 provides that Brazilian law applies to criminal offences committed by foreigners against Brazilians abroad, subject to certain conditions, but this does not appear relevant to the offence of foreign bribery.

met if the act is unlawful where it occurred, even if under a different criminal statute.” The Brazilian authorities have confirmed that, for example, the bribery of a foreign public official committed in that official’s country by a Brazilian national, in contravention of that country’s laws against domestic bribery, would be sufficient. Also, if a Brazilian national bribes a foreign public official from country A while in country B, the requirement will be met so long as the act constitutes any kind of punishable offence in country B, but not otherwise.

Aside from the question of dual criminality, the word “punishable” as used in paragraph 2.b) includes consideration of substantive factors such as the availability of defences, and also of procedural factors such as whether the statute of limitations (for prosecution) has expired. Paragraph 2 e) excludes cases where a pardon has been granted in the country where the act was committed, or the sentence “eliminated” (for example, because the limitations period for the execution of the sentence has expired). The Brazilian authorities have explained that these requirements derive from Article 5, clause XL of the Constitution, which lays down the principle that criminal law is not retroactive, other than for the benefit of the defendant, and that the law most beneficial to the defendant will be applied.

Paragraph 2.c) imposes the requirement that the offence is one which is extraditable under Brazilian law. The Brazilian authorities have confirmed that the bribery of a foreign public official is an offence to which extradition can be applied (see 10.1/10.2 below).

There are no additional, formal preconditions for the exercise of nationality jurisdiction, such as the consent or authorisation of the Minister of Justice.

4.3 Consultation Procedures

Article 4.3 of the Convention requires that, when more than one Party has jurisdiction over an alleged offence described in the Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

According to the Brazilian authorities, there is no express provision for consultation procedure. However, the Brazilian authorities have explained that the handling of such cases will depend on whether there is a bilateral or multilateral agreement in place providing for mutual legal assistance and extradition. Consultation is possible in the context of these agreements. Brazil also operates a system of direct consultation and cooperation with some states between the respective central authorities. Brazil has confirmed that there is no legal obstacle to its consulting with all the Parties to the Convention, either by an agreement, by direct consultation, or by the use of diplomatic channels.

4.4 Review of Basis of Jurisdiction

Brazil believes that its system of jurisdiction is effective, providing both for territorial jurisdiction over offences committed only partially in Brazilian territory as well as those that produce or were intended to produce results there, and also for jurisdiction over Brazilian nationals committing offences abroad.

5. ARTICLE 5. ENFORCEMENT

Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be “subject to the applicable rules and principles of each Party”. It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official “shall not

be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”.

5.1 Rules and Principles Regarding Investigations and Prosecutions

There are no special rules or principles governing investigations and prosecutions of the bribery of foreign public officials. The investigation and prosecution of this offence are initiated, suspended and terminated pursuant to the general rules set forth in the Penal Procedural Code.

According to *Criminal Justice System—Brazil* by Pedro Scuro Neto, Ph.D.¹⁴, the police are responsible for ordering and undertaking the investigation, screening cases for whether to prosecute or drop them, and notifying the defendant of the charges; the Public Prosecutor’s Office which then receives the case decides whether to proceed with the case, or send the case back to the police for further investigation. The Brazilian authorities have explained that the police investigation is an administrative procedure, informative in nature.

Brazil states that under the Penal Procedure Code, criminal proceedings consist of two stages: a “preparatory stage” in which the police conduct investigations, and a “procedural stage” involving the prosecutor, the accused and the court. The act which has the effect of taking the case from the “preparatory” to the “procedural” stage is the receipt by the court of the initial complaint brief or “accusation” in which the Public Prosecutor’s Office submits the indictment. This step is required under Article 24 for “crimes involving a public action”, which includes the offence of foreign bribery. The “accusation” has to contain a detailed account of the facts and conduct of the accused which make up the offence alleged.

Article 24 also refers to the need for a request by the Ministry of Justice or by the victim before an “accusation” may be brought. The Brazilian authorities have explained that this has no application to foreign bribery, but only to limited categories of crime where prosecution is conditional upon the interests of the victim being represented.

In Brazil, the police and the Public Prosecutor’s Office are obliged to take action on a criminal case, in principle. Pursuant to Article 5, the police inquiry will be initiated *ex officio* or by a request from the judicial authorities, the Public Prosecutor’s Office, or the victim (or his/her authorised representative) for “the crimes of a public case” (which includes the foreign bribery offence). Pursuant to paragraph 3 of Article 5, any person may inform the police of knowledge of a criminal offence which is subject to public prosecution, and the police, after checking the source of the information, will order the institution of the investigation. Article 17 states that the police may not order the records of an investigation to be terminated.

Further, Article 42 appears to lay down the principle of mandatory prosecution.

The Brazilian authorities state that the termination of criminal proceedings can only take place through a request to a judge. They state that only the Public Prosecutor’s Office can request a judge to terminate a police investigation: the Prosecutor’s Office is the body responsible for the criminal case, and is thus responsible for checking whether there are sufficient elements. Article 28 states that if the judge considers that the reasons for the request for termination are unfounded, he/she will send the case to the Attorney General, who will then present an “accusation” (or designate another prosecutor in the Public

¹⁴. This information was taken from the following website:
<http://www.conjunturacriminal.com.br/biblioteca/Brazil%20-%20Criminal%20Justice%20System.htm>

Prosecutor's Office to do so), or accept the request for termination. The judge is bound by the decision of the Attorney General.

Pursuant to Article 43, an "accusation" (*denúncia*) or "complaint" (*queixa*) will be rejected where the facts obviously do not constitute a crime (paragraph I), where there is no punishability due to expiration of the limitations period or any other reason (paragraph II), or where the "accusation"/"complaint" was made by a non-competent authority or in the absence of the conditions required by law for conducting criminal proceedings (paragraph III)¹⁵. It would appear from the explanation given by the Brazilian authorities that "the conditions required by law" refer to such matters as the legitimacy of and interest in prosecuting; the showing of "fair cause" (a minimum amount of supporting evidence as to the facts and the person); any requirement of dual criminality, and the availability of a judge with competence.

