



BRAZIL: PHASE 2

FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS

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

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 4 June 2010.

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SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

a) *Summary of Findings*

1. In March 2010, Brazil presented its written follow-up report, outlining its responses to the recommendations adopted by the Working Group on Bribery at the time of Brazil's Phase 2 examination in December 2007. The Working Group welcomed the information provided by the Brazilian authorities in the course of this exercise and recognised Brazil's efforts to implement the Phase 2 recommendations. As concerns the Phase 2 examination, the Working Group considers that Brazil has satisfactorily implemented 8 out of the 16 recommendations, while 4 recommendations have been partially implemented, and 4 recommendations have not been implemented.

2. With respect to raising awareness and providing training on foreign bribery, Brazil has undertaken an impressive array of awareness raising activities targeting the private sector, including small and medium sized enterprises (SMEs) (*recommendation 1b*). Much has also been done by Brazil to raise awareness of its public officials. For example, in February 2010 the Brazilian Ministry of Foreign Affairs circulated information on the Anti-Bribery Convention to all Brazilian embassies abroad, with instructions to disseminate to Brazilian nationals and companies, and the Brazilian Office of the Comptroller General (CGU) developed primers on the Anti-Bribery Convention for distribution in the National Police Academy's training programmes. However, the Working Group considered that Brazil's export credit agency, the National Economic and Social Development Bank (BNDES), and Brazil's trade promotion agency, BrazilTradeNet, had not sufficiently fulfilled their role in terms of awareness raising of Brazilian enterprises exporting or seeking to operate abroad (*recommendations 1a and c*). The Working Group nevertheless welcomed news that BNDES was finalising a 'Statement of Commitment for Exporters' requiring all exporters receiving official export financing, export credit insurance and interest rate equalisation support to undertake to comply with anti-corruption laws and regulations, and encouraged Brazil to proceed promptly with the implementation of these new policies by BNDES.

3. In relation to the detection and reporting of foreign bribery, the CGU issued an official communication to all relevant agencies reminding them of Brazil's obligations under the OECD Anti-Bribery Convention and the obligation of Brazilian public officials to report suspected instances of foreign bribery (*recommendation 2b*). Brazil has not yet enacted legislation to protect whistleblowers reporting suspected instances of foreign bribery (*recommendation 2a*) however two Bills have been introduced before Congress (Bill 5228 of 2009 and Senate Bill 228/2006), relating respectively to private and public sector whistleblower protection.

4. As concerns detection and reporting by external auditors, three Brazilian Technical Standards for Independent Audits applicable to independent auditors have been in place since January 2010, which, *inter alia*, require auditors to report illicit acts, or non-compliance with laws and regulations, to "those charged with governance and management". Where there are doubts regarding the honesty of management, the auditor should obtain legal advice to assist in determining the appropriate course of action (*recommendation 2d*).

5. In the area of anti-money laundering (AML), Brazil is yet to extend AML reporting obligations to the legal and accounting professions. Bill 3443/2008, which would address this, was already under

consideration at the time of the Phase 2 on-site visit, and is yet to pass Congress (*recommendation 2e*). The Working Group however welcomed the progress accomplished by Brazil in relation to professional training undertaken by the Council of Control of Financial Activities for professionals in financial institutions, oversight agencies and prosecutors' offices.

6. In relation to the Working Group recommendation on detection and reporting in the private sector (*recommendation 2c*), the CGU, in cooperation with the Ethos Institute for Business Social Responsibility (Ethos Institute), a Brazilian NGO, distributed a publication setting out good practice for companies in internal controls, ethics and compliance. The Working Group considered, however, that more could be done in this area, such as encouraging companies to make statements in their annual reports about internal compliance programs.

7. With respect to recommendations on the investigation and prosecution of foreign bribery and related offences, the Working Group noted that Brazil is yet to successfully prosecute an individual or entity for the foreign bribery offence. Nevertheless, Brazil has taken significant regulatory and practical steps to enhance the capacity of the Federal Police and Public Prosecutor's Office to pursue cases of foreign bribery (*recommendation 3a, b and c*). Specifically, training has been provided on general and special investigative techniques to police and prosecutors at both state and federal level and the Federal Prosecutor's Office is in the process of establishing a specific unit to deal with international bribery.

8. A key concern of the Working Group during Brazil's Phase 2 review was the lack of legislative provisions for liability of legal persons for foreign bribery offences. The Working Group welcomed reports from Brazil of the recent introduction to Congress, on 8 February 2010, of a Draft Bill on the administrative and civil liability of legal persons for acts of corruption committed against the National and foreign Public Administration. However, the Working Group noted that at this point Brazil has still not implemented effective liability of legal persons for foreign bribery, and urged Brazil to pass this legislation promptly (*recommendation 4*).

9. In relation to Phase 2 recommendations on sanctions for foreign bribery, the Working Group noted that the situation in relation to confiscation of the proceeds of foreign bribery remained unchanged. Where the proceeds of a foreign bribery offence are in the hands of a legal person, and unless money laundering of these proceeds by the legal person is involved, confiscation of these proceeds is extremely unlikely. Provisions in the above mentioned Bill on the liability of legal persons, providing for monetary sanctions of an effect comparable to confiscation may address this matter. However, as noted above, the Bill is still at a very preliminary stage (*recommendation 5a*). With regard to the Working Group's recommendation on due diligence procedures for agencies in charge of administering public funds and government contracts (*recommendation 5b*), BNDES has yet to put in place adequate due diligence procedures for export credit applicants. The Working Group welcomed, however, indications that BNDES was in the final stages of introducing the abovementioned 'Statement of Commitment for Exporters' requiring applicants to undertake to comply with anti-corruption laws and regulations. The Working Group noted that provisions in the yet to be enacted Draft Bill on corporate liability provide for additional sanctions such as suspension or refusal of public incentives or subsidies.

10. Finally, with regard to the non tax-deductibility of bribes, the Working Group welcomed Brazil's express clarification in this regard, as well as the awareness raising initiatives envisaged (*recommendation 6a and b*). Brazil's Federal Revenue Secretariat (RFB) published Interpretive Declaratory Act 32 (ADI) in October 2009, which expressly clarifies that bribes paid to foreign public officials are not tax-deductible. The ADI also requires auditors to verify whether illegitimate amounts, including those paid in bribes, are itemised in tax files. The ADI was circulated to all tax auditors in the Government Gazette and via internal communication channels. In terms of awareness raising, the Disciplinary Board of the RFB published a Handbook on Ethics and Discipline which refers to the provisions of the OECD Anti-Bribery Convention

and will form the basis of future training for current and future tax officials. The Working Group recommended that Brazil proceed promptly with this training.

b) Conclusions

11. Based on the findings of the Working Group on Bribery with respect to Brazil's implementation of its Phase 2 recommendations, the Working Group concluded that Brazil has satisfactorily implemented recommendations 1(b), 2(b), 2(d), 3(a), 3(b), 3(c), 6(a) and 6(b); that Brazil has partially implemented recommendations 1(a), 2(a), 2(c) and 2(e); and that Brazil has not implemented recommendations 1(c), 4, 5(a) and 5(b).

12. The Working Group invites Brazil to report orally on the implementation of recommendations 2(a), 4 and 5(a) within one year of the review of the written follow-up report (*i.e.* in March 2011)

WRITTEN FOLLOW UP TO PHASE 2 REPORT - BRAZIL

Name of country: Brazil

Date of approval of Phase 2 Report: 7 December 2007

Date of information: 9 February 2010

Note: The recommendations starting on page 63 of the original Phase 2 Report have the same numbers as in the boxes below.

Part I: Recommendations for Action

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

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

- a) Pursue its efforts to raise the level of awareness of and provide training on the foreign bribery offence within the public administration, notably among diplomatic representations, trade promotion, export credit and development aid agencies, as well as other public institutions involved with Brazilian companies operating abroad (Revised Recommendation, Paragraph I);

Actions taken as of the date of the follow-up report to implement this recommendation:

With a view to implementing recommendation 1^A, a number of measures have been put in place to disseminate the terms of the OECD Convention and the foreign bribery offense in the Brazilian Federal Public Administration.

The Secretariat of Foreign Trade (Secretaria de Comércio Exterior – SECEX) of the Ministry of Development, Industry and Foreign Trade included, as part of the working agenda of its Foreign Trade Workshop, 6-10 July 2009, a presentation and follow-on discussion on the implementation of the OECD Convention on combating foreign bribery in Brazil. The objective of the Workshop was to disseminate SECEX's export incentive activities and those of other entities to officials of the State Secretariats of Development, Industry, Trade and Finance. Participating officials were provided guidance on notifying the export community in their respective states to give wide publicity to the OECD Convention's applicability.

The Brazilian Ministry of Foreign Affairs sent a telegraphic circular (Annex 12) to all Brazilian Embassies abroad, on the 9th of February 2010, regarding the subject of disseminating the OECD Convention on Combating Bribery in International Commercial Transactions. The purpose of the circular

was to disseminate the terms of the Convention among diplomatic representations while instructing the Embassies to follow up the operations of Brazilian enterprises abroad, in order to communicate potential acts of transnational bribery. Some Embassies have already answered the Ministry's instructions, including the Diplomatic representation in Colombia (Annex 13). Colombia informed the Ministry that a communication on the OECD Convention, as well as other measures adopted by the Brazilian government for purposes of implementation, was sent to Brazilian enterprises operating within the country.

Similarly, in order to raise awareness on the crime of foreign bribery and on the text of the Convention, the Federal Police Department undertook a review of the materials used in the agency's personnel capacity-building and training programs, with a view to including information on the Convention, as well as the offense of transnational bribery and the measures to combat the phenomenon. The aim is to ensure the new material offers expanded information on the foreign bribery offense in international commercial transactions.

To this end, at the request of the Federal Police Department, the CGU delivered two thousand primers on the OECD Convention for distribution in the National Police Academy's course programs.

In addition, the CGU maintains an updated hot site on the OECD Convention – www.cgu.gov.br/ocde – with guidance for enterprises, government bodies and public servants on the Convention, its impact, the adaptation of Brazilian law and adoption of the pertinent measures to ensure compliance with the instrument.

Of significant note in this light, the National Economic and Social Development Bank (Banco Nacional de Desenvolvimento Econômico e Social – BNDES) and the Ministry of Development, Industry and Foreign Trade's Export Portal (Portal do Exportador) now offer direct links to the CGU's OECD Convention hot site through their respective Web sites – http://www.bndes.gov.br/SiteBNDES/bndes/bndes_pt/Areas_de_Atualizacao/Exportacao_e_Insercao_Internacional/ and http://www.portaldoexportador.gov.br/index.php?option=com_weblinks&catid=28&Itemid=62 .

If no action has been taken to implement recommendation 1(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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

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

- b) Significantly step up efforts, in cooperation with business organisations and other civil society stakeholders, to improve awareness of the foreign bribery offence among companies, and in particular small and medium size companies, active in foreign markets, and advise and assist companies with regard to the prevention and reporting of foreign bribery (Revised Recommendation, Paragraph I);

Actions taken as of the date of the follow-up report to implement this recommendation:

The Brazilian Federal Government has stepped up its efforts, in cooperation with organized civil society stakeholders, to disseminate the terms of the OECD Convention on transnational bribery to the business community and broader public. This has included elucidating the measures undertaken by the Federal Public Administration to prevent bribery and to establish adequate reporting channels.

Some of the pertinent measures are laid out below.

Official communication issued by the Head of the Office of the Comptroller General to Brazil's major export firms

In May 2009, the Head of the CGU issued an official communication on the OECD Convention to fifty (50) of Brazil's leading export firms (Annex 1). The communication provided information on the Convention's ratification and adoption by the Brazilian government, highlighting the applicable obligations of both the public and private sectors. The communication further calls on enterprises to take up the task of implementing integrity principles, codes of best corporate practices, internal control systems, channels for reporting misconduct, in addition to a variety of other corruption prevention measures.

The CGU believes that these efforts can contribute to raising the awareness of enterprises regarding their status as role models for other firms and the obligation to prohibit bribe payments by persons or organizations acting on their behalf.

Distribution of 25,000 copies of a Handbook on the OECD Convention on transnational bribery to export firms

The Office of the Comptroller General (CGU) distributed more than 25,000 copies of the Handbook on the OECD Convention on Combating Bribery of Foreign Public Officials in International Commercial Transactions to over 21,000 export firms registered in a common database shared with the Ministry of Development, Industry and Foreign Trade. In addition to the Handbook, the CGU issued a document outlining the importance of the active involvement of enterprises in the effort against transnational bribery.

Primer prepared by the CGU in partnership with the Ethos Institute for Business and Social Responsibility – “The Business and Social Responsibility of Enterprises in Combating Corruption”

The Office of the Comptroller General prepared a primer in partnership with the Ethos Institute for Business and Social Responsibility¹ titled “The Business Social Responsibility of Enterprises in Combating Corruption” (Annex 2).

¹ Non-Governmental Organization established in 1998 to mobilize, encourage and assist enterprises to manage their businesses in a socially responsible way, making them partners in building a sustainable and fair society. In 2006, the Ethos Institute, in partnership with PATRI Governmental & Public Policy Relations, the United Nations Development Programme (UNDP) and The Global Compact, launched the Pact for Integrity and Against Corruption. The initiative strives to mobilize society against all forms of corruption by illustrating the effects of corrupt activities in national economic and social development through data and news reports. A direct product of the Campaign was the Clean Company Web site, a channel aimed at fighting corruption through the dissemination of news and reports on corruption cases.

