

MECHANISM FOR FOLLOW-UP ON THE
IMPLEMENTATION OF THE INTER-AMERICAN
CONVENTION AGAINST CORRUPTION
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FEDERATIVE REPUBLIC OF BRAZIL

FINAL REPORT

(Adopted at the September 16, 2011 plenary session)

**COMMITTEE OF EXPERTS OF THE MECHANISM FOR FOLLOW-UP ON THE
IMPLEMENTATION OF THE INTER-AMERICAN CONVENTION AGAINST
CORRUPTION**

**REPORT ON IMPLEMENTATION IN THE FEDERATIVE REPUBLIC OF BRAZIL OF
THE CONVENTION PROVISIONS SELECTED FOR REVIEW IN THE THIRD ROUND,
AND ON FOLLOW-UP TO THE RECOMMENDATIONS FORMULATED TO THAT
COUNTRY IN PREVIOUS ROUNDS¹**

INTRODUCTION

1. Contents of the Report

[1] This report presents, first, a review of implementation in Brazil of the provisions of the Inter-American Convention against Corruption selected by the Committee of Experts of the Follow-up Mechanism (MESICIC) for review in the Third Round: Article III, paragraphs 7 and 10, and Articles VIII, IX, X and XIII.

[2] Second, the report will examine follow-up to the recommendations that were formulated to Brazil by the MESICIC Committee of Experts in the previous rounds, which are contained in the report on that country adopted by the Committee and published at the following web pages: www.oas.org/juridico/english/mec_rep_bra.doc and www.oas.org/juridico/english/mesicic_II_inf_bra_en.pdf

2. Ratification of the Convention and adherence to the Mechanism

[3] According to the official records of the OAS General Secretariat, Brazil deposited the instrument of ratification of the Inter-American Convention against Corruption on June 24, 2002.

[4] In addition, Brazil signed the Declaration on the Mechanism for Follow-up on the Implementation of the Inter-American Convention against Corruption on August 9, 2002.

I. SUMMARY OF THE INFORMATION RECEIVED

1. Response of the Federative Republic of Brazil

[5] The Committee wishes to acknowledge the cooperation that it received throughout the review process from Brazil and in particular from the Office of the Comptroller General of the Union (CGU), which was evidenced, inter alia, in the Response to the Questionnaire and in the constant willingness to clarify or complete its contents. Together with its response, Brazil sent the provisions and documents it considered pertinent. The response, along with said provisions and documents, may be consulted at the following webpage: www.oas.org/juridico/portuguese/mesicic3_bra.htm

[6] For its review, the Committee took into account the information provided by Brazil up to February 21, 2011, and that furnished and requested by the Secretariat and the members of the review subgroup, to carry out its functions in keeping with its Rules of Procedure and the review Methodology.

1. This Report was adopted by the Committee in accordance with the provisions of Article 3(g) and 25 of its Rules of Procedure and Other Provisions, at the plenary session held on September 16, 2011, at its Nineteenth meeting, held at OAS Headquarters, September 12-16, 2011

2. Documents received from civil society organizations

[7] The Committee also received, within the deadline established in the schedule for the Third Round, a document from the civil society organization “*Amigos Associados de Ribeirão Bonito (AMARRIBO)*”, submitted electronically by Transparency International.²

II. REVIEW, CONCLUSIONS AND RECOMMENDATIONS ON IMPLEMENTATION BY THE STATE PARTY OF THE CONVENTION PROVISIONS SELECTED FOR THE THIRD ROUND

1. DENIAL OR PREVENTION OF FAVORABLE TAX TREATMENT³ FOR EXPENDITURES MADE IN VIOLATION OF THE ANTICORRUPTION LAWS (ARTICLE III (7) OF THE CONVENTION)

1.1. Existence of provisions in the legal framework and/or other measures

[8] Brazil has a set of provisions related to the denial or prevention of favorable tax treatment for expenditures made in violation of the anticorruption