The Brazilian authorities explain that the factors listed in Article 43 would also in practice govern decisions to request the termination of an investigation, and the decision of the Attorney General in respect of any such request. A request to shelve an inquiry based on considerations of public interest would, they state, be inappropriate, and, because of the requirement in Article 93 XI of the Constitution that any legal or administrative decision must be properly grounded, the arbitrary shelving or suspension of cases is only a remote possibility.

Pursuant to Article 366, the proceedings will be suspended where the duly summoned defendant fails to appear and does not appoint a lawyer¹⁶.

A decision to shelve a police inquiry is, according to the Brazilian authorities, not subject to appeal, but if new evidence comes to light the inquiry must be reactivated, and the Public Prosecutor's Office must bring a criminal case if fresh evidence is actually produced.

There is a procedure available under Article 29 of the Penal Procedural Code whereby, in a public criminal case where the prosecutor has neither proposed the shelving of the case nor made an "accusation" within a fixed time limit, a victim may initiate a case, with respect to which the Public Prosecutor's Office continues to have certain obligations.

According to *Criminal Justice System—Brazil*, there is no plea-bargaining under law, but in major jurisdictions, there has been pre-trial resolution through a bargain between the prosecutor and the defence counsel to plead guilty in exchange for a shorter sentence, without involving a judge. This practice has not been confirmed by the Brazilian authorities. They explain that reduction or cancellation of the penalty is provided for in specified circumstances under the laws relating to money laundering, criminal organisations and victim and witness protection, but that these would not be applicable to foreign bribery.

Brazilian law also allows for conditional suspension (also known as "procedural probation") of cases where the minimum penalty is no more than one year, which could at least in principle apply to foreign bribery. Where the accused has not been convicted of any other crime and fulfils certain other requirements, the Public Prosecutor's Office may request the court for the suspension of the case from between two and four years, on conditions to be set by the court. Under Article 89, paragraph 1, of Law No. 9,099 of 1995, the legal conditions for such a suspension are, essentially, that the offender remedy the damage where possible; that the offender is prohibited from frequenting certain places and being absent

^{15.} However, pursuant to the sole paragraph of the same Article, the rejection of the case under paragraph III will not prevent criminal proceedings in the case when they are brought by the competent authority or when the conditions are met.

^{16.} Under Article 366, it appears that the statute of limitations is also suspended during the suspension of the proceedings.

from the district of the crime without court authorisation; and that the offender appear monthly in person before the court. If the offender fails to comply, the court must revoke the suspension and the case is sent back to the Public Prosecutor's Office to proceed with the criminal case. The courts have interpreted the minimum penalty requirement restrictively, so as to exclude the application of suspension from cases where the charges cumulatively carry a higher penalty.

5.2 Considerations such as National Economic Interest

The Brazilian authorities state that Brazilian criminal law does not accept political or economic interests as a reason for not proceeding. They state that the prosecuting authorities are fully independent, and that only the legal rules are relevant to their decision. The other factors enumerated in Article 5, such as national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved could not be relevant as considerations in the investigation and the prosecution of foreign bribery cases.

6. ARTICLE 6: STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

In Brazil, the statute of limitations is twelve years in the case of the offence of foreign bribery. This is the same as for domestic bribery. Under Article 109 of the Penal Code, the statute of limitations is determined by the length of the term of imprisonment available for the crime in question: the longer the term of imprisonment available, the longer the limitations period. In the case of crimes carrying a maximum penalty of not less than four but not more than eight years' imprisonment, the limitations period provided under Article 109, clause III is twelve years. Foreign bribery falls within this category of offences.

Article 111 provides that the limitations period begins to run "from the day the crime was committed". The Brazilian authorities have confirmed that for the foreign bribery offence, it starts to run when the offer, promise or gift of a bribe is made. In the case of an attempt, it begins to run "on the day criminal activity ceased."

Article 116, clause I, provides that the limitations period does not run as long as "*any question depending on the recognition of the existence of the crime, in another case, has not been resolved*". This is explained by the Brazilian authorities as referring to fundamental matters which have to be established in a different court proceeding before it is clear that a crime has been committed (eg. the validity of a marriage in a case of bigamy). It does not apply to foreign bribery cases.

Under clause II, the limitations period does not run while the offender is serving a sentence abroad.

In the event that a person is duly summoned to appear in answer to a criminal charge, and fails to do so and does not appoint a lawyer, Article 366 of the Penal Code provides that the proceedings will be suspended. The limitations period is also suspended during the suspension of the proceedings.

The running of the limitations period is interrupted in certain circumstances. Article 117 of the Penal Code provides:

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 a verdict of guilty, which is appealable against;*
- V – by the beginning or continuation of serving the penalty;*
- VI – by an act of recidivism.*

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

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

Unlike other articles, this part of Article 117 does not expressly distinguish whether each clause applies in respect of the limitations period for prosecution (i.e. before a final and unappealable sentence) or for execution of a sentence (i.e. after a final and unappealable sentence). However, the Brazilian authorities have confirmed that clauses I to IV are applicable to the limitations period for prosecution, and clauses V and VI stop the limitations period running in respect of the carrying out of the sentence.

Under paragraph 2, a new limitations period starts to run after each interruption (except under clause V) and thus, for an offence of foreign bribery, a fresh twelve-year period begins to run on the date of “accusation” or “indictment”, etc.

The Brazilian authorities also refer to the possibility that the limitations period might be “altered in accordance with the judge’s tangible setting of the penalty”. This refers to the so-called retroactive limitations period, whereby, pursuant to Article 110 of the Penal Code, the limitations period for carrying out the sentence will be determined by the length of the penalty actually imposed.

There are no mandatory deadlines with regard to the conduct of investigations and prosecutions.