The publication tackles important issues regarding the OECD Convention and its impact on trade. Additionally, the duties and obligations of government, enterprises and other stakeholders provided for under the Convention are addressed in accessible language. To this end, complex technical and legal terminology is illustrated using concrete examples, case studies, statistics and examples of successful good practices all enterprises should be encouraged to adopt.

Chapter 4 includes specific sections on acts of corruption and acts against corporate integrity. The section on acts of corruption describes and explains the offenses of domestic bribery (active and passive); transnational bribery; extortion by public officials; violations of the tax code; administrative misconduct; and small facilitation payments.

The section on acts in violation of corporate integrity covers offenses ranging from money laundering, tax evasion and slush funds. Moreover, both sections lay out examples of conduct constituting such offenses (Sections 4.2.2 and 4.3).

Further, the publication devotes an entire section to the OECD Convention, offering additional information on the offense of bribery of foreign public officials as prescribed by the Convention and the Brazilian Criminal Code of Procedure, in addition the channels available for reporting suspected cases of bribery and the other offenses addressed in the primer.

Workshops in anticorruption measures for large- and small-sized enterprises

As part of the CGU's partnership with the Ethos Institute, beginning in the second half of 2009 a series of ten (10) workshops was organized in cooperation with private enterprises to raise awareness on anticorruption measures and on the related initiatives enterprises should adopt in response to the phenomenon. In 2009, the first four workshops were held in Bahia, Espírito Santo, Rio de Janeiro, Minas Gerais and Paraná. The remaining sessions are scheduled to take place in 2010.

The events are founded on a unique approach: the Ethos Institute and the CGU invite major enterprises to take part in the events. For their part, large-scale enterprises are urged to invite their respective partners and suppliers – medium- and small-sized enterprises – to participate in the workshops, thereby consolidating a chain of private sector commitment and engagement in combating and preventing corruption.

Amendment to the Ethos Pact for Integrity and Against Corruption

Since its original release, an amendment has been incorporated to the Pact. Specifically, participating enterprises undertake to consult the CGU's List of Ineligible Enterprises to verify whether any of their suppliers (legal or natural persons) have been subject to sanction by the Public Administration for violations in connection with irregularities in public procurement procedures, tax fraud or the improper execution of administrative contracts. The objective is to prevent, to the extent possible, enterprises from entering into direct or indirect business relationships with sanctioned entities.

Studies to the development of a Clean Companies List

Since 2009, CGU has been studying models and criteria for the development of a List of Clean Companies. The intention of the mentioned project is to create incentives to companies that adopt good governance, ethics and anti-corruption measures. This is an ongoing project that might be ready in 2010.

“Socially Responsible Market: a New Ethic for Development” – Ethos International Conference

In 2008, the Ethos Institute for Business and Social Responsibility held its annual International Conference with the support and sponsorship of the Brazilian Government and State Enterprises. The theme

of the 2008 edition was “A Socially Responsible Market: a New Ethic for Development. The CGU’s representative to the conference, the Director of Corruption Prevention, underscored the OECD Convention’s role in fostering a more ethical trade environment within and among enterprises.

The International Conference gathered an average of 30 enterprises from each Brazilian state. Representatives included corporate officials from the procurement, legal and compliance departments of the participating business firms.

2009 Ethos Institute Conference and release of the “Business Social Responsibility in Combating Corruption” Handbook

The theme of the 2009 edition of the Ethos International Conference was “Towards a New Economy: Transforming People, Business and Society.” The Conference was attended by 1,357 participants from Brazil and foreign countries, and included 759 registered participants, 115 accredited journalists, 71 speakers and 47 invitees, all of whom actively engaged over the course of four days in six panels, six roundtables, five workshops, three plenary sessions and two cultural events.

One of the panels held at the 2009 Conference, titled “Economic Crisis: More Corruption or the Opportunity for a New Model?,” included the participation of the Head of the CGU. The Minister of State also took part in the official release of the “Business Social Responsibility in Combating Corruption” handbook with representatives of the Ethos Institute and the United Nations Office on Drugs and Crime – UNODC.

Ongoing activities of the CGU-Ethos Institute partnership to raise awareness of integrity measures in the Private Sector:

1. Ethos Pact for Integrity and Against Corruption Monitoring Platform – a mechanism developed through the CGU-Ethos Institute partnership

The CGU has provided a significant contribution to the development of the Ethos Institute’s Pact for Integrity and Against Corruption, an initiative designed to mobilize society against all forms of corruption. A direct product of the campaign was the Clean Company Web site, which offers individual citizens and enterprises direct access the Pact’s terms and provisions, a membership form and a list of the signatory enterprises. Further, as part of the effort to assist in the fight against corruption the site publishes good practices arising from the Pact, information on acts of corruption subject to sanction under Brazilian law and news on ongoing investigations into corruption cases.

In response to the rapid expansion of private sector participation in both the Pact and Clean Company Web site – upwards of 680 enterprises to date – a platform is currently under design to monitor effective adherence to the Pact. The tool is aimed at evaluating the level of commitment among enterprises to the underlying principles of the campaign through the analysis of information on the commission of corrupt acts. Any enterprise found to have engaged in corrupt acts is excluded from the Pact and immediately entered on a blacklist of business bad practices maintained on the Clean Company Web site.

2. Distance Course programs for small- and medium-sized enterprises

The Ethos Institute is currently designing a distance course program for small- and medium-sized (SMEs) enterprises with the support of the CGU and UNODC. The objective is to expand awareness regarding the potential anticorruption and corruption prevention measures available to SMEs and to lay out the current applicable domestic and international legislation on the subject, with a view to preventing the

commission of offenses such as bribery and other forms of improper conduct.

The aim is to assist SMEs in implementing effective mechanisms to promote corporate integrity and prevent and combat corruption.

If no action has been taken to implement recommendation 1(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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

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

c) With respect to export credits, (i) take necessary measures to raise awareness of the foreign bribery offence among staff of the Brazilian Development Bank (BNDES); (ii) ensure that applicants requesting export credit support are made expressly aware of the foreign bribery offence and its legal consequences; (iii) put in place due diligence procedures to verify that applicants are not engaging in acts of bribery; and (iv) consider adhering to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits. A similar approach should be considered in the context of infrastructure projects and any aid funded procurement contracts run by BNDES (Revised Recommendation, Paragraphs I, II.v and VI.iii).

Actions taken as of the date of the follow-up report to implement this recommendation:

In 2008, the Export Financing and Guarantee Committee (Comitê de Financiamento e Garantia das Exportações – COFIG), a component of the Ministry of Development, Industry and Foreign Trade, established a Working Group to review the OECD Recommendation concerning the foreign bribery offense and officially supported export credits.

In response, the Committee prepared the “Statement of Commitment for Exporters” (“Declaração de Compromisso do Exportador”), a required document for all exporters receiving official export financing, export credit insurance and interest rate equalization support from the Brazilian Export Credit Insurance Company (Seguradora Brasileira de Crédito à Exportação – SBCE), the National Economic and Social Development Bank (Banco Nacional de Desenvolvimento Econômico e Social – BNDES) or the Bank of Brazil (BB).

The objective of the statement is to raise awareness among exporters on Brazil’s adherence to the OECD Convention on Combating Bribery of Foreign Public Officials in International Commercial Transactions and the resulting impact on domestic law. In addition, exporters undertake to comply with all anticorruption laws and regulations, under penalty of revocation of access to approved financing lines. Annex 3 provides the full text of the “Statement of Commitment for Exporters,” which is currently undergoing a final stage review by the Legal Departments of the member bodies of COFIG.

If no action has been taken to implement recommendation 1(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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

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

- a) Adopt comprehensive measures to protect public and private sector whistleblowers in order to encourage those employees to report suspected cases of foreign bribery without fear of retaliation (Revised Recommendation, Paragraphs I and V.C.iv);

Actions taken as of the date of the follow-up report to implement this recommendation:

The National Congress is currently considering Senate Bill 228/2006 (Annex 4). The statute would institute the Incentive Program for Public Interest Disclosures, a set of measures designed to protect and compensate persons who come forward in the public interest to report information of which they have knowledge.

The Bill defines public interest disclosures as the reporting, notification or furnishing of any information, data, reference, evidence or proof capable of prompting or assisting the investigation, prosecution and judgment of actions or omissions classified as administrative misconduct or criminal offenses, based on a specific list of infractions set out in the proposed law. These include money laundering and acts against the Public Administration.

The criminal offenses against the Public Administration prescribed in Title XI of the Brazilian Criminal Code of Procedure include the offense of active bribery in international commercial transactions and trafficking in influence in international commercial transactions, articles 337-B and 337-C of the Criminal Code of Procedure (Chapter II-A. Crimes against the Foreign Public Administration).

Under the Bill, any person may make a public interest disclosure voluntarily and spontaneously to an administrative or law enforcement authority, the Public Prosecutor's Office or the Courts. For their part, however, public officials are required to come forward with public interest disclosures of which they have knowledge.

The Bill establishes a minimum set of mandatory elements to investigate a public interest disclosure. Similarly, the proposed legislation allows reporting persons to make disclosures contingent on the adoption of the necessary protective measures to ensure their physical safety and professional standing. An additional measure prescribed in article 7 protects the identities of reporting persons, except where the reporting person authorizes disclosure of his or identify, identification is deemed essential to the effective investigation of the facts or to prevent violations against public health, public safety and the environment.

Reporting persons are afforded additional protection through their inclusion in the special victim and witness protection program provided for in Law 9807 of 1999 (article 9 of Bill 228/2006). The draft legislation further establishes specific guarantees to safeguard the professional standing of public servants,

the occupants of commissioned or appointed positions and the employees of public and private entities.

As compensation for disclosures that effectively contribute to the investigation and prosecution of offenses, a reporting person is eligible to receive cash payments in an amount up to 10% of the total value of the assets, rights and securities reimbursed to the public coffers as a result of the disclosure; or, in such cases, up to 10% of the total value of the damages effectively reimbursed as a result of the disclosure; or up to 10% of the total value of the proceeds of crime or property recovered as a result of the disclosure.

Additionally, the National Congress is currently considering Bill 5228 of 2009, regulating the access to information provided for under article 5, 37 and 216, of the 1988 Brazilian Constitution. Specifically, articles 42 and 43 two of the draft law establish protections for reporting persons of good faith: ²

Article 42. Subsection VI of article 116 of Law 8112 of 11 December 1990, hereby enters into effect with the following text:³

VI – report irregularities of which the official has knowledge by virtue of his or her public duties to such official’s immediate superior or, where such superior’s involvement is suspected, to another authority with competence for investigating the matter;

Article 43. Chapter IV of Title IV of Law 8112 of 1990 hereby enters into effect with the following additional article:

Article 126-A. No public servant shall be held civilly, criminally or administratively liable for disclosing to his or her immediate superior or, where such superior’s involvement is suspected, another competent authority, information concerning the commission of a criminal offense or misconduct of which such public servant becomes aware, whether in the performance of a public office, position or function.

If no action has been taken to implement recommendation 2 (a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

² The provisions were incorporated in articles 37 and 38 of the original Bill. The two articles were subsequently renumbered in the revised version submitted by the committee rapporteur and included the additional measures reproduced above.

³ The original text of subsection VI of article 116 of Law 8112/90 read as follows:
Article 116. Public servants have the following duties: (...)VI – to disclose any irregularities of which they have knowledge by virtue of their position to their immediate superiors;

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

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

b) Regularly remind Brazilian public officials (particularly those in diplomatic representations, the tax administration, and in trade promotion, export credit and development aid agencies, as well as in other public institutions involved with Brazilian companies operating abroad) of their obligation to report instances of foreign bribery, and encourage and facilitate such reporting (Revised Recommendation, Paragraph I);

Actions taken as of the date of the follow-up report to implement this recommendation:

In order to underscore to the heads and directors of Brazilian Federal Government bodies the reporting requirements of their public servants, the Office of the Comptroller General issued an official communication recommending that bodies and entities of the Federal Executive Branch undertake to raise awareness among their public servants regarding the obligation to report suspected acts of corruption, notably transnational bribery, identified in the course of their activities to the competent authorities (Annex 5). The recommendation was distributed to the National Economic and Social Development Bank (Banco Nacional de Desenvolvimento Econômico e Social – BNDES); the Ministry of Development, Industry and Foreign Trade (Ministério do Desenvolvimento, Indústria e Comércio Exterior – MDIC); the Chamber of Foreign Trade (Câmara de Comércio Exterior – CAMEX); the Bank of Brazil (BB); the Brazilian Export Promotion Agency (Agência de Promoção de Exportações do Brasil – APEX); the Brazilian Institute of Independent Auditors (Instituto dos Auditores Independentes do Brasil – IBRACON); the Federal Accounting Board (Conselho Federal de Contabilidade – CFC); the Brazilian Securities Commission (Comissão de Valores Mobiliários – CVM).

The Brazilian Ministry of Foreign Affairs issued a circular to all Brazilian embassies abroad on 9 February 2010 (see above 1A and Annexes 12 and 13).

If no action has been taken to implement recommendation 2 (b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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

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

- c) Take additional measures to encourage Brazilian businesses active in foreign markets (i) to implement adequate internal company controls and standards of conduct, with a particular focus on the control of foreign operations and on compliance with the law criminalising foreign bribery; (ii) to develop monitoring bodies (such as audit committees) that are effective and independent from management; and (iii) to make statements in their annual reports about their internal compliance programs for the prevention and detection of foreign bribery (Revised Recommendation, Paragraphs I, II.iii and V.C);

Actions taken as of the date of the follow-up report to implement this recommendation:

As outlined in Recommendation 1.B, the Office of the Comptroller General prepared and distributed a primer in partnership with the Ethos Institute for Business Social Responsibility titled “The Business Social Responsibility of Enterprises in Combating Corruption.”