7. ARTICLE 7: MONEY LAUNDERING

Article 7 of the Convention provides that, if a Party has made bribery of its own public official a predicate offence for the purpose of its money laundering legislation, it shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

The Money Laundering Offences

Bribery of a domestic and foreign public official are predicate offences for the purposes of Brazil’s money laundering legislation by virtue of Law No. 9,613 of 3 March 1998, as amended by Law No. 10,467 of 2002. Article 1 defines the offences of money laundering as follows:

To conceal or disguise the true nature, origin, location, disposition, movement or ownership of assets, rights and valuables that result, directly or indirectly, from the following crimes:

-
- V – against the Public Administration, including direct or indirect demands, on behalf of oneself or others, of benefits, as a condition or price for the performance or omission of any administrative act;*
-

VIII – committed by a natural person against a foreign public administration (articles. 337-B, 337-C and 337-D of Decree-Law No. 2,848, of 7 December 1940 – Penal Code).

Further, paragraphs 1 and 2 of the same Article provides:

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

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

Paragraph 2 The same penalty also applies to anyone who:

- I. Through economic or financial activity, makes use of any assets, rights and valuables that he/she knows are derived from the crimes referred to in this article;*

.....

Bribery of a domestic public official is a “crime against the Public Administration” and the offence of bribery of a foreign public official under Article 337-B of the Penal Code falls within the chapter of “crimes committed by individuals against a Foreign Public Administration”. Also, since the offences defined in paragraphs 1 and 2 refer to “crimes set forth in this article”, both domestic and foreign bribery offences qualify as predicate offences for all the money laundering offences as defined in Article 1 of the No. 9,613 of 1998.

The Brazilian authorities have explained that there is no reason in principle why a foreign bribery offence for which only a legal person had been prosecuted, convicted, etc. in another jurisdiction (i.e. one which allows for the criminal responsibility of legal persons) would not qualify as a predicate offence for money laundering under Article 1, though there are no cases on the point.

The term “assets, rights and valuables” is broad in scope and would, according to the Brazilian authorities, be interpreted to cover all kinds of pecuniary assets, whether tangible or intangible.

Since each offence refers to laundering of assets, etc. “resulting from” or “derived from” the predicate offence, it would appear that where the predicate offence is foreign bribery (i.e. active bribery), laundering of the proceeds of a bribe (i.e. proceeds) would be covered. As to the bribe itself, (i.e. instrumentality), this would still be covered, according to the Brazilian authorities, as it would be the proceeds of a concomitant passive bribery offence.

The language of the offences of money laundering would suggest that they cover both the laundering of the proceeds resulting/derived from a predicate offence committed by the launderer (i.e. “self-laundering”), or by a third party.

The offences in the principal paragraph and paragraph 1 do not refer to the state of the mind of the offender, whereas paragraph 2, clause I requires that the offender “know” that the assets, etc. are derived from “the crime referred in this article”. According to the Brazilian authorities, the state of mind required in respect of paragraph 2.I (i.e. “know”) is part of the intrinsic definition of the offence itself. It does not cover cases where the offender simply believed or was wilfully blind but did not know that the assets, etc. were derived from the predicate offence. The standard is the same as that applicable to offences of felonious receiving, on which case-law exists. According to one such case, “it is necessary that the

offender be aware of the criminal origin of the thing acquired; it is not sufficient to have doubts about this origin.”¹⁷ The “knowledge” does not have to be knowledge of the specific predicate offence (i.e. foreign bribery), but can be of any one of the listed predicate offences. The state of mind required for other money laundering offences under Article 1 is, according to the Brazilian authorities, the same.

Pursuant to Article 2, judicial proceedings or sentencing of the money laundering offences is not dependent on judicial proceedings and sentencing for the predicate offence, even if these crimes were committed abroad. Pursuant to paragraph 1 of the same Article, although the charge must include sufficient indications of the existence of the predicate offence, the acts of money laundering under Article 1 shall be punishable even when the offender of the predicate offence is unknown or exempt from punishment. The Brazilian authorities have confirmed that there is no need for a conviction for the predicate offence in order to charge someone with a money laundering offence.

Article 2 provides for offences to be prosecuted “even though committed in another country”. The Brazilian authorities stated that they knew of no cases where any distinction had been made on the basis of the place where the predicate offence occurred, or of dual criminality.

The penalty is imprisonment from three to ten years and a fine, for the offences under Article 1. An attempt to commit the offences is punishable pursuant to the general rule prescribed in Article 14 of the Penal Code (paragraph 3).

Pursuant to paragraph 4, the sentence shall be increased by one to two-thirds where the predicate offence is among those listed under clauses I to VI and the “crime follows a constant pattern” or is committed by a criminal organisation. Since the predicate offence of domestic bribery is listed in clause V and foreign bribery in clause VIII, this increase in penalties is applicable where the predicate offence is domestic bribery, but not where it is foreign bribery. The Brazilian authorities explained that, according to available statistics, the offences under clauses I to VI had been shown to occur frequently, and showed a constant pattern which required the imposition of additional penalties as a matter of overall deterrent policy. It remains open to the authorities to introduce the same additional penalties for foreign bribery when more statistics are available about the occurrence of the offence, but for the present, there is insufficient experience on which to base such a decision.

Pursuant to paragraph 5, the sentence may be reduced by one or two thirds (or may take other less onerous forms¹⁸), where the offender, including an accomplice, voluntarily cooperates with the competent authorities by providing information that leads to the detection of a crime and the identification of the perpetrator/participants, or the discovery of assets, etc. which are the object to the offence.

Law No. 9,613/98 further provides for the pre-trial seizure and forfeiture of assets, rights and valuables (Articles 4 and 7). Moreover, assets, etc. resulting from predicate offences committed abroad may be seized, upon the request of a competent foreign authority, on the basis of the relevant treaty/convention or reciprocity (Article 8).

Reporting Obligations

Law No. 9,613/98 sets out a regime of requirements for customer identification, record keeping, and reporting suspicious or large transactions, and lists the categories of institution to which the rules apply.

¹⁷ Law Courts of the State of Mato Grosso do Sul, Rapporteur Rui Garcia Dias, in *Rivista dos Tribunais* 619, page 347.

¹⁸ Other less onerous forms include the substitution of a penalty for the restriction of rights.

This Law also set up the Council for Financial Activities Control (COAF) under the Ministry of Finance, a financial intelligence unit with the function of administering compliance with these obligations by entities not already under the jurisdiction of some other regulatory body.

Article 9 enumerates the categories of institutions subject to these obligations, including reporting obligations. These include an entity engaging, as a principal or secondary activity, in brokering and investment of funds; purchase and sale of foreign currency and gold as a financial asset; brokers, issuers and negotiators in securities; stock, commodities and futures exchanges; insurance companies and brokers and pension providers; credit card and consumer credit administrators; administrators of electronic or magnetic cards allowing the transfer of funds; companies engaged in leasing and factoring; lottery administrators; real estate agents; and those trading in jewellery, precious stones and metals, objects of art, and antiques. The list does not include professions that have certain roles in financial activities carried out by such entities, such as lawyers, accountants and tax consultants.

Article 10 requires the entities provided in Article 9 to identify their customers and to keep records of transactions prescribed by the competent authorities for at least five years.

Article 11 sets out the reporting requirements of suspicious transactions, etc. Under Article 11, the entities provided in Article 9 shall pay special attention to any transaction that may represent “serious indications” of a predicate offence under Article 1 or that may relate thereto, and shall inform the “competent authorities” of the transaction (including its proposal). The reporting entities are also subject to the obligation of reporting prescribed large transactions to the “competent authority”. Pursuant to paragraph 3, the “competent authority” that receives such reports is the relevant regulatory agency, or the COAF in respect of the entities which are not subject to a particular regulatory authority.

Article 12 provides for administrative sanctions applicable to legal entities and their managers for non-compliance with these obligations, to be applied by the “competent authorities”. These are: a warning, a fine [from one percent to twice the amount of the transaction, up to two hundred percent of the profits derived (or presumably obtained) from the transaction, or up to BRL 200 000¹⁹], temporary disqualification from holding a position in the management of the legal entities subject to the obligations, and cancellation of the authorisation to operate.

8. ARTICLE 8. ACCOUNTING

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibit the making of falsified or fraudulent accounts, creating statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

8.1.1/8.2.1/8.3.1 Books and Records/Accounting Requirements

There are two accounting frameworks in Brazil, for companies and for the accounting profession, respectively. The Companies Law, No. 6,404, applies to all corporations irrespective of the fact that their shares are traded or not on the open market. Listed companies are also governed by the rules of the

¹⁹. As of March 2003, 1 Brazilian real valued at USD 0.29 or EUR 0.27. Therefore, BRL 200 000 is approximately, USD 58 000 or EUR 54 000.

Securities and Exchange Commission (CVM). Other companies are covered by Law 10,406 of 2002 (Civil Code, Book II, Title III, Chapters III and IV, articles 1,177 to 1,195). The accounting profession is governed by the rules of its professional body, the Federal Accounting Board [Conselho Federal de Contabilidade (CFC)], which are binding on accountants but not on companies.

As to the maintenance of books and records, Article 177 of Law No. 6,404 requires corporations to maintain permanent bookkeeping records, in conformity with commercial legislation and with “generally accepted accounting principles”. Article 1,179 of the Civil Code requires businesses and companies to maintain a uniform system of bookkeeping. Article 1,180 makes it obligatory to keep a daily journal. By Resolution No. 563 of 28 October 1983, the CFC approved Brazilian Accounting Standard T2 which requires a uniform system of bookkeeping of administrative and commercial transactions based on a journal and a ledger, using a manual, automated or electronic system.

Brazil has confirmed that these provisions do not contain an express prohibition of the establishment of off-the-books accounts, or of the activities referred to in Article 8 of the Convention. However, they cite Law n° 7.492/86 , which provides a sanction of imprisonment and fine for any person that "Art. 11. Maintains or transfers resources or values in parallel to the legal accounting requirements: Sanction – Imprisonment, of 1 (one) to 5 (five) years, and fine." The Brazilian authorities also cite Articles 153 and 154 of the Companies Law, which lay down certain standards of conduct for directors, but do not contain any such specific prohibition. Article 158 of the same law provides that directors are civilly liable for any losses they cause by acting within the scope of their powers but with felonious intent, or by acting illegally.

Brazil cites several other laws which could address the prohibition of off-the-books accounts.

Pursuant to Article 1 of the Law No. 4,729/1965, falsifications with the intention to evade tax payments or defrauding the Treasury, by means of introducing inaccurate elements or omitting income or transactions in the documents or books required by tax law, furnishing or issuing false documents, altering or increasing expenses, or altering invoices or other documents relating to commercial transactions, etc. constitute an offence of tax evasion punishable by a deprivation of liberty from 6 months to 2 years and a fine from two to five times the amount of the tax. Pursuant to Article 1 of the Law No. 8,137 of 1990, evading tax or other social or ancillary payments by means of omitting information, providing a false declaration to the Treasury authorities, introducing inaccurate elements or omitting transactions of any nature in the documents or books required by tax law, falsifying or altering invoice or other documents relating to a taxable transaction, or preparing, distributing, furnishing, issuing or making use of false or inaccurate documents, etc. constitutes an offence against the tax system punishable by a deprivation of liberty from 2 to 5 years and a fine. These prohibitions and penalties are restricted to falsifications for tax purposes. The criminal penalties under Law No. 4.728/65 and Law No. 8,137 of 1990 apply to all natural persons.

Pursuant to Article 72 of the Law No. 4,728/1965, corporations subject to capital markets regulation are prohibited from recording, producing, etc. enterprise documents (e.g. documents representing shares) without written and signed authorisation by the relevant legal representatives. According to Brazil, the penalty for a violation of this provision is deprivation of liberty from 1 to 4 years. However, its application is limited to listed companies using the capital markets and companies forming part of the system of distribution and intermediation of securities, and moreover, it does not directly address the prohibition of off-the-book accounts.

Article 188 of the Decree-Law No. 7,661/45 requires “debtors” not to misrepresent their financial information. For instance, it prohibits misrepresenting share capital in order to obtain larger loans, misrepresenting expenses related to debts and of losses, material misrepresentation of accounting entries, the alteration of actual accounting entries, omission in accounting entries of postings that should have been

applied, or false posting, or a posting that is different from that which should have been made and the destruction, nullification or suppression of compulsory books of account. The penalty for its violation is deprivation of liberty from 1 to 4 years. However, the application of this Decree-Law is limited only to the event of a bankruptcy.