Completed in 2009, the document has been widely distributed throughout the country by correspondence and at special events held with private enterprises.

In addition to devoting a specific chapter and section to the OECD Convention and its enactment under Brazilian law (Chapter 3 and Section 5.4), the publication sets out a list of good practices that enterprises should adopt to ensure an environment of integrity, while offering, to this end, case studies, specific information on acts of corruption and a valuable discussion of small facilitation payments (Chapter 4 and Section 4.3).

The primer highlights a number of themes, including codes of conduct, the implementations of internal controls and audit systems and transparency in accountability and financial information. Moreover, a separate section considers the question of transparency among stakeholders, namely the principles and practices that should govern the relationships between Brazilian enterprises and foreign public officials.

Additionally, it’s worth mentioning that on April 15th 2009, the CGU, represented by the Secretariat of Corruption Prevention and Strategic Information, and the Ethos Institute promoted a meeting in São Paulo with the biggest companies in the area of auditing and consulting in order to foster the adoption of good governance measures in enterprises. Among the participants of the meeting were Ernst & Young, Deloitte, KPMG and PriceWaterhouseCoopers.

If no action has been taken to implement recommendation 2 (c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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

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

d) With regard to accounting and auditing, (i) work with the accounting and auditing professions to raise awareness of the foreign bribery offence and encourage the detection and reporting of suspected instances of foreign bribery; (ii) require external auditors to report all indications of possible acts of foreign bribery to company management and, as appropriate, to corporate monitoring bodies; (iii) consider requiring external auditors to report such suspicions to the competent law enforcement authorities; and (iv) consider enactment of legislative reforms that would require all large Brazilian companies (whether listed or unlisted) to submit to an external audit (Revised Recommendation, Paragraphs I, II.iii and V.B); and

Actions taken as of the date of the follow-up report to implement this recommendation:

- (i) Work with the accounting and auditing professions to raise awareness of the foreign bribery offence and encourage the detection and reporting of suspected instances of foreign bribery.**
- (ii) Require external auditors to report all indications of possible acts of foreign bribery to company management and, as appropriate, to corporate monitoring bodies.**

With respect to this recommendation, three Standards applicable to independent auditors have been in place since January 2010: NBC TA⁴ 1240 (Responsibilities of Auditors in Relation to Fraud, in the Framework of Financial Statement Audits); NBC TA 250 (Consideration of Laws and Regulations in Financial Statement Audits); and NBC TA 260 (Communication with Those Charged with Governance). The three Standards were approved by the Federal Accounting Board (Conselho Federal de Contabilidade – CFC), the accounting profession’s official oversight body, in direct response to the international convergence of the Brazilian Accounting Standards.

In general, notifications of evidence of illicit acts must be reported to the corporate units charged with the administration or governance of private enterprises. Paragraph 10 of NBC TA 260 sets forth those charged with governance and management:

10. For purposes of the ISAs, the following terms have the meanings attributed below:

- (a) Those charged with governance – The person(s) or organization(s) (for example, a corporate trustee) with responsibility for overseeing the strategic direction of the entity and obligations related to the accountability of the entity. This includes overseeing the financial reporting process. For some entities in some jurisdictions, those charged with governance may include management personnel, for example, executive members of a governance board of a private or public sector entity, or an owner-manager. For discussion of the diversity of governance structures, see paragraphs A1-A8.
- (b) Management – The person(s) with executive responsibility for the conduct of the entity’s operations. For some entities in some jurisdictions, management includes some or all of those charged with governance, for example, executive members of a

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Brazilian Technical Accounting Standards for Independent Audits.

governance board, or an owner-manager. Management has responsibility for preparing the financial statements, the general supervision of those charged with governance and, for some entities in some jurisdictions, approval of the financial statements (in other cases, those charged with governance exercise this responsibility).

By way of laying out the procedures for the internal communication of evidence of fraud and non-compliance with the provisions of the applicable laws and regulations, a selection of passages from the NBC TA in question is provided below.

NBC TA 240 specifically addresses fulfillment of the auditor's responsibility upon identifying evidence of fraud.

Paragraphs A1 and A2 define fraud as follows:

A1: Fraud, whether fraudulent financial reporting or misappropriation of assets, involves incentive or pressure to commit fraud, a perceived opportunity to do so and some rationalization of the act.

A2: Fraudulent financial reporting involves intentional misstatements including omissions of amounts or disclosures in financial statements to deceive financial statement users.

It is important, further, to distinguish fraud from error. According to paragraph 2 of NBC TA 240:

Misstatements in the financial statements can arise from either fraud or error. The distinguishing factor between fraud and error is whether the underlying action that results in the misstatement of the financial statements is intentional or unintentional.

Paragraph 3 goes on to state:

Although fraud is a broad legal concept, for the purposes of the audit standards, the auditor is concerned with fraud that causes a material misstatement in the financial statements. Two types of intentional misstatements are relevant to the auditor – misstatements resulting from fraudulent financial reporting and misstatements resulting from misappropriation of assets. Although the auditor may suspect or, in rare cases, identify the occurrence of fraud, the auditor does not make legal determinations of whether fraud has actually occurred.

Communication of the acts of fraud described above is accomplished as laid out below:

Communication to Management and with Those Charged with Governance

40. If the auditor has identified a fraud or has obtained information that indicates that a fraud may exist, the auditor shall communicate these matters on a timely basis to the appropriate level of management in order to inform those with primary responsibility for the prevention and detection of fraud of matters relevant to their responsibilities. (Ref: Para. A60)

41. Unless all of those charged with governance are involved in managing the entity, if the auditor has identified or suspects fraud involving:

(a) management;

(b) employees who have significant roles in internal control; or

(c) others where the fraud results in a material misstatement in the financial statements, the auditor shall communicate these matters to those charged with governance on a timely basis. If the auditor suspects fraud involving management, the auditor shall communicate these suspicions to those charged with governance and discuss with them the nature, timing and extent of audit procedures necessary to complete the audit. (Ref: Para. A61-A63)

42. Under NBC TA, the auditor must communicate with those charged with governance any other matters related to fraud that are, in the auditor's judgment, relevant to their responsibilities. (Ref: Para. A64)

Communications to Management and with Those Charged with Governance

Communication to Management (see paragraph 40)

A60. When the auditor has obtained evidence that fraud exists or may exist, it is important that the matter be brought to the attention of the appropriate level of management as soon as practicable. This is so even if the matter might be considered inconsequential (for example, a minor defalcation by an employee at a low level in the entity's organization). The determination of which level of management is the appropriate one is a matter of professional judgment and is affected by such factors as the likelihood of collusion and the nature and magnitude of the suspected fraud. Ordinarily, the appropriate level of management is at least one level above the persons who appear to be involved with the suspected fraud.

Communication with Those Charged with Governance (Ref: Para. 41)

A62. In some cases, the auditor may consider it appropriate to communicate with those charged with governance when the auditor becomes aware of fraud involving employees other than management that does not result in a material misstatement. Similarly, those charged with governance may wish to be informed of such circumstances. The communication process is assisted if the auditor and those charged with governance agree at an early stage in the audit about the nature and extent of the auditor's communications in this regard.

NBC TA 250 assists the auditor in identifying significant misstatements in the financial statements based on non-compliance with the applicable laws and regulations. Paragraph 2 of the Standard defines the applicable laws and regulations in framework of financial statement audits:

2. The impact on financial statements of laws and regulations varies considerably. Those laws and regulations to which an entity is subject constitute the legal and regulatory framework. Some laws or regulations determine the form or content of an entity's financial statements or The amounts to be recorded or the disclosures to be made in financial statements. Other laws or regulations are to be complied with by management or set the provisions under which the entity is allowed to conduct its business. Some entities operate in heavily regulated

industries (such as banks and chemical companies). Others are only subject to the many laws and regulations that relate generally to the operating aspects of the business (such as those related to occupational safety and health, and equal employment opportunity). Non-compliance with laws and regulations may result in financial consequences for the entity such as fines and litigation and have a significant impact on financial statements.

Paragraph 10 of NBC TA 250 sets out the objectives of the auditor in relation to laws and regulations:

10. The objectives of the auditor are:

- (a) To obtain sufficient appropriate audit evidence regarding compliance with the provisions of those laws and regulations generally recognized to have a direct effect on the determination of material amounts and disclosures in the financial statements;
- (b) To perform specified audit procedures to help identify instances of non-compliance with other laws and regulations that may have a material effect on the financial statements; and
- (c) To respond appropriately to non-compliance or suspected noncompliance with laws and regulations identified during the audit.

Paragraph 11 of the same standard defines the act of non-compliance with laws and regulations:

11. For the purposes of this norm, the following term has the meaning attributed below:

Non-compliance – Acts of omission or commission by the entity, either intentional or unintentional, which are contrary to the prevailing laws or regulations. Such acts include transactions entered into by, or in the name of, the entity, or on its behalf, by those charged with governance, management or employees. Non-compliance does not include personal misconduct (unrelated to the business activities of the entity) by those charged with governance, management or employees of the entity.

NBC TA 250 enumerates the indications of non-compliance with laws and regulations. These include:

Indications of Non-Conformity with Laws and Regulations (Ref: Para. 18)

A13. If the auditor becomes aware of the existence of, or information about, the following matters, it may be an indication of non-compliance with laws and regulations:

- * Payments for unspecified services or loans to consultants, related parties, employees or government employees.
- * Sales commissions or agent's fees that appear excessive in relation to those ordinarily paid by the entity or in its industry or to the services actually received.

Paragraphs 22-27 of the Standard addresses the reporting of matters to those charged with governance:

Reporting Non-Compliance to Those Charged with Governance

22. Unless all of those charged with governance are involved in management of the entity, and therefore are aware of matters involving identified or suspected non-compliance already communicated by the auditor (NBC TA 260, “Communication with Those Charged with Governance,”), the auditor shall communicate with those charged with governance matters involving non-compliance with laws and regulations that come to the auditor’s attention during the course of the audit, other than when the matters are clearly inconsequential.

23. If, in the auditor’s judgment, the non-compliance referred to in paragraph 22 is believed to be intentional and material, the auditor shall communicate the matter to those charged with governance as soon as practicable.

24. If the auditor suspects that management or those charged with governance are involved in non-compliance, the auditor shall communicate the matter to the next higher level of authority at the entity, if it exists, such as an audit committee or supervisory board. Where no higher authority exists, or if the auditor believes that the communication may not be acted upon or is unsure as to the person to whom to report, the auditor shall consider the need to obtain legal advice.

Reporting Non-Compliance in the Auditor’s Report on the Financial Statements

25. If the auditor concludes that the non-compliance has a material effect on the financial statements, and has not been adequately reflected in the financial statements, the auditor shall, in accordance with NBC TA 705 (NBC TA 705, “Modifications to the Opinion in the Independent Auditor’s Report,” paragraphs 7-8), express a qualified opinion or an adverse opinion on the financial statements.

26. If the auditor is precluded by management or those charged with governance from obtaining sufficient appropriate audit evidence to evaluate whether non-compliance that may be material to the financial statements has, or is likely to have, occurred, the auditor shall express a qualified opinion or disclaim an opinion on the financial statements on the basis of a limitation on the scope of the audit in accordance with NBC TA 705.

27. If the auditor is unable to determine whether non-compliance has occurred because of limitations imposed by the circumstances rather than by management or those charged with governance, the auditor shall evaluate the effect on the auditor’s opinion in accordance with NBC TA 705.

In addition to the auditing standards discussed above, on 14 May 1999 the Brazilian Securities Commission (Comissão de Valores Mobiliários – CVM) issued Order 308, governing the registration and performance of independent auditing activities in the framework of the securities market and laying out the duties and responsibilities of the management of audited entities in regard to the relationship with independent auditors.

Of particular note is article 25, specifying the obligations to which independent auditors are subject. Subsection II requires the independent auditor to “prepare and submit to management and, when so requested, to the Audit Committee, a substantiated report containing the auditor’s judgments concerning the

deficiencies or ineffectiveness of the audited entity's internal controls and accounting procedures.”

Article 25. In performing his or her activities in the framework of the securities market, the auditor shall additionally:

II – prepare and submit to management and, when so requested, to the Audit Committee, a substantiated report containing the auditor's judgment concerning the deficiencies or ineffectiveness of the audited entity's internal controls and accounting procedures.

Further, article 35 of the CVM Order prescribes the applicable sanctions for independent auditors who “act in contravention of the laws and regulations governing the securities market” and “perform negligent or fraudulent audits, falsify data or statistics or withhold information that they are required to report.”

Article 35. The Independent Auditor – Natural Person, the Independent Auditor – Legal Person and the responsible technical personnel may be subject to warning, fine or the suspension or termination of their registration with the Brazilian Securities Commission, without prejudice to other applicable legal sanctions, where they:

I – act in noncompliance with the laws and regulations governing the securities market, including the provisions of this Order;

II – perform negligent or fraudulent audits, falsify data or statistics or withhold information that they are required to report.

(iii) Consider requiring external auditors to report suspected fraud to the competent authorities for criminal prosecution.

NBC TA 240 and 250 provide general rules on the communication of indications of a fraud or non-compliance with laws and regulations.

NBC TA 240 governing the detection of fraud sets out the following provisions:

Communications to Regulatory and Enforcement Authorities

43. If the auditor has identified or suspects a fraud, the auditor shall determine whether there is a responsibility to report the occurrence or suspicion to a party outside the entity. Although the auditor's professional duty to maintain the confidentiality of client information may preclude such reporting, the auditor's legal responsibilities may override the duty of confidentiality in some circumstances. (Ref: Para. A65-A67)

A63. In the exceptional circumstances where the auditor has doubts about the integrity or honesty of management or those charged with governance, the auditor may consider it appropriate to obtain legal advice to assist in determining the appropriate course of action.