In addition, certain provisions in the Penal Code apply to the generation or creation of false source documents or underlying supporting documentation. Pursuant to Article 297, falsifying, in all or in part, a “public document”, or altering a “genuine public document” is punishable by deprivation of liberty from 2 to 6 years, and a fine. Pursuant to paragraph 2 of Article 297, certain documents, including “accounting records” are deemed to be equivalent to a “public document”. Article 298 provides for penalties of deprivation of liberty from 1 to 5 years for such acts with respect to a “private document”. Moreover, Article 299 penalises omitting in a “public or private document” any declaration that ought to be made, or including or causing to include in such a document a false declaration or one different from that to be included, in order to damage the law or to create or alter the truth as to a “legally relevant fact”. Penalties are deprivation of liberty from 1 to 5 years and a fine, with respect to a “public document”, and deprivation of liberty from 1 to 3 years and a fine, with respect to a “private document”. Furthermore, Article 304 applies to the use of any falsified or altered documents referred to in these articles. Penalties are equivalent to those for falsification and alteration prescribed under relevant articles. The Brazilian authorities state that these provisions apply to the activities of all types of enterprises, but only natural persons are subject to the criminal penalties (see the discussion under 2.1 “Criminal Responsibility”).

As to accountants, Article 24 of CFC Resolution No. 825, of 30 June 1998, made it an infringement of professional standards to “breach any of the Generally Accepted Accounting Principles and the Brazilian Accounting Standards”, as well as “to carry out, in the exercise of his or her professional business, any act defined in law as a crime or infringement”. Penalties range from a fine to suspension and possible cancellation of professional registration.

8.1.2/8.2.2/8.3.2 Auditing and Auditors

Law No. 6,385, of 7 December 1976, which governs the securities market, requires in Article 26 that the accounts of listed companies, and other companies forming part of the system of distribution and intermediation of securities and regulated by the CVM, be audited. Audits may only be carried out by audit firms or independent accounting auditors registered with the CVM. These auditors are subject to the rules of the CVM and the CFC, and also the Independent Auditors’ Institute (IBRACON), with regard to professional conduct.

According to the Brazilian authorities, auditor rotation is a mandatory requirement, based on their belief that providing audit services to the same client for a long length of time may damage the quality of auditing or the independence of auditors. Article 31 of the CVM Normative Instruction no.308, of 14 May 1999, bans the provision of services to the same client for more than five consecutive years, and requires an interval of three years before being rehired. This rule is applicable only to external independent auditors for listed companies, and other organizations under the control of the CVM. The CVM Normative Instruction has the force of law within the securities market. The Brazilian authorities state that the Brazilian Central Bank adopts the same procedure for financial institutions.

Under Article 11 of the Law no. 6,385/1976, the CVM may impose penalties on auditors and audit firms, including warnings, fines, suspension or cancellation of authorization or registration, where they acted in breach of Law no. 6,385/1976, the Companies Law or other relevant laws or regulations, which according to the Brazilian authorities, include cases where he/she acts in breach of legal and regulatory

rules governing the securities market, carries out an incompetent or fraudulent audit, falsifies information, or withholds information that ought to be disclosed.

The rules on independence of auditors, approved by the CFC in Resolution No. 821/97, prohibit an auditor from auditing any entity if he or she has, in relation to that entity or its associated companies, subsidiaries, parent company or members of the same economic group, a close blood relationship with any director or shareholder, a recent working relationship, a direct or indirect financial interest, or any other function or position which gives rise to a conflict of interest. The Brazilian authorities have explained that, furthermore, an auditor may not buy or own shares in the entity audited. CVM Instruction No. 308/99 prohibits the provision by an auditor of certain consultancy services to audit customer companies. Organisations regulated by the CVM are obliged, pursuant to Instructions No. 381 and 386, to disclose the fees paid to non-audit services and the proportion this represents of fees paid to the same auditor for audit services.

According to the Brazilian authorities, an independent auditor must endeavour to uncover any frauds and mistakes that might significantly affect the financial statements of the company being audited, and is obliged to communicate them to the directors, as well as to suggest corrective measures. The test appears to be one of materiality. Aside from this, there is no express requirement for an auditor to report suspected criminal activity to the investigative/prosecuting authorities.

For organisations registered with the CVM, the independent auditor's opinion must be published along with the financial statements pursuant to Article 133 of Law no. 6,404, and to CVM Instruction No. 202/93 as amended.

9. ARTICLE 9: MUTUAL LEGAL ASSISTANCE

Article 9.1 of the Convention mandates that each Party cooperate with the others to the fullest extent possible in providing "prompt and effective legal assistance" with respect to criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention.

In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with regard to criminal matters. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence in respect of which assistance is sought is within the scope of the Convention. Further, Article 9.3 requires that a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

9.1.1 Criminal Matters

Generally, the ability to provide mutual legal assistance under Brazilian law depends on the existence of a bilateral or multilateral agreement on MLA with the country in question. Brazil has 27 bilateral accords, including those still in the course of negotiation.

The Brazilian authorities state that the Ministry of Justice is currently preparing a Bill on the subject of mutual legal assistance, which would enable Brazil to provide MLA to a country with which Brazil has not concluded an agreement on MLA, solely on the basis of reciprocity.

The Brazilian authorities have explained that Article 9 of the Convention is self-executing in Brazil because it does not require the enactment of a criminal law in order to give it effect. Therefore, the Convention itself affords a sufficient basis for mutual legal assistance to be granted, provided there is reciprocity. The existence of a bilateral or multilateral agreement with another Party facilitates the procedure, but has no implications as to the substance of the request.

Brazil is a party to a number of multilateral mutual assistance agreements, and it has concluded bilateral treaties on international legal cooperation with Argentina, Belgium, Spain, the United States, France, Italy, Portugal and Japan. Bilateral treaties are in the course of negotiation with Australia, Austria, Bulgaria, Canada, Germany, Greece, Hungary, Luxembourg, New Zealand, Poland, Spain, Switzerland and the United Kingdom.

Brazil's treaties on mutual legal assistance typically cover the taking and production of evidence, including depositions by suspects and witnesses, expert evidence, and the examination of people, goods and places; the production of documents, records and goods; the location or identification of people and goods; precautionary measures such as search and seizure of goods and the transfer of confiscated goods.

9.1.2 Non-Criminal Matters

As to whether mutual legal assistance is available, with or without a formal agreement, in respect of non-criminal proceedings against a legal person, such as the types of administrative proceeding described above in connection with Articles 2 and 3 of the Convention, the Brazilian authorities explained that, in practice in most cases, there would be an individual involved against whom a criminal charge could be brought, but there was no reason why cooperation would not also be given in relation to civil proceedings. However, there is at the present time no clear indication of the basis on which Brazil could seek evidence located overseas in connection with its own administrative proceeding against a legal entity involved in foreign bribery.

9.2 Dual Criminality

Whether or not dual criminality is required depends on the language of the agreement in question: some of Brazil's agreements contain no such requirement, while in others it is an express condition²⁰.

The Brazilian authorities have explained that the requirement for dual criminality has been broadly interpreted, where it exists, and is satisfied even if the offence is differently characterised, as one of domestic bribery. They cite case law which states that the necessary common factor is "offering or giving to a public official an undue advantage to carry out his functions".²¹ Thus, there is no requirement that foreign bribery has to have been an offence under Brazilian law or the law of the other country (or for the Convention to have been in force) at the time it was committed.

²⁰ The Brazilian authorities cite the Bilateral Agreement for Legal Assistance in Criminal Affairs entered into with France as an example of an agreement imposing a requirement of dual criminality. The agreements in place with the United States, Italy and the MERCOSUR countries contain no such requirement.

²¹ Federal Supreme Court. Rapporteur Francisco Rezek, in *Diario de Justicia da Uniao* of 5 December 1997, pages 63,903-63,904).

9.3 Bank Secrecy

Brazil states that it would not be possible for Brazil to decline to provide mutual legal assistance in criminal matters under the Convention on grounds of bank secrecy.

In Brazil, banking confidentiality has been interpreted by the Federal Supreme Court as a constitutional guarantee pursuant to Article 5, clauses X and XII of the Federal Constitution. Banks and other financial institutions are specifically bound to respect the confidentiality of their customers' affairs by Complementary Law No. 105 of 10 January 2001.

Exceptions to this rule are, however, allowed both by case-law and by the provisions of the same statute. The Brazilian authorities explain that breaking banking confidentiality depends on legal authorisation and may be decreed only where there are well-grounded elements for suspicion of the possible commission of criminal offences. Except where expressly provided by statute, this requires the ruling of a judge in each case.

Complementary Law No. 105/2001 provides, in Article 1, that financial institutions shall maintain confidentiality with regard to transactions and services. There are two types of exception to this rule. The first is that category of disclosures which, according to Article 1, paragraph 3, "do not constitute breaches of the obligation for confidentiality". These situations do not require a court ruling to authorise disclosure, but there is no indication of the level of authority required to take the decision to disclose. These situations include, under clause IV, "communication to the competent authorities of the commission of illegal criminal or administrative acts, covering the supply of information on transactions involving money deriving from any criminal act." The Brazilian authorities have confirmed that this exception allows an official at the financial institution to disclose information in relation to any criminal offence, including foreign bribery, if the information is about "transactions involving money deriving from any criminal act".

The second category of exception to the general rule is described in Article 1, paragraph 4. It provides that: "*Breaking confidentiality can be decreed, when necessary for establishing the occurrence of any illegal act, in any stage of the investigation or of the court case, and especially in the case of the following crimes:.....VI. -- against the Public Administration...*"

This provision would clearly cover cases where the crime in respect of which MLA was sought was the bribery of a domestic public official, which is a crime against the Public Administration. Although the foreign bribery offence may be an "illegal act", there is no express mention of crimes against the Foreign Public Administration in the enumeration of the relevant offences. However, the Brazilian authorities have explained that the list is illustrative, but not exhaustive, and that an order lifting bank secrecy could be granted in the case of bribery of a foreign public official.

The Federal Supreme Court has further ruled, in the context of bribery, that "the constitutional legal system...authorizes breaking bank confidentiality by means of advance legal authorization, where the need for the measure is justified for the purpose of a criminal investigation or fact-finding in criminal proceedings. Breaking banking confidentiality is not illegal when properly determined by the competent legal authority, grounded on the need to establish the origin of the money offered as a bribe in the criminal offence of active bribery."²²

In any event, the Brazilian authorities explain that an order lifting bank secrecy requires demonstration of a "relevant public interest" and "a fact establishing, at least in principle, the existence of a crime." The Brazilian authorities explain that, in the context of MLA, this would require the requesting

²². ROMS 10097/DF Rapporteur Minister Vicente Leal, 6th Court, DJ: 15 May 2000, page 00202

state to show that well grounded reasons existed for lifting bank secrecy. One of the cases cited states that “there is no way of alleging that the breaking of banking confidentiality ruled by a competent legal authority is arbitrary and illegal, if there are sufficient signs of the supposed occurrence of a crime subject to a public criminal action, which is being investigated in a competent police inquiry.”²³ According to the Brazilian authorities, requests for lifting bank secrecy are processed the same way as other requests for MLA. Such requests generally require legal authorisation, as they would for domestic legal purposes, because of the right to privacy enshrined in the Constitution. Brazil has confirmed that its legislative provisions on banking secrecy in no way restrict Brazil’s ability to provide MLA to other Parties to the Convention.

It appears from the language of the statute that a judicial order lifting bank secrecy would not be granted in connection with non-criminal proceedings against a legal person. According to the Brazilian authorities, there would need to be at least an investigatory procedure in order to justify a breach of banking secrecy.

10. ARTICLE 10: EXTRADITION

10.1/10.2 Extradition for Bribery of a Foreign Public Official/Legal Basis for Extradition

Article 10.1 of the Convention provides that bribery of a foreign public official shall be deemed to be an extraditable offence under the laws of the Parties and the treaties between them. Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official.”