A65. The auditor's professional duty to maintain the confidentiality of client information may preclude reporting fraud to a party outside the client entity. However, the auditor's legal responsibilities vary by country and, in certain circumstances, the duty of confidentiality may be overridden by statute, the law or courts of law. In Brazil, the auditor of a financial institution has a statutory duty to report the occurrence of fraud to supervisory authorities. In other segments, the auditor has the statutory duty to report misstatements for which management and those charged with governance fail to adopt the appropriate corrective measures.

A66. The auditor may consider it appropriate to obtain legal advice to determine the appropriate course of action in the circumstances, the purpose of which is to ascertain the steps necessary in considering the public interest aspects of identified fraud.

In a similar vein, NBC TA 250 provides for the procedures to be adopted in the event noncompliance is identified or suspected:

Reporting Non-Compliance to Regulatory and Enforcement Authorities

28. If the auditor has identified or suspects noncompliance with laws and regulations, the auditor shall determine whether the auditor has a responsibility to report the identified or suspected non-compliance to parties outside the entity (Ref: Para. A19 and A20).

Reporting of Identified or Suspected Non-Compliance

Reporting Non-Compliance to Regulatory and Enforcement Authorities (Ref: Para. 28)

A19. The auditor's professional duty to maintain the confidentiality of client information may preclude reporting identified or suspected noncompliance with laws and regulations to a party outside the entity. However, the auditor's legal responsibilities vary by jurisdiction and, in certain circumstances, the duty of confidentiality may be overridden by statute, the law or courts of law. In Brazil, the auditor of a financial institution has a statutory duty to report the occurrence, or suspected occurrence, of noncompliance with laws and regulations, in a substantiated report to supervisory authorities (Central Bank of Brazil). Also, in some jurisdictions, the auditor has a duty to report misstatements to authorities in those cases where management and, where applicable, those charged with governance fail to take corrective action. The auditor may consider it appropriate to obtain legal advice to determine the appropriate course of action. In Brazil, the responsibilities of the independent auditor are determined by the regulatory bodies the specific regulated industries.

Considerations Specific to Public Sector Entities

A20. A public sector auditor may be obliged to report on instances of noncompliance to the legislature or other governing body or to report them in the auditor's report.

(iv) Consider the issuance of legal reforms to oblige all large-sized Brazilian enterprises (whether listed on a stock exchange or not) to adopt external audit procedures.

On 28 December 2007, Bill 3741/00 was enacted as Law 11638/07. The statute modifies procedures for financial statement preparation by joint stock corporations, while extending the related procedures to “large-sized enterprises.” Large-sized enterprises are defined as those with total assets of more than R\$ 240,000,000.00 or annual gross earnings greater than R\$ 300,000,000.00, irrespective of their business model or arrangement. Enterprises under the same economic group (i.e. those controlled by the same company) are required to adopt the new procedures separately, where the combined asset value or gross earnings of the economic group are equal to or greater than the amounts set forth above. In addition to the changes introduced to the procedures for bookkeeping and financial statement preparation, the new statute extends the provisions of Law 6404/76 (Corporate Law) to large-sized enterprises, including the obligation to arrange for the performance of independent audits by an independent auditor registered with the Brazilian Securities Commission (Comissão de Valores Mobiliários – CVM).

Yet another provision prescribed under Law 11638/07 requires that all CVM standards related to the financial statements of publicly held companies conform to the prevailing international accounting standards adopted by the principal securities markets in the world.

Financial Statements of Large-Sized Enterprises

Article 3.: The provisions of Law 6404 of 15 December 1976 on bookkeeping and financial statements and the obligation to arrange for the performance of independent audits by an auditor registered with the Brazilian Securities Commission shall apply to large-sized enterprises, including business corporations.

Sole Paragraph. For the exclusive purposes of this Law, a large-sized enterprise or group of enterprises under common control means any enterprise or group of enterprises under common control with a total asset value of two hundred and forty million reais (R\$ 240,000,000.00) or more or gross earnings greater than three hundred million reais (R\$ 300,000,000.00) in the previous fiscal year. (boldface added).

If no action has been taken to implement recommendation 2 (d), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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

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

e) With regard to money laundering and foreign bribery, ensure that the institutions and professions required to report suspicious transactions, their supervisory authorities, as well as the Council of Control of Financial Activities (COAF) itself, receive appropriate directives and training (including typologies) on the identification and reporting of information that could be linked to foreign bribery; and proceed with the adoption of foreseen legislation which aims to extend money laundering reporting, due diligence and record keeping obligations and requirements to members of the legal and accounting professions (Convention, Article 7; Revised Recommendation, Paragraph I).

Actions taken as of the date of the follow-up report to implement this recommendation:

Measures to enhance awareness

The Financial Activities Control Board (Conselho de Controle Atividades Financeiras – COAF), Brazil’s Financial Intelligence Unit (FIU),⁵ has organized a number of training programs for specialized human resources (including Board staff personnel and officials), in cooperation with other government agencies. All training programs involving COAF, whether those directly administered by the Board or in which the entity’s staff participate, includes course content on money laundering and the related predicate offenses, among them the foreign bribery offense. In 2007, COAF provided training to approximately 1,052 participants, an additional 1,816 in 2008 and 2,907 in 2009 on issues related to the detection of money laundering.

Additionally, every year COAF offers a Financial Intelligence Training Course to professionals employed in financial institutions, oversight agencies and prosecution services. Launched by COAF in 2000, the program is supported by a variety of government academies and educational institutions.

The table lays out the broad set of participating institutions in COAF’s course programs in 2009. Individual courses addressed subjects ranging from money laundering, including the related predicate offenses, to financing of terrorism.

Participating Institutions in COAF’s Training Program in 2009

Central Bank
São Paulo State Public Prosecutor’s Office
Santa Catarina State Civil Police Department
Federal Savings Bank of Brazil
Santander Bank
Bank of Brazil

⁵ COAF was established through Law 9613/98, Brazil’s anti-money laundering law (AML), as a component of the Ministry of Finance for the purpose of receiving pertinent information in connection with and examining and identifying the suspected commission of the illicit acts prescribed under the statute. The Board exercises the duty and power to exchange information and undertake cooperation arrangements. Information may be shared with the competent authorities of other countries and international organizations on the basis of reciprocity or formal agreements. COAF is an administrative model FIU.

HSBC Bank
 Banco Rural
 Brazilian Association of Investigative Journalism (ABRAJI)
 Brazilian National Intelligence Agency (ABIN)
 Office of the Solicitor General of the Republic
 Rio Grande do Norte State Public Prosecutor's Office
 Pernambuco State Public Prosecutor's Office
 Paraguayan Financial Analysis Unit
 Paraíba State Public Prosecutor's Office
 Colombian Banking Association

Another key initiative is the National Capacity-Building and Training Program to Combat Corruption and Money Laundering (Programa Nacional de Capacitação e Treinamento no Combate a Corrupção e à Lavagem de Dinheiro – PNLD). Launched by the Ministry of Justice, through August 2009th the Program, which has included the direct support of COAF in a number of specific course offerings, had provided training to 6,181 professionals, as reflected in the table below:

YEAR	2004	2005	2006	2007	2008	2009
PROFESSIONALS	253	490	909	1097	1746	1681

Professionals who successfully fulfill a specified set of requirements upon completing the program receive certificates in one of two categories: professional certificate in preventing and combating money laundering or expert certificate in combating and preventing money laundering.

The minimum requirements to qualify for the “Professional Certificate in Preventing and Combating Money Laundering,” which must be fulfilled within a period of two (2) years, are:

- Completion of all mandatory PNLD course offerings; and
- Proof of participation in at least forty (40) course hours in PNLD certified training programs or events.

The minimum requirements to qualify for the “Professional Certificate in Preventing and Combating Money Laundering,” which must be fulfilled within a period of four (4) years, are:

- Completion of all mandatory PNLD course offerings;
- Proof of participation in at least three hundred and sixty (360) course hours in PNLD certified training programs or events; and
- Completion of formal academic research related to PNLD course offerings.

In addition, institutions that provide training to their employees receive the official seal of the National Strategy to Combat Corruption and Money Laundering (Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro – ENCCCLA). Since 2007, the seal has been conferred to the following bodies and entities:

Alagoas State Public Prosecutor's Office, Minas Gerais State Public Prosecutor's Office, São Paulo State Public Prosecutor's Office, Public Prosecutor's Office of the Federal District and Territories, Rio de Janeiro State Public Prosecutor's Office, Alagoas State Public prosecutor's Office – Module III, Goiás State Public Prosecutor's Office, Pernambuco State Public Prosecutor's Office, UNICRI Capacity Building Course, Goiás

State Public Prosecutor's Office – Module II, Roraima State Public Prosecutor's Office, "Analysis of Indications of Money Laundering" – Bank of Brazil, Pernambuco State Public Prosecutor's Office, Goiás State Public Prosecutor's Office – Module II, Roraima State Public Prosecutor's Office, Rondônia State Public Prosecutor's Office, Minas Gerais State Public Prosecutor's Office, Mato Grosso do Sul State Public Prosecutor's Office, Bahia State Civil Police Department, Rio de Janeiro State Civil Police Department, São Paulo State Civil Police Department, Rio Grande do Sul State Civil Police Department, Civil Police Department of the Federal District and Territories, São Paulo State Secretariat of Finance, Goiás State Secretariat of Finance, Santa Catarina State Civil Police Department.

Adoption of legislation regarding the reporting obligations of members of the legal and accounting professions

The National Congress is currently considering Bill 3443/2008,⁶ which provides for a number of significant changes to the Law on Money Laundering (Law 9613 of 3 March 1998), including requirements of reporting by the members of the legal and accounting professions, as follows:

Article 9. The obligations prescribed in articles 10 [client identification and transaction registration] and 11 [reporting of transactions or suspicious proposed transactions] apply to all legal persons who perform, on a permanent or temporary basis, as a principal or complementary business activity, whether cumulatively or otherwise:

[...]

Sole Paragraph. The obligations in this article shall further apply to:

[...]

Amended text to be provided by Bill 3443/2008:

XIV – natural or legal persons providing, even if on a temporary basis, **advisory, consulting, accounting, audit, counseling or assistance services** of any nature engaged in the following:

- a) purchase and sale of real estate property, commercial or industrial establishments or corporate shares of any nature;
- b) management of funds, securities or other assets;
- c) opening or management of checking, savings, investment or securities accounts;
- d) establishment, conduct or management of corporate entities of any nature, foundations, fiduciary funds or analogous structures;
- e) financial, corporate or real estate operations;
- f) transfer or acquisition of rights to contracts in connection with professional athletic/sport or art activities;

XV – natural or legal persons engaged in the promotion, mediation, marketing, procurement

⁶ The Bill cleared the Senate and is currently under final review in committee in the Chamber of Deputies for purposes of a subsequent vote by the full Chamber.

or negotiations of the transfer of rights in connection with athletes, artists or exhibits, expositions or similar events;

XVIII – the branch offices of the entities set forth in this article operating abroad, through their main office in Brazil, with respect to the residents of Brazil engaged therein.

If no action has been taken to implement recommendation 2 (e), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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

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

- a) Ensure that sufficient resources are made available and that training is provided to relevant law enforcement authorities, including the Federal Police, State Police, and the Federal Public Prosecutor's Office, for the effective detection and investigation of foreign bribery offences; and consider developing specialised prosecutors' offices to more effectively investigate and prosecute complex economic and financial crimes, including the foreign bribery offence (Convention, Article 5; Revised Recommendation, Paragraphs I and II);

Actions taken as of the date of the follow-up report to implement this recommendation:

The Federal Courts are responsible for cases with international legal effects and all offenses in violation of international agreements. As such, State Courts may only intervene in a particular case to safeguard the vital interests of the affected state, including, for example, cases related to local or state corruption.⁷ Therefore, while state law enforcement agencies have received PNLD training, a majority of the capacity building initiatives and measures adopted to enhance the effort against foreign bribery have been undertaken at the federal level.

The National Council of the Public Prosecutor's Office (Conselho Nacional do Ministério Público – CNMP), established through Constitutional amendment 45 of 2004, has primary responsibility for the internal control of the administrative and financial conduct of Federal Prosecutors and Attorneys, in accordance with the body's [Internal Rules of Procedure, Resolutions](#) and [Recommendations](#), available at: www.cnmp.gov.br.

Of particular note are [Resolution 12](#) (Governing the oversight of the administrative and financial conduct of the Public Prosecutor's Office) and [Resolution 25](#) (Establishing the Strategic Action Center – NAE), both of which were drafted specifically to enhance the institution's internal control mechanisms and guarantee the transparency of the related control measures (Annexes 6 and 7).

In the performance of its duties and powers, the CNMP has issued norms regulating the activities of members of the Public Prosecutor's Office in criminal investigations and prosecutions, including Resolution

⁷ See article 109 of the Brazilian Constitution.

36 of 6 April 2009, which “Provides for the application for and use of telephone intercepts within the scope of the Public Prosecutor’s Office, pursuant to Law 9296 of 24 July 1996”(Annex 8).

Further, in the specific context of the Federal Public Prosecutor’s Office, Complementary Law 75/93 (articles 58-62) established a series of sectoral Coordinating and Review Committees, the specific competencies of which are prescribed in article 62,⁸ for purposes of integrating and reviewing the institution’s functional operation.

In regard to anticorruption, the pertinent committees are the 2nd Committee – criminal matters and external control of law enforcement activities (<http://2ccr.pgr.mpf.gov.br>) – and the 5th Committee – defense of public and social property (<http://5ccr.pgr.mpf.gov.br>) – both of which, among other activities, issue recommendations and declarations and sponsor annual national meetings among active Federal Attorney in their specific fields of action for purposes of debating, discussing, planning and formulating strategies. The Committees also establish thematic Working Groups. To this end, the 2nd Committee and the 5th Committee currently have in place, respectively, a Working Group on Criminal Strategic Planning (2nd CCR) and a Working Group on Projects and Goals (5th CCR).

Also important to note are the efforts of the Advanced Studies School of the Federal Public Prosecutor’s Office (Escola Superior do Ministério Público da União – ESMPU) (www.espmu.gov.br) to promote the continuing professional training and updating of the members and employees of the Federal Public Prosecutor’s Office and to develop research projects and programs in the field of law. To achieve these goals, the ESPMU offers academic activities throughout the country, including professional training programs, workshops, seminars, symposiums, congresses and graduate studies programs.

The fight against corruption has been the focus of a number of activities organized by the various bodies and units of the Federal Public Prosecutor’s Office. In specific regard to the OECD Convention on Combating Bribery of Foreign Public Officials, the following lectures and presentations have been offered to foster debate on the practical application of the OECD Convention:

1. “The OECD Convention against Bribery and the Federal Public Prosecutor’s Office,” delivered at the “Training Course in International Legal Cooperation,” an event organized by the International Legal Cooperation Department (Assessoria de Cooperação Jurídica Internacional da Procuradoria-Geral da República – ASCJI) of the Office of the Attorney-General of the Republic in Salvador, Bahia, 23 September 2008. One hundred participants attended the program.

⁸

Article 62. The Coordinating and Review Committees have the duty and authority to:

I – promote the integration and coordination of institutional bodies engaged in activities connected to its competence, in accordance with the principle of functional independence;

II – undertake exchanges with the bodies or entities engaged in related areas;

III – refer legal information to the institutional bodies in their respective sectors;

IV – issue opinions on the closing of law enforcement investigations, parliamentary inquiries or the setting aside of evidentiary information, except in those cases originally under the competence of the Attorney-General of the Republic;

V – decide on the special distribution of legal actions requiring uniform treatment due to their recurrence;

VI – decide on the special distribution of inquiries, legal actions and procedures, where so required, due to the materiality of the matter in question;

VII – render decisions on disputes over jurisdictional competencies between units and bodies of the Federal Public Prosecutor’s Office.

Sole Paragraph. The competencies set forth in subsections V and VI shall be exercised on the basis of objective criteria previously established by the Superior Council.

2. “The Convention on Combating Bribery and Its Evaluation Mechanism,” offered at the 8th National Meeting of the 5th Coordinating and Review Committee of the Federal Public Prosecutor’s Office in Brasilia, 22 October 2008. The Convention drew 80 participants.

In the framework of the National Capacity Building and Training Program to Combat Corruption and Money Laundering (Programa Nacional de Capacitação e Treinamento no Combate a Corrupção e à Lavagem de Dinheiro – PNLD), a capacity building initiative established within the National Strategy to Combat Corruption and Money Laundering (Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro – ENCCLA), from 2004 to 2009 a total of 83 capacity building programs were held. The programs trained 6,176 officials (federal attorneys, prosecutors, solicitors and law enforcement authorities and agents). The most recent training programs (2007-2009) centered on Corruption and Administrative Misconduct, with an emphasis on:

- Concepts and Definitions of Corruption – national legislation, conventions, treaties, methodologies, modalities of operation, typologies, case studies, corruption in comparative law; legal and criminal aspects of corruption – basic types, subjective criminal liability, objective criminal liability, elements of the offense, related and equivalent offenses, completion of the offense, attempted corruption, co-participation of agents, customary criminal practice, sentences, procedural aspects of corruption – investigation, competence, complaint filings and reporting, discovery, nullity, assurance measures, asset management, anticipated disposal, loss of assets, civil effects of conviction, case studies;
- Administrative Misconduct – legal nature, active subject, co-participation of agents, classification, typologies, treaties and case studies, procedural aspects of administrative misconduct – legitimacy, competence, requirements, assurance measures, privileged forum based on public function, statute of limitations, case studies;
- Illicit Enrichment – concepts and definitions, distinctions, legal consequences, treaties, case studies;
- Financial Investigations – concepts and definitions, use, legal consequences, regulations, connection to criminal law;
- Fraud in Public Procurement Procedures – concepts and definitions, types, legal consequences, treaties, case studies;
- Financing of Electoral Campaigns – concepts and definitions, distinctions, legal consequences, categories, case studies;
- Tax Havens – concepts and definitions, specificities, legal entities, activities, international cooperation;
- Informal Cash Remittance Systems – concepts and definitions, categories, legal consequences under criminal law, controls, case studies;
- Types of Foreign Exchange Exports – concepts and definitions, national legislation, international conventions, treaties and guidelines, methodologies and case studies;
- Types of Foreign Exchange Imports – concepts and definitions, national legislation, international conventions, treaties and guidelines, methodologies, case studies;
- Real Estate Market – concepts and definitions, categories of activities, legal consequences under

criminal law, controls, regulations, professional obligations, case studies;

- Art and Antiquities Market – concepts and definitions, categories of activities, legal consequences under criminal law, controls, regulations, professional obligations, case studies;
- Jewels, Gemstone and Precious Metals Market – concepts and definitions, categories of activities, legal consequences under criminal law, controls, regulations, professional obligations, case studies;
- Games of Chance and Lotteries – concepts and definitions, distinctions, regulations, legal consequences, categories, professional obligations, case studies;
- Factoring – concepts and definitions, categories of activities, legal consequences under criminal law, controls, regulations, case studies;
- Transport of Securities – concepts and definitions, categories of activities, legal consequences under criminal law, controls, regulations, case studies;
- Financing of Terrorism – concepts and definitions, methods, scope of action, specificities by region and activity, regulations, international guidelines, case studies;
- Cyber Crimes concepts and definitions, distinctions, legal consequences, treaties, case studies;
- Sporting Events and Activities – concepts and definitions, distinctions, regulations, legal consequences, categories, examples;
- Tax Immunity – concepts and definitions, distinctions, regulations, legal consequences, categories, case studies;
- Improper Use of Judicial Proceedings – concepts and definitions, case studies;
- Tertiary Sector – concepts and definitions, distinctions, categories, regulations, legal consequences, controls, financial mechanisms, relations with public entities, vulnerabilities, case studies.

The Federal Public Prosecutor's Office has also received valuable support from the International Legal Cooperation Department of the Office (Assessoria de Cooperação Jurídica Internacional da Procuradoria-Geral da República – ASCJI)⁹ of the Office Attorney-General of the Republic (<http://ccji.pgr.mpf.gov.br/>) in the context of the OECD's Matrix of alleged foreign bribery cases. The Department's assistance has paved the way for the obtainment and offer of more effective international cooperation, reflected in the implementation of a range of measures, including the lifting of bank and tax secrecy, among others.

In relation to the use of investigative techniques, measures such as lifting of bank and tax secrecy, telephone and telematic intercepts, environmental monitoring and search and seizure operations continue to be widely used by the Public Prosecutor's Office in the course of its investigations, in strict accordance with the law and applicable regulations, as communicated to the Working Group during the 2nd Phase review of Brazil.

⁹ The primary duties of the ASCJI are to assist the Attorney-General of the Republic in matters of international legal cooperation with foreign officials and international organizations, as well as the relationships maintained with national bodies engaged in international cooperation.

In addition, the National Council of the Public Prosecutor's Office recently enacted a measure regulating the procedures for telephone interceptions, with a view to preventing the occurrence of formal irregularities (Resolution 36 of 6 April 2009). Moreover, the National Justice Council (Conselho Nacional de Justiça – CNJ) has issued a series of resolutions on the matter¹⁰ to ensure application of the related mechanisms is accomplished in a consistent and secure manner. Similarly, prevailing constitutional precedence has reaffirmed the execution of more invasive measures,¹¹¹²¹³ demonstrating that investigative techniques continue and will continue to be employed as part of criminal investigations and prosecutions.

In the light of the concerns expressed by the Working Group in relation to financial and economic

¹⁰ Examples include Resolution 59 of 9 September 2008, regulating and standardizing the pertinent procedures, with a view to enhancing the interception of telephone communications and computer and telematic systems in the jurisdictional bodies of the judicial branch; Resolution 63 of 16 December 2008, instituting the National Asset Seizure System (Sistema Nacional de Bens Apreendidos – SNBA) and other measures; Resolution 61 of 7 October 2008, regulating the registration procedures for single user accounts in connection with court-ordered asset freezes executed through the BACENJUD Agreement.

¹¹ Docket: criminal proceeding. Interlocutory appeal. Curtailment of defense. Denial of investigative act. Direct constitutional violation. Court authorized telephone interceptions. Full transcription. Absence of necessity. Appeal without merit. I – this court has decided that the denial of the investigative act, based on a ruling of absence of necessity by the lower court, does not violate the principles of the right to challenge and the right to a full defense. Precedents. II – No decision in HC 91.207-MC/RJ, Judgment, Rapporteur, Minister Cármen Lúcia, this Court finds unnecessary the consolidation of the full content of the transcripts relating to the telephone intercepts and, as such, sufficient the submission of the transcripts containing the passages necessary to substantiate the complaint. III – Impossibility of judicial review of evidentiary gathering. Case File 279 of the Superior Court of Justice. IV – Appeal without merit. (STF - AI 685878 AgR, Rapporteur, Minister Ricardo Lewandowski, First Panel, judged on 05/05/2009, DJe-108 DIVULG 06-10-2009 PUBLIC 06-12-2009 EMENT VOL-02364-06 PP-01155)

¹² Criminal proceeding. Habeas corpus. Qualified misappropriations, embezzlement and conspiracy. Lifting of bank and tax secrecy and freezing of immovable assets. Absence of merit. Non-occurrence. Absence of illegal detention. Motion denied.

1. In the light of the sufficiently substantiated showing as to the commission of the various crimes, the clear indications of authorship and the necessity of the measure, there is no basis for considering the nullity of the decision ordering lifting of the bank and tax secrecy of the defendant, or the freezing of the appellant's immovable and other assets, without which the proceeding would not have achieved maximum efficacy.

2. Motion denied. (HC 65.052/RN, Rapporteur, Minister Arnaldo Esteves Lima, Fifth Panel, judged on 05/05/2009, Published 06/15/2009)

¹³ Criminal Proceeding – Habeas Corpus – Operation Deluvium Of The Federal Police – Duty Evasion – Criminal Misrepresentation – Money Laundering – Telematic Data Interception – Evidence Of Authorship – Impossibility Of Proof By Other Means – Evidentiary Elements Obtained Legally – Absence Of Illegal Detention – Motion Denied.

1. The telematic interception executed by court order prior to the interception under review, relative to the co-defendant, constitutes a legitimate element for a showing of the evidence necessary to lift the telematic secrecy of another suspect in the course of a law enforcement investigation.

2. Absence of illegality in the executed telematic interception where such interception represents, in conjunction with the presence of evidence as to authorship, considering the peculiarities of the modus operandi of the offense, the only means of proof available to elucidate the facts.

3. The substantiation of the decision establishing evidence of authorship for purposes of enabling the lifting of telematic secrecy is legitimate, even if excessively succinct.

4. Motion denied. (HC 101.165/PR, Rapporteur, Minister Jane Silva (High Court Judge Invited By Superior Court Of Minas Gerais), Sixth Panel, judged on 04/01/2008, Published 04/22/2008).

crimes, it is worth noting that specialized courts – designated money laundering and financial crimes courts – operated by specialized judges and prosecutors have been established in a number of judicial districts. Examples include the 2nd and 6th Federal Criminal Courts of the São Paulo Judicial Subsection.

Further, each State Public Prosecutor’s Office has created specialized units to handle complex cases involving organized crime, money laundering and financial crimes. These groups are generally designated Special Anti-Organized Crime Action Groups (Grupo de Atuação Especial de Combate ao Crime Organizado – GAECO).¹⁴ The GAECOs convene for twice yearly meetings of the National Anti-Organized Crime Group (Grupo Nacional de Combate ao Crime Organizado – GNCOC – www.newmd.com.br/gncoc/). The GNCOC has a working Group specifically devoted to money laundering cases and typologies.

Finally, at the conclusion of its seventh annual meeting of 20 November 2009, the National Strategy to Combat Corruption and Money Laundering (Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro – ENCCLA) formally announced the Brazilian Anticorruption Strategy (Estratégia Brasileira Anticorrupção), a move which does not, it should be noted, signal a decision by the entity to abdicate its broader role in coordinating the national strategy against corruption and money laundering. As part of the announcement, the Office of the Comptroller General (Controladoria-Geral da União – CGU), author of the original proposal, officially vacated its position on ENCCLA’s coordinating committee, although the institution will continue to serve as a full member of ENCCLA and to oversee ongoing anticorruption measures throughout 2010 during its transition out of the entity.

The ultimate objective of the initiative is to formulate a Brazilian anticorruption policy rooted in the understanding that corruption must be addressed in a comprehensive and in-depth manner. In this light, the purpose of the Strategy is to approach corruption as a risk (not as a legacy), reinforcing the strategic aspect of the effort and putting in place a specific public policy.

However, both the anti-money laundering and anticorruption communities will continue to maintain extensive communications, providing ongoing feedback to their efforts. As a first step in the Brazilian Anticorruption Strategy, the Comptroller’s Office will consolidate the initiatives of the Brazilian State in the area, undertaking to coordinate the related activities, including the collection of inputs from other participants, the development of the proposal and mediation of the respective discussions.