Brazil states that bribery of a foreign public official is an offence for which extradition can be granted within the scope of its laws and extradition treaties with other Parties to the Convention. The legal basis for extradition in Brazil, and the situations under which it may not be granted, are contained in Law No. 6,815 of 19 August 1980. Article 76 sets out the general rule which states that extradition may be granted when the requesting state bases its request on a treaty²⁴, or when it promises reciprocity to Brazil. In addition, in the absence of a treaty, Brazil confirms that it would consider the Convention the legal basis for extradition with regard to the offence of bribery of a foreign public official, subject to the condition of reciprocity of treatment.

Article 77 provides the conditions for extradition. Pursuant thereto, extradition will not be granted when:

- The subject is Brazilian, except if he/she has acquired this nationality by naturalisation after the commission of the criminal offence giving rise to the request (clause I);
- The reason for the request is not considered a crime in Brazil or in the requesting state (dual criminality) (clause II);
- Brazil has the right, pursuant to its laws, to try the criminal offence imputed to the person to be extradited (clause III). This clause applies, according to the Brazilian authorities, where Brazil

²³ Federal Supreme Court, Rapporteur Felix Fischer, in *Diario de Justicia da Uniao* on 14 October 2002, page 240.

²⁴ Parties with which Brazil has concluded a bilateral treaty on extradition are: Argentina, Australia, Belgium, Chile, Italy, Mexico, Portugal, Spain, Switzerland, the U.K. and the U.S.

has jurisdiction, either on a territorial or nationality basis, over the person whose extradition is sought. If the case falls within the exception in this clause and extradition is denied, there is an obligation to exercise that jurisdiction to investigate and pursue the case in Brazil. In practice, as explained by the Brazilian authorities, all such cases are sent to the Ministry of Justice and the Federal Public Prosecutor's Office for them to take the appropriate steps.

- Brazilian law imposes a penalty of deprivation of liberty equal to or less than one year (clause IV). With regard to this requirement, foreign bribery attracts a term of between one and eight years in Brazil, and is thus not excluded;
- The party to be extradited is about to go to trial or has already been found guilty or not guilty in Brazil for the same criminal offence as that on which the request is based (clause V);
- The criminal offence is no longer punishable under the statute of limitations pursuant to Brazilian law or that of the requesting state (clause VI);
- The criminal offence is “political” (clause VII). Pursuant to paragraphs 1 and 2 of the same Article, this ground for refusal, for the purpose of which the Federal Supreme Court alone decides the nature of the offence, would not impede extradition where the offence mainly constitutes a breach of common criminal law, or where the common criminal offence connected to the political offence, constitutes the main fact. The Brazilian authorities have confirmed that foreign bribery would not be characterised as “political” where, for example, the bribe was given for political motives or destined to be paid as a contribution to a political party in the requesting country: the test is whether the criminal element is preponderant; and
- The person that is to be extradited is not subject to judgment, in the requesting state, by a “court of exception” (clause VIII). A “court of exception” is an *ad hoc* court specially created to try the offence in question.

The Brazilian authorities mention further conditions under the same law and the Internal Regulations of the Federal Supreme Court, in order for extradition to be granted: that there is a criminal sentence or an arrest warrant issued by a competent judge, court or authority in the requesting state; and that there is a formal commitment by the requesting state to (i) undertake the criminal prosecution, taking into account the time of “deprivation of liberty” (ie. the arrest/detention for the purpose of the procedure for extradition) which was served in Brazil as a result of the extradition (ii) to commute the death penalty to one of imprisonment (except in cases where Brazilian law allows it to be applied); and (iii) to not carry out or grant re-extradition. These apply to all cases of requested extradition.

As to whether the provisions on grounds for refusal, such as Article 77, would prevail in the event of incompatibility with a provision in one of Brazil's extradition treaties, the treaty, once ratified, will itself have the force of an ordinary law. The answer will thus depend on which is the later in date of the respective instruments: *lex posterioris derogat priori*.

The extradition process, according to the Brazilian authorities, takes place in three stages. The first is administrative, beginning with the receipt of the request by the Executive branch. The second is judicial, in which the Federal Supreme Court processes and judges the extradition petition, including checking its legality, and rules on whether the Executive branch is authorised to grant the extradition if it chooses to do so (the court may not rule on whether or not to grant extradition as this is the prerogative of the Executive). In the final stage, if extradition is granted, the administrative authorities carry out the decision. During the judicial process, the party to be extradited can bring an action for habeas corpus or an appeal seeking clarification of the extradition.

10.3/10.4 Extradition of Nationals

Brazil's Federal Constitution (Article 5, clause LI) expressly forbids the extradition of Brazilian nationals, both native and naturalised, except, in the case of a naturalised citizen, where the offence was committed before the date of naturalisation, or where participation in illegal trafficking in drugs or narcotics can be shown, irrespective of the date of the offence. Thus, as mentioned above, under clause I of Article 77 of Law No. 6,815/80, extradition of Brazilian nationals for foreign bribery will not be granted except if the person acquired the nationality after the commission of the offence.

The Brazilian authorities have explained that there exists a legal duty to proceed with an investigation or prosecution in Brazil in a case where a request for extradition has been refused on the grounds of nationality alone (see above).

10.5 Dual Criminality

As mentioned earlier (see 10.1/10.2), extradition requires the existence of dual criminality (Article 77, clause II, of Law No. 6,815/80). Brazil explains that it is essential that the facts attributed to the person to be extradited are covered by what is deemed to be a criminal offence both under Brazilian law and under the legal system of the requesting state. Brazil confirms that Article 1 of the Convention is sufficient to satisfy this requirement, and provides a basis for extradition to be granted to a state which is a Party to the Convention. The condition of dual criminality requires that the alleged act of foreign bribery must have been a criminal offence – though not necessarily the offence of foreign bribery – at the time when it was committed.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

Brazil has notified the Secretary-General of the OECD that the responsible authority for the making and receiving of requests for consultation, mutual legal assistance and extradition is the Ministry of Justice.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. Tax Deductibility

The Brazilian authorities state that Brazilian tax legislation does not accept the deductibility of any illegal expenses. There is no express prohibition of deductibility of illegal payments: Brazilian law treats this as a matter of general principle. The Brazilian authorities explained that there is a Federal guideline stating that illegal expenses are not deductible, and that this overrides any provision at state level.