If no action has been taken to implement recommendation 3 (a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

¹⁴

See, for example, the following sites: www.mp.sp.gov.br/portal/page/portal/gaeco (GAECO – São Paulo); www.gaeco.caop.mp.pr.gov.br/ (GAECO - Paraná); www.gaecopb.com.br/ (GAECO – Paraíba.)

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

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

b) Take necessary measures to ensure that all credible foreign bribery allegations are proactively investigated, and remind the Federal Police and the Federal Public Prosecutor's Office of the importance of actively looking into the range of possible sources of detection of foreign bribery (Convention, Article 5; Revised Recommendation, Paragraphs I and II); and

Actions taken as of the date of the follow-up report to implement this recommendation:

In addition to the responses set out in Recommendation 3.A concerning the use of investigative techniques, in March 2008 the Office of the Comptroller-General (Controladoria-Geral da União – CGU) established a partnership with the Ministry of Justice (Ministério da Justiça – MJ) to collect information on cases of cross-border bribery. Under the partnership, the CGU has collaborated with the MJ to prepare requests for international legal cooperation, with a view to gathering information capable of assisting the inquiries of the Federal Police and the prosecution of bribery cases by the Public Prosecutor's Office.

As a first step in the initiative, requests on information of suspected cases of the foreign bribery offense contained the OECD's Matrix of possible bribery cases were submitted to: Argentina (Odebrecht), Bolivia (Univen Petroquímica), the Dominican Republic (EMBRAER), Italy (Tri Technologies) and the Russian Federation (Beef Exporters). The information received from the requested countries will be used in Federal Police Department's inquiries into suspected cases of cross-border bribery involving the cited enterprises.

In January 2010, responses were received from Bolivia and the Russian Federation regarding Univen Petroquímica and Beef Exporters. The responses are currently being translated for subsequent submission to the Federal Public Prosecutor's Office and the Federal Police Department.

It is important to note that in respect to the other cases contained in the OECD's Matrix formal probes have yet to be established pending receipt of the responses to the cooperation requests issued by the Office of the Comptroller General (Controladoria-Geral da União – CGU), which could well include concrete elements to justify the launch of official investigations, or, further, the translation of responses submitted by requesting countries for purposes of their referral to the competent criminal prosecution bodies.

With specific regard to the Iraq Oil for Food program, four law enforcement inquiries are currently underway based on the findings of final report of the UN Independent Inquiry Committee submitted by Transparency Brazil to the Federal Public Prosecutor's Office:

ENTERPRISE
COURT
CASE No.

MOTOCANA MÁQUINAS E EQUIPAMENTOS LTDA.

2nd Federal Court of Piracicaba/SP
2006.61.09.001960-2

WEG INDÚSTRIAS S/A

Federal Criminal Court of Jaraguá do Sul/SC
2007.72.09.000052-4

RANDOM S/A IMPLEMENTOS E SISTEMAS AUTOMOTIVOS

Federal Criminal Court of Caxias do Sul/ RS
2006.71.07.000949-7

VALTRA DO BRASIL S/A

5th Federal Criminal Court of Guarulhos/SP
2007.61.81.002964-5

Considering the critical need for full knowledge of the documentation obtained by the UN Independent Committee to ensure thorough investigation into the activities of the enterprises cited in the final report, the Attorney-General of the Republic prepared a consolidated international cooperation request to the Committee covering the four inquiries and seeking delivery of all available information and documentation.

In October 2008, the UN Independent Inquiry Committee submitted a copy of the documentation reviewed by the Committee in electronic format (CD-ROM) on the transactions executed by the four Brazilian enterprises.

The material was immediately made available to each of the four Federal Prosecutors charged with the respective investigations. Because the it was originally prepared in Arabic and subsequently translated into English, a Portuguese translation was required to ensure the legally validity of the evidentiary documentation in the related judicial proceedings.

Yet, given the enormous volume of documents submitted in English, a decision was made to request that the Federal Police Department undertake a preliminary review of the material and select those items for which a Portuguese translation would be required. The strategy was adopted in a January 2009 meeting of the lead Federal Prosecutors in the pertinent cases and a member of the International Legal Cooperation Department (Assessoria de Cooperação Jurídica Internacional República – ASCJI) of the Office of Attorney-General. it was further decided that the request for review of the documentation by the Federal Police Department begin with an analysis of the law enforcement inquiry relative to the VALTRA DO BRASIL S/A case filed with the 5th Federal Court of Guarulhos.

The results of the Federal Police Department's review were submitted in June 2009 to the lead Federal Prosecutor in the respective inquiry and subsequently to the lead Federal Prosecutors in the remaining cases, who are currently analyzing the expert report to determine future course of action.

Brazil is vigorously pursuing the full range of investigations into the cases of bribery of foreign public officials detected in the country as well as those in which Brazilian enterprises are at the center of the allegations.

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

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

c) Encourage law enforcement authorities to make full use of the broad range of investigative measures available to Brazilian investigative authorities, including special investigative techniques and access to financial information, in order to effectively investigate suspicions of foreign bribery (Convention, Article 5; Revised Recommendation, Paragraphs I and II).

Actions taken as of the date of the follow-up report to implement this recommendation:

SEE RESPONSE TO RECOMMENDATION 3A.

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

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

Actions taken as of the date of the follow-up report to implement this recommendation:

(i) Take urgent steps to establish the direct liability of legal persons for the bribery of a foreign public official;

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

Beyond fulfilling the recommendation to establish the direct liability of legal persons for bribery of foreign public officials, the proposal fills a major gap identified in the Brazilian system regarding the liability of legal persons for illicit acts committed against the National Public Administration in the three branches of government – Executive, Legislative and Judicial – and at every level of the Federation (Union, states, Federal District and municipalities), in particular acts of corruption and fraud in public procurement procedures and contracts executed with the Public Administration.

The Bill establishes a comprehensive system to suppress acts of corruption committed by enterprises

in Brazil and abroad by providing for administrative and civil mechanisms to establish liability and a uniform system throughout the country, with a view to strengthening the fight against corruption in accordance with the unique features of the Brazilian federal system.

By establishing the direct liability of legal persons, the proposed law moves beyond the narrow discussion of individual culpability of agents in the commission of violations. Under the legislation, legal persons are held liable upon a showing of the facts, the resulting consequences of such facts and the causal connection between them. In this way, the proposed law effectively removes the evidentiary difficulties of demonstrating the necessary subjective elements, including the intent to cause damage, a common feature of the general and subjective procedures required to establish the liability of natural persons, particularly in the criminal sphere.

Further, a decision was made to establish the administrative and civil liability of legal persons for acts of corruption. The liability of legal persons in the administrative sphere is not unprecedented in the Brazilian legal system.

Laws 8884 of 1994 (violations against the economic order), 8666 of 1993 (public procurement procedures and administrative contracts) and 8429 of 1992 (administrative misconduct), all designed to suppress violations committed by legal persons, have yielded positive results.

Moreover, the decision was driven by a recognition that the administrative sphere has traditionally proved more expeditious and effective in suppressing misappropriations arising from public contracts and public procurement procedures, while demonstrating a greater capacity of response vis-à-vis the public.

(ii) Put in place sanctions that are effective, proportionate and dissuasive, including monetary sanctions and confiscation

With regard to sanctions, the Bill prescribes monetary and non-monetary administrative and civil sanctions. The objective in both cases is not merely the suppression of illicit acts but the prevention of their recurrence as well. To this end, a range of instructional and dissuasive sanctions are applied, including fines, the mandatory publication of the sanction judgment in a major media outlet operating in the area in which the violation took place and connected to the enterprise's business segment, or, in the absence of a specialized outlet, in a national media outlet, and the prohibition on receiving government incentives and entering into contracts with the Public Administration.

Additionally, legal persons are subject to an array of civil sanctions intended to serve as a complement to the applicable administrative sanctions. These more severe penalties are imposed following thorough review and scrutiny by the Courts and may include the mandatory dissolution of a legal person constituted or employed to facilitate or promote illicit acts and the forfeiture of assets, rights and securities arising from direct or indirect advantages or benefits obtained through the commission of violations, while ensuring that the rights of all damaged parties or third parties of good faith are properly safeguarded.

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

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

petition the Courts to apply the administrative and civil sanctions corresponding to the infraction.

(iii) Ensure that, in relation to establishing jurisdiction over legal persons, a broad interpretation of the nationality of legal persons is adopted

The sole paragraph of article 2 of the Bill establishing the liability of legal persons for acts of corruption mandates application of the law to all corporations and limited partnerships, whether legal entities or otherwise, irrespective of their particular business model, as well as any foundations, business associations of entities or persons or incorporated or unincorporated foreign enterprises with main offices, subsidiaries or representations located in Brazil, including on a temporary purposes.

The objective is to ensure the broad liability of all national and foreign legal persons for acts of corruption committed against the National and Foreign Public Administration.

In respect to bribery of foreign public officials, the proposed law covers a range of activities by extending its applicability to corporations and limited partnerships, whether legal entities or otherwise, irrespective of their business organization or model.

Note that under article 982 of the Civil Code of Procedure, Law 10406 of 10 January 2002, corporations are defined as enterprises constituted for purposes of exercising the specific business activity of a business entity subject to registration. Article 966 of the Civil Code of Procedure defines a business entity as any person exercising an organized business activity for purposes of the production or distribution of goods and services.

Yet, notwithstanding the definition above, under the proposed Law joint stock companies are also considered corporations, irrespective of their objective, based on the sole paragraph of article 982 of the Civil Code of Procedure. Joint stock companies are regulated by Law 6404 of 15 December 1976. All enterprises not covered by the definition of corporation are considered limited partnerships (article 982, second part).

Additionally, the Draft Law strives to establish the liability of legal persons for all acts of corruption, irrespective of their business organization or model.

To this end, the legislation provides a broad interpretation of the nationality of legal persons, with a view to establishing liability for acts of corruption committed against the National and Foreign Public Administration.

Moreover, the Bill extends the liability of legal persons for acts of corruption to all the members of an incorporated or unincorporated economic group, including their controlled, affiliated or partner enterprises. Ultimately, the measure will serve to significantly contribute toward reducing impunity.

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

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

- a) Take all necessary measures to provide that proceeds of foreign bribery can always be confiscated, including where they are in the hands of a third party not acting in good faith, and regardless of whether that third party is a natural or legal person, or that monetary sanctions of comparable effect are applicable (Convention, Article 3);

Actions taken as of the date of the follow-up report to implement this recommendation:

In the 2nd phase evaluation, it is argued that confiscation of the proceeds of bribery by the Brazilian judicial system would not likely occur for two reasons – both related to the nature of confiscation arising from a criminal conviction: i) the impossibility of establishing the criminal liability of legal persons; and ii) the need of the foreign State to join the criminal action for purposes of seeking confiscation.

However, in practice the application of monetary sanctions to natural and legal persons is possible under current law. Clarifications on issues related to the applicable monetary sanctions for the offense of active bribery in international commercial transactions are provided below. The comments are divided by the respective legal spheres – criminal, civil and administrative.

Criminal Sanctions

In the case of transnational bribery, criminal sanctions are only applicable to natural persons. To date, Brazil has not considered the possibility of establishing the criminal liability of legal persons (with the exception of environmental crimes). However, this does not preclude the application of civil and administrative sanctions to legal persons, as illustrated below. Further, Brazil is currently studying the issue of liability of legal persons with a view to enhancing the current normative framework.

The criminal liability of natural persons in cases of bribery of foreign public officials carries two types of monetary sanctions: fine and confiscation. Information on fines was provided in the oral report. With respect to the confiscation of proceeds of bribery, a few clarifications are warranted.

A situation of transnational bribery would allow a conviction : i) for the commission of active bribery in international commercial transactions (article 337-B of the Criminal Code of Procedure); ii) or for the commission of one of the money laundering offenses (provided for in article 1 of the Law 9613/1998). In both cases, confiscation is provided for as a result of a conviction, as per the legislation below:

Criminal Code of Procedure (Decree-Law 2848/1940):

Article 91. The conviction shall result in:

II – the loss, to the Union, reserving the rights of the damaged party or third party of good faith:

- a) of the instruments of crime, provided these consist in items the manufacture, disposal, use, carrying or possession of which constitutes an illicit act;

b) of the proceeds of crime or any asset or security constituting an advantage obtained by the agent as a result of a criminal offense.

Law on Money Laundering (Law 9613/1998):

Article 7. The conviction shall result in the following penalty, in addition to those prescribed in the Criminal Code of Procedure:

I – the loss, to the Union, of the assets, rights and securities arising from the criminal offense prescribed in this Law, reserving the rights of the damaged party and third party of good faith.

Both articles ensure the rights of the damaged party and third party of good faith. Similarly, the proceeds in the hands of third parties of bad faith may be subject to confiscation.

Under domestic criminal law and national jurisprudence, the assets, rights and securities of organizations arising from criminal activities may be frozen, seized and confiscated, including any objects used or intended for use in the criminal act. This applies additionally to objects acquired as a result of the criminal act or, further, assets of equivalent value. Under Brazilian law, assets may be confiscated in the absence of a criminal conviction. Where assets are used to commit an illicit act or conceal proceeds of crime, the respective legal persons may be subject to the definition of product/instrument of crime or third-party owner of illicit property. In other words, it is perfectly possible to apply the provisions set forth in article 91, subsection II, lines a and b, of the Criminal Code of Procedure and article 7, subsection I, of Law 9613/98.

An additional point relative to confiscation bears mention: the act of confiscation – understood as a result of the criminal conviction – does not require the prior involvement of the foreign country. The mandatory public criminal action is provided for in article 337-B and within the typologies of money laundering. In other words, only the Public Prosecutor's Office has competence over the criminal action. The institution alone has authority to file a complaint for purposes of launching a criminal proceeding. Specifically, article 100 of the Criminal Code of Procedure¹⁵ requires that the criminal action be public, except as otherwise provided by law. The provision of article 100 also applies to the offenses of money laundering, as set forth in article 2, I, of Law 9613/1998.¹⁶ Therefore, the Public Prosecutor's Office exercises competence to launch criminal proceedings against the alleged perpetrators of the criminal acts prescribed in article 337-B and applicable money laundering offenses. In this light, confiscation, a natural result of the conviction, does not require the intervention of foreign countries.

It is also important to note that the victim of a criminal offense is not always the principal complainant in the criminal action. In fact, the principal complainant is the person with "the power to petition the pertinent jurisdictional authority to investigate the punitive intent in the case in question."¹⁷ The victim of the criminal offense holds title over the particular legal asset damaged or placed at risk by

¹⁵ Article 100. The criminal action shall be public, except where a specific law expressly provides for the confidentiality of the proceeding for the aggrieved party. Paragraph 1 – The public action shall be prosecuted by the Public Prosecutor's Office, and be contingent, where so required by law, on a representation by the aggrieved party or a petition of the Ministry of Justice.

¹⁶ Article 2. The prosecution and judgment of the criminal offenses provided for in this Law: I – shall comply with the provisions governing the ordinary proceedings presided by the single judge for criminal offenses punishable by imprisonment.

¹⁷ PRADO, Luiz Regis. *Comentários ao Código Penal*. 4a. Edição. São Paulo: Editora Revista dos Tribunais, 2007, p. 345.

the criminal conduct. The principal complainant in a criminal action involving the offense of active bribery in international commercial transaction (article 337-B) is, as discussed above, the Public Prosecutor's Office; the victim of the same offense, meanwhile, is "the damaged natural or legal person, including the State (national or foreign)."¹⁸

Civil Sanctions

In the civil sphere, actions may be brought to recover the proceeds of foreign bribery.

One course of action involves a civil action *ex delicto*, a civil execution procedure arising from a criminal conviction. A criminal conviction automatically gives rise to the obligation to compensate the damaged party for the criminal conduct, pursuant to article 91, I, of the Criminal Code of Procedure.¹⁹ If the owner (liable party) fails to fulfill the obligation voluntarily, the interested party may file a civil action *ex delicto* demanding payment of compensation. In this case, the sentence handed down by the civil court serves as an executive title, that is the right to compensation in the civil sphere is no longer subject to challenge.

In the case of transnational bribery, the probable interested parties with legitimate cause to bring a civil action *ex delicto* would be the foreign country and the damaged parties of a foreign bribery offense.

Another option for purposes of applying a monetary civil sanction to the perpetrator of an act of transnational bribery is a civil compensation action. Property arising from an illicit act may be confiscated through a civil judicial procedure. Article 927 of the Civil Code of Procedure provides that anyone who commits an illicit act must compensate the victim. Similarly, article 935 of the Civil Code of Procedure²⁰ states that generally the related action is disassociated from the criminal proceeding, except in two cases: where the criminal decision determines that the act did not take place and where the accused party is deemed not to have committed the act in question.

In regard to the liability of legal persons for acts of corruption, it is important to underscore that, as discussed in Recommendation 4A (ii), article 19, subsection I, of the Draft Bill provides for the confiscation of assets, rights and securities representing a direct or indirect advantage or benefit obtained from the one of the violations therein prescribed, reserving the rights of any damaged parties or third parties of good faith.

Because the legislation does not include exceptions, legal persons may also be considered third parties of bad faith holding assets, rights and securities representing an undue direct or indirect advantage or benefit obtained from the respective violations, to which end they are subject to confiscation.

Administrative Sanctions

¹⁸ NUCCI, Guilherme de Sousa. Código Penal Comentado. 6a. edição. São Paulo: Editora Revista dos Tribunais, 2006, p. 1078.

¹⁹ Article 91. Conviction shall result in: I – the obligation to pay compensation for all damages arising from the criminal offense;

²⁰ Civil Code of Procedure, Article 935. Civil liability shall be considered separately from criminal liability, to which end questions as to the factual basis of the offense, or as to the author of such offense, may not be raised, where a decision on such questions has been rendered in a criminal proceeding.

In addition, administrative sanctions are applicable where prejudice to competition is shown.

In principle, the sanctions would be applied by the Administrative Council for Economic Defense (Conselho Administrativo de Defesa da Concorrência – CADE). The body's jurisdiction, as broadly defined under article 2 of Law 8884/1994,²¹ would cover, for example cases of transnational bribery in which payments affecting the Brazilian market were made. The sanction could be applied to natural and legal persons alike.²²

CADE has authority to apply a variety of sanctions to natural and legal persons that commit violations against the economic order. The principal form of sanction consists of fines (article 23 of Law 8884/1994),²³ although article 24 provides for the application of additional types of penalties.

If no action has been taken to implement recommendation 5 (a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

²¹ Law 8884/1994, article 2. Article 2. Without prejudice to the conventions and treaties to which Brazil is a signatory, the acts committed in whole or part within the territorial limits of Brazil or which produce or could produce effects therein are subject to this Law. Paragraph 1. Residency in the National Territory shall be deemed for any foreign enterprise operating in Brazil or with a subsidiary, agency, branch, office, establishment or representative located in Brazil. Paragraph 2. The foreign enterprise shall be notified and summoned for purposes of all procedural acts, irrespective of power of attorney or contractual or statutory provision, through the party with responsibility for the subsidiary, agency, branch, establishment or office located in Brazil.

²² Law 8884/1994, Article 15. This Law shall apply to natural or legal persons under public or private law, as well as any associations of entities or persons, whether incorporated or unincorporated, even if on a temporary basis, with or without a legal personality, including those in the exercise of a legal monopoly.

²³ Article 23. Liable parties shall be subject to the following penalties for violations against the economic order: I – in the case of an enterprise, a fine of one percent to thirty percent of the entity's gross earnings in the previous quarter, not including taxes, which amount may not be less than the advantage obtained, where quantifiable; II – in the case of a manager directly or indirectly responsible for the violation committed by the enterprise, fine in the amount of ten percent to fifty percent of the value of the fine assessed to the enterprise, payment of which shall be the sole and exclusive responsibility of such manager. III – In the case of any other natural or legal persons under public or private law, as well as any associations of entities or persons, whether incorporated or unincorporated, even if on a temporary basis, with or without a legal personality, which do not exercise a corporate activity and as a result of which the criteria of gross earnings does not apply, a fine in the amount of six thousand (6,000.00) to six million (6,000,000.00) Fiscal Reference Units (Unidades Fiscais de Referência – Ufir), or equivalent standard, shall be assessed.

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

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

b) Pursue efforts to require agencies in charge of administering public funds and government contracts (including those responsible for export credit guarantees, public procurement and privatisation processes) to (i) take due consideration of prior convictions for foreign bribery offences in their contracting decisions and (ii) put in place due diligence procedures where there are suspicions that applicants or clients have been or are involved in payment of bribes to foreign public officials, with a view to suspending or withdrawing support (Revised Recommendation, Paragraphs I, II.v and VI).

Actions taken as of the date of the follow-up report to implement this recommendation:

In addition to the information provided in Recommendation 1C, enterprises contracted by the Public Administration who engage in bribery of foreign public officials, according to the new Bill on Liability of Legal Persons, will be subject to two types of sanctions:

- i) Temporary suspension from participation in public procurement procedures and prohibition on entering into contracts with the public Administration for a period of up to two (2) years; and
- ii) Declaration of ineligibility to participate in public procurement procedures or execute contracts with the Public Administration. The two sanctions may be applied pursuant to the provisions of article 99, III, of Law 8666/1993 (Law of Public Procurement Procedures).²⁴ In this case, enterprises are entered in National Registry of Ineligible and Suspended Companies (Cadastro de Empresas Inidôneas e Suspensas – CEIS) – www.portaldatransparencia.gov.br/ceis/, an online database with information on enterprises subject to sanction for acts of corruption and fraud in public procurement procedures and public contracts. Enterprises declared ineligible or suspended by the CEIS are barred from entering into contracts with the Public Administration.

An additional instrument is the Bill on the Liability of Legal Persons. If approved, the Law will markedly expand the possibilities for sanctioning enterprises for bribery of foreign public officials. To this end, article 7 of the proposed legislation mandates that the authors of the illicit acts are subject to a declaration of ineligibility and the prohibition on contracting with or receiving incentives, subsidies, grants, donations or loans from government bodies or public or publically controlled financial institutions.

A final provision warranting note is the inclusion of clause 7 in the Pact for Integrity and Against Corruption (Pacto pela Integridade e Contra a Corrupção),²⁵ which extends the ban on executing of

²⁴ Article 88. The sanctions provided for in subsections III and IV of the previous article may further be applied to enterprises or professionals who, by virtue of the contracts governed under this Law: (...) III – are found ineligible to enter into contracts with the Public Administration due to the commission of illicit acts.

²⁵ 7. The Signatories or any person or organizations acting on behalf of the Signatories or for their benefit undertake to consult the National Registry of Ineligible and Suspended Companies (Cadastro Nacional de Empresas Inidôneas e Suspensas – CEIS) of the Office of the Comptroller General (Controladoria Geral da União – CGU) for purposes of verifying whether the natural and legal persons engaged in the supply of

contracts with persons declared ineligible by the Public Administration to the Pact's signatories. The question is addressed in the response to Recommendation 1B.

If no action has been taken to implement recommendation 5 (b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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

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

- a) Clarify the prohibition on the deductibility of bribes by introducing an express denial for foreign bribe payments either in the tax legislation or through another appropriate mechanism that is binding and publicly available (Revised Recommendation, Paragraph IV; 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials);

Actions taken as of the date of the follow-up report to implement this recommendation:

In October 2009, the Federal Internal Revenue Department published Interpretive Declaratory Act 32 (Ato Declaratório Interpretativo – ADI) (Annexes 10 and 11) in the Government Gazette. The Act establishes the tax non-deductibility of expenses related to payments or compensation for the commission of offenses or related in any way to such offenses, in particular those set forth in article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Commercial Transactions, for purposes of calculating Income Tax and Social Contribution on Net Profit obligations.

Pursuant to the Internal Rules of Procedure of the Federal Internal Revenue Department, Ministry of Finance Administrative Rule 125 of 4 March 2009, Declaratory Acts are regulated in law. Declaratory acts are issued by the Secretary of the Federal Internal Revenue Department following review of the matter by the General Coordination for Taxation (Coordenação-Geral de Tributação – COSIT).²⁶ Under the Internal

goods and services in their supply chain have been declared ineligible by the Public Administration, and to refrain from, to the extent possible, entering into business relationships with sanctioned persons.

²⁶

Ministry of Finance Administrative Rule 125 of 4 March 2009

Article 82. The General Coordination for Taxation (Coordenação-Geral de Tributação – COSIT) has the duty and authority to:

II – interpret the applicable tax, customs and related legislation, proposed international agreements and accords and the complementary rules and regulations necessary to ensure execution and preparation of the normative acts issued to provide guidance and standardize procedures;

III – render decisions in Consultation proceedings on the interpretation of the applicable tax, customs and related legislation and on appeals filed in Consultation proceedings;

Rules of Procedure, Interpretive Declaratory Acts are intended to express the opinion of the Federal Internal Revenue Department of Brazil on a particular law, decree or normative order

As interpretive instruments, Declaratory Acts set out the norms provided for in the preexisting tax legislation, elucidating their meaning and laying out, in specific relation to such norms, the opinion of the Tax Administration.

In this light, Interpretive Declaratory Act 32 expressly establishes the tax non-deductibility of bribe amounts paid to foreign public officials for purposes of calculating Income Tax and Social Contribution on Net Profits obligations.²⁷

As an official act of the Federal Internal Revenue Department, Interpretive Declaratory Act 32 is binding and mandatory, and applicable to the official procedures of all Federal Internal Revenue Department auditors. In addition, the Act is available to the public on the Internal Revenue Department's official Web site.²⁸

If no action has been taken to implement recommendation 6 (a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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

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

b) Expressly communicate to tax inspectors the non-tax deductibility of bribes and the need to be attentive to any outflows of money that could represent bribes to foreign public officials, including commissions, bonuses and gratuities, through the issuance of guidelines or manuals, and training programmes (Revised Recommendation, Paragraph IV; 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials).

Sole paragraph. In the case of the appeals rulings provided for in subsection III, publication of the decision shall be accomplished concomitantly with the respective Interpretive Declaratory Act of the Secretary of the Federal Internal Revenue Department of Brazil (Receita Federal do Brasil – RFB).

Article 261. The Secretary of the Federal Internal Revenue Department of Brazil (Receita Federal do Brasil – RFB) shall:

III – issue normative administrative acts on matters under the competence of the RFB;

²⁷ The Social Contribution on Net Profit (Contribuição Social sobre o Lucro Líquido – CSLL), instituted by Law 7689/1998, in accordance with article 195 of the 1988 Federal Constitution, is a tax obligation established to fund the social security system. The CSLL is subject to the same assessment and payment rules as those applied to the corporate income tax.

²⁸ <http://www.receita.fazenda.gov.br/Legislacao/AtosInterpretativos/2009/ADIRFB032.htm>

Actions taken as of the date of the follow-up report to implement this recommendation:

As set out in Recommendation 6A, pursuant to Interpretive Declaratory Act 32 (ADI 32) issued by the Secretary of the Federal Internal Revenue Department, a binding and mandatory instrument on all Federal Internal Revenue Department auditors, the work procedures and processes of auditors must be reported as per ADI 32.