Under Article 29 of the Income Tax Regulation, a corporation may deduct expenses if they are necessary and associated with the business of the company. Paragraph 1 of that Regulation states that “Expenses paid or incurred for undertaking transactions required by the business of the company are deemed to be necessary”. Article 249 lists certain categories of expenses that are not deductible, including “expenses with giveaways” (sole paragraph, clause VIII). Payments (such as commissions) that would otherwise be deductible, but for which no reason is given, or where the beneficiary is not identified, cannot

be deducted (Article 304). The Brazilian authorities explained that corporations are required to file tax returns electronically, and retain the supporting documentation. They stated that it is the practice of the tax inspectors to review and compare levels of commission deducted in different business sectors, and that any unusual trends or payments which exceed the normal levels for the relevant sector will be examined. However, it is not clear how, in practice, a tax inspector would identify a bribe paid to a foreign public official where this was disguised as a legitimate commission to a named beneficiary and supported by apparently legitimate documentation.

The Brazilian authorities explained that the tax authorities may supply information to the investigating or prosecuting authorities in respect of suspected criminal activities, but only on the request of those bodies legally authorised, and subject to procedures to maintain the confidentiality of the information.

EVALUATION OF BRAZIL

General comments

The Working Group appreciates the high level of cooperation received from Brazil throughout the examination process, and in particular the thoroughness and completeness of the responses and materials provided by them.

Brazil enacted the Convention into domestic law by Decree No. 3,678 of 30 November 2000. By Law 10,467 of 11 June 2002, it amended its Penal Code to establish, in Articles 337-B to 337-D, the offence of bribing a foreign public official. The Working Group considers that Brazil's legislation is broadly in conformity with the Convention, subject to the issues noted below. The Working Group urges Brazil to take the steps recommended below.

Specific issues

1. The offence of foreign bribery

1.1 Elements of the offence

A number of questions were raised in the draft report relating to different elements of the foreign bribery offence. The concerns of the examiners were satisfied by Brazil's explanations, given in its written comments and in the preparatory meetings

1.2 Definition of foreign public official

According to the Brazilian authorities, the definition of a foreign public official in Article 337-D of the Penal Code, based on the phrase ' a position, a job or a public function in state bodies', is to be construed in accordance with the interpretation given to the definition of a domestic public official under Article 327. Certain differences were noted between the language of the two provisions, giving rise to a concern that Article 337-D might be more restrictive. However, Brazil has stated that a very broad meaning has been given in practice to Article 327, and that, based on this, it is confident that Article 337-D will be broadly interpreted. Brazil has further explained that, in case of doubt, Article 337-D will be interpreted by reference to the Convention which, in Brazilian law, is an aid to interpretation as well as having the status of ordinary law.

The Working Group noted Brazil's explanation based on practice, and its assurances that the definition would be interpreted in accordance with the Convention, and proposes to review the practice on this issue in Phase 2.

2. Responsibility of legal persons; sanctions

There is no concept of criminal liability for legal persons in Brazil, with one specific and limited recent exception, for crimes against the environment. The Working Group takes note of Brazil's explanation that Law 8,884 (Protection of Economic Order) imposes administrative liability on legal persons and that bribery, including transnational bribery, although not named, is encompassed within the general prohibitions of the Law. Nevertheless, the Working Group recommends that Brazil amend Law 8,884 to specifically identify bribery as a prohibited act. Further, the Working Group proposes to review the application of this Law in Phase 2.

Penalties under this Law are between 1% and 30% of the company's turnover for the last financial year, but in no case less than the illicit advantage; a further penalty is disqualification from public contracting. In addition, Brazil explained that fines of up to three times the illicit advantage and in certain cases punitive fines of up to nine times the benefit derived from the illicit act can be obtained against a legal person under the money market law, Law 6,385. Furthermore, Law 8,666 of 1993 provides for the disqualification from eligibility for all public contracts of legal persons found to have been the beneficiary of a criminal act.

Brazil also drew attention to the availability of civil liability for damages against legal persons. It is also possible, under Article 91 of the Penal Code, for confiscation to be imposed against a legal person found to have benefited from a criminal act for which a natural person has been convicted.

In the absence of case law applying these administrative penalties to cases of domestic bribery, the Working Group proposes to follow up this issue in Phase 2 to determine whether the sanctions available in Brazil are effective, proportionate and dissuasive.

3. Mutual legal assistance

Brazil has entered into bilateral agreements for mutual legal assistance with eight Parties to the Convention and is negotiating agreements with thirteen others. Brazil explains that, since Article 9 of the Convention is directly applicable, the Convention already provides a sufficient basis for mutual legal assistance to be granted. The Working Group noted Brazil's invitation to other Parties to the Convention to negotiate such agreements in order to facilitate and simplify the granting of mutual legal assistance in foreign bribery cases. The Working Group will follow up in Phase 2 whether Brazil is able in practice to obtain mutual legal assistance in relation to evidence located overseas which is needed in a Brazilian administrative proceeding against a legal person.

4. Accounting

Brazil has in place accounting rules and standards under its Civil Code, the Federal Securities Commission rules, and the tax code which all address the issue of accounting. Brazil's system of rules and regulations (including the Civil and Penal Codes) regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, is sufficient to prohibit the making of falsified or fraudulent accounts and to provide effective, proportionate, and dissuasive penalties in relation to such omissions and falsifications, and thus to comply with the requirements of the Convention.

5. Tax deductibility

Brazil has a general prohibition on tax deductibility in respect of illegal payments, though its rules do not contain an express denial of deductibility. Certain categories of expenses are expressly allowed as deductible. Brazil has explained that its tax authorities examine claims for deductibility of expenses which are stated to fall within allowable categories. The Working Group is however concerned that bribes might be deducted if they were disguised as legitimate business expenses, and is uncertain how it would be determined in practice whether a given expense was legitimate or a bribe. The Working Group therefore proposes to follow up in Phase 2 how the rules are implemented.