The binding nature of the Act mandates its fulfillment by federal auditors when reviewing and analyzing Income Tax and Social Contribution on Net Profit filings. Specifically, ADI 32, an integral part of the rules and guidelines governing the Federal Internal Revenue Department's audit activities, requires all agency auditors to verify whether illegitimate amounts, including expenses arising from bribery, are itemized in Income Tax and Social Contribution on Net Profit filings. Therefore, in the light of the publication of ADI 32 in the Government Gazette and in the Federal Internal Revenue Department's internal communication channels, including the agency's audit procedure system, it is Brazil's conclusion that the staff personnel and officials of the Federal of the Internal Revenue Department have received appropriate and sufficient guidance and notification concerning the content of the Act.

In addition to the measures described in the response to Recommendation 6A, the Federal Internal Revenue Department of Brazil issued a Handbook on Ethics and Discipline offering a discussion of issues related to ethics and disciplinary matters within the civil service, including with regard to the international commitments undertaken by Brazil in this area. The Handbook makes reference to the provisions of the Convention on Combating Bribery of Foreign Public Officials in International Commercial Transactions, as well as the Intern-American Convention against Corruption of the Organization of American States – OAS and the United Nations Convention against Corruption.

The issues broached in the Handbook have proved to be of considerable value to staff personnel of the Federal Internal Revenue Department and, in the context of career civil service programs in the treasury and revenue collection fields, to candidates seeking entry to the institution who have qualified in the first phase of the public exam selection process. The objective of the Revenue Department is to ensure the provision of comprehensive information and training to future officials as well as retraining and updating for current employees with respect to the values, principles and rules on ethics and disciplinary matters adopted by Brazil at both the domestic and international levels.

If no action has been taken to implement recommendation 6 (b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Part II: Issues for Follow-up by the Working Group

Text of issue for follow-up:

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

- a) The adequacy of the limitation period for completing criminal investigations in foreign bribery cases (Convention, Article 6);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Since the adoption of the Phase 2 Report, no other cases of transnational bribery have been identified. As such, there are no relevant developments to report.

Text of issue for follow-up:

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

- b) Brazil's ability to (i) provide prompt and effective mutual legal assistance for offences under the Convention; and (ii) provide and obtain mutual legal assistance in foreign bribery investigations involving legal persons (Convention, Article 9);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

With regard to the OECD transactions matrix in which national enterprises are cited, Brazil has cooperated with other countries in the related investigations.

As an example, the "GTECH Case" of 23 March 2007 relates to the request for international legal cooperation submitted by the United States of America. On 11 July 2007, the Department of Asset Recovery and International Legal Cooperation (Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional – DRCI) of the Ministry of Justice furnished documents, through Communication 5035/2007/DRCI-SNJ-MJ, in compliance with the request for legal cooperation presented by the Central Authority of the United States. The documentation referred to the depositions of two witnesses cited in the original request.

Subsequently, on 15 October 2008, DRCI submitted, through Communication 6947/2008/DRCI-SNJ-MJ, supplementary documents containing the testimony of the remaining subjects of the legal cooperation request. The Communication further reported that three of the cited subjects were not located, thus precluding the possibility of complying fully with the legal cooperation request.

With respect to statistical data, 6 requests issued by Brazil for international legal cooperation relating

to criminal matters and 1 request received by Brazil for international legal cooperation were identified, all involving the offenses prescribed in the OECD Convention.

In regard to Brazil's capacity to offer timely and effective responses to legal cooperation requests relating to criminal matters connected to the offenses prescribed in the Convention, the Ministry of Justice publishes the requirements for the grant of Direct Assistance Requests on its Internet site (<http://www.mj.gov.br/data/Pages/MJ86D74191ITEMIDADBC7CA2BDAB4352ADB251C67F8FC5CFPTBRIE.htm>). Similarly, the Ministry's site provides two types of Direct Assistance Forms for download. The principal requirements for a legal assistance request relating to criminal matters are laid out in the Legal Assistance Forms, accompanied by summary instructions on their proper completion.

Further, DRCI/SNJ is available to review draft legal assistance requests prepared by the competent authorities to ensure compliance with the requirements of the requesting States. To this end, the draft requests may be submitted to drci-cgci@mj.gov.br.

Following the corresponding analyses (in general, reviews of draft requests performed by DRCI/SNJ technical personnel are completed within 48 hours), DRCI/SNJ returns the drafts to the requesting party with the suggested corrections and modifications and awaits submission of the final requests and their corresponding translations for immediate referral to the authorities with competence for their execution.

It is important to note that the legal cooperation requests labeled as urgent by the respective Central Authorities must receive priority treatment in Brazil.

In addition, in cases of extreme urgency, Central Authorities may submit communications by fax, email or equivalent format. To assure effective communication, mutual legal assistance requests relating to criminal matters may, opportunistically and exceptionally, be made verbally.

An important resource for Central Authorities is the international legal cooperation networks. Their objective is to facilitate and expedite legal cooperation between participating States, furnish legal information and practices to national authorities and assist authorities in the formulation of legal assistance requests.

Employees of the Administrative Coordination Unit of DRCI/SNJ receive special training in expediting the mutual legal assistance requests in urgent criminal matters received from foreign jurisdictions. Upon identification, all urgent legal cooperation requests from foreign countries are ensured priority treatment.

For their part, technical personnel receive express instructions to expedite, to the extent possible, the referral of mutual legal assistance requests received from foreign countries relating to urgent criminal matters to the competent Brazilian authorities, either by fax, email or equivalent format.

Finally, the Department of Asset Recovery and International Legal Cooperation developed and implemented a control system to monitor the status of legal proceedings (Sistema de Controle de Andamento de Processos –SAP). The System's database receives daily inputs from the Department's General Coordination for International Legal Cooperation and General Coordination for Asset Recovery, thereby enabling the dissemination of monthly statistics as well as daily follow-up of the individual tasks and controls connected to the status of each pending legal proceeding in the Department.

Text of issue for follow-up:

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

c) Whether, in relation to extradition, (i) considerations of national economic interest, the potential effect on relations with another State and the identity of the person involved unduly influence decisions to grant or refuse extradition; and (ii) whether Brazil initiates prosecutions of its nationals in circumstances where extradition is refused (Convention, Articles 5 and 10);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Since the adoption of the Phase 2 Report, no other cases of transnational bribery have been identified. As such, there are no new developments to report.

Article 5, subsection LI, of the Brazilian Federal Constitution prohibits the extradition of Brazilian nationals, except naturalized citizens, in the case of common offenses committed prior to naturalization or proven involvement in the trafficking of illicit narcotics:

LI – no Brazilian nationals shall be extradited, except naturalized citizens, in the case of common criminal offenses committed prior to naturalization or proven involvement in the trafficking of illicit narcotics, pursuant to the law;

Given the prohibition on the extradition of Brazilian nationals in these cases, Brazil adheres to the principle of *aut dedere, aut judicare*, whereby the agent of the criminal offense is subject to Brazilian criminal law, in accordance with the principles of conditional extraterritoriality and active nationality, pursuant to article 7, subsection II, b, of the Criminal Code of Procedure:

Article. 7. The following are subject to Brazilian law, even if committed outside Brazil:

...

II – criminal offenses;

...

b) committed by Brazilian nationals;

...

Paragraph 2. In the cases of subsection II, the following conditions must be met for purposes of the application of Brazilian law:

a) the agent must have entered into the national territory;

b) the criminal offense must be punishable under the applicable laws of the country in which the offense was committed;

c) the criminal offense must be among those subject to extradition under Brazilian law;

d) the agent may not have been absolved in a foreign jurisdiction or served a sentence;

e) the agent may not have been pardoned in a foreign jurisdiction, nor may the applicable penalty have lapsed, pursuant to the more advantageous law.

Article 88 of the Brazilian Criminal Code of Procedure also warrants mention:

Article 88. In the prosecution of criminal offenses committed in foreign jurisdictions outside the territorial

limits of Brazil, the competent forum shall be the competent court in the State Capital of the accused party's last place of residence. Where such party never previously resided in Brazil, the competent forum shall be the competent court of the Federal Capital.

Therefore, Brazilian citizens who return to the country after committing a criminal offense in a foreign jurisdiction are subject to Brazilian criminal law, provided the State in which the criminal offense occurred officially transfers the documents necessary to launch a criminal prosecution.

On this point, the precedent of the Federal Supreme Court provided below expressly establishes that, following denial of an extradition motion against a Brazilian national, the Brazilian State is authorized to launch a criminal prosecution (HC 83.113-DF (Point of Order), Full Court, Judicial Gazette of 08/29/2003, Rapporteur Minister Celso de Mello):

- Irrespective of the circumstances or nature of the criminal offense, Brazilian nationals may not be extradited by Brazil upon the request of a foreign Government, given the absolute prohibition, under the Federal Constitution, in accordance the relevant binding constitutional clause, on the execution of extradition procedures against the holders, whether by birth ("jus soli") or descent ("jus sanguinis"), of primary or original Brazilian nationality. This constitutional privilege, which benefits all Brazilian nationals, without exception (Federal Constitution, article 5, LI), is not invalidated by virtue of the conferral, by the foreign State, of original nationality in such State, pursuant to its applicable laws (Federal Constitution, article 12, paragraph 4, II, a). – Where the granting of extradition is not possible, due to the inadmissibility of the extradition arising from the status of native Brazilian citizenship of the person sought, the possibility of extraterritorial application of Brazilian law by the Brazilian State is authorized (Criminal Code of Procedure, article 7, II, b, and paragraph 2) as is – considering the provisions of the Extradition Treaty between Brazil and Portugal (Article IV) – launch of a criminal prosecution, before the competent national judicial body (Criminal Code of Procedure, article 88), for the purposes of preventing, due to ethical and legal reasons, impunity for criminal offenses allegedly committed by native or naturalized Brazilian citizens. Doctrine. Jurisprudence.

Text of issue for follow-up:

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

- d) How jurisdiction is exercised over natural and legal persons when the offence takes place in part or wholly abroad (Convention, Article 4);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Since the adoption of the Phase 2 Report, no other cases of transnational bribery have been identified. As such, there are no relevant developments to report.

Text of issue for follow-up:

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

e) Whether the foreign bribery offence in the Penal Code (i) covers an act of bribery through an intermediary; (ii) covers any use of the public official's position, whether or not within the official's authorised competence; (iii) covers all elements of the definition of "foreign public official"; and (iv) effectively narrows the scope of the foreign bribery offence by linking the act or omission of the foreign public official to an international business transaction, contrary to Article 1 of the Convention (Convention, Article 1);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Since the adoption of the Phase 2 Report, no other cases of transnational bribery have been identified. As such, there are no relevant developments to report.

Nonetheless, it is worth clarifying certain aspects of Brazilian criminal legal doctrine governing the extension of the foreign bribery offense to intermediaries.

Where an intermediary assumes a central role in establishing the offense of active or passive bribery,²⁹ the liability of such intermediary shall be established. Under the Brazilian Criminal Code of Procedure, any person who, in any way, commits the offense of corruption is subject to the applicable penalties, to the extent of such person's culpability (article 29 of the Criminal Code of Procedure – co-participation of agents).

In this light, any intermediary representing the illicit interests of another natural or legal person is deemed to commit the offense of active or passive bribery as well. The distinction between the intermediary and the principal agent of the illicit act is reflected in the sentence, which may vary according to the degree of participation.

The Public Prosecutor's Office and the Federal Police Department have extensive experience in bribery cases involving intermediaries. Consequently, it is possible to conclude that the issue does not adversely affect the activities of the competent judicial authorities or criminal prosecutions connected to the investigation of foreign bribery.

²⁹

Article 333 of the Brazilian Criminal Code of Procedure defines the offense of active corruption as the offering or promising of any undue advantage to a public official to influence the official to perform, refrain from performing or delay performance of a public function. Similarly, article 317 of the Criminal code defines passive corruption, an offense committed by a public official against the Public Administration, as soliciting or receiving, for him or herself, or a third party, directly or indirectly, including subsequently or prior to performing a public function, yet in direct connection to such function, any undue advantage, or accepting the promise of such advantage.

Text of issue for follow-up:

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

f) Whether the offence of “concessão” in article 316 of the Penal Code can be relied on in foreign bribery cases and could be used as a basis to preclude prosecution of a perpetrator for the offence of bribery of a foreign public official (Convention Articles 1 and 5);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Since the adoption of the Phase 2 Report, no other cases of transnational bribery have been identified. As such, there are no relevant developments to report.

Text of issue for follow-up:

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

g) Whether the sanctions, including confiscation measures, handed down by the courts for the offence of bribery of a foreign public official are effective, proportionate and dissuasive (Convention, Article 3);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

See the response to Recommendation 5, which offers a thorough discussion of the applicable sanctions for the offense of bribery of foreign public officials.

Text of issue for follow-up:

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

h) The application of the money laundering offence where the predicate offence is foreign bribery, including (i) where the foreign bribery is committed abroad by a legal person; (ii) where the foreign bribery is committed in a country which does not criminalise this predicate offence; and (iii) the sanctions imposed (Convention, Article 7); and

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant

statistics as appropriate:

Since the adoption of the Phase 2 Report, no other cases of transnational bribery have been identified. As such, there are no relevant developments to report.

Text of issue for follow-up:

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

- i) The effective prohibition in Brazilian corporate law of the offenses listed in Article 8.1 of the Convention (Convention, Article 8; Revised Recommendation, Paragraph V).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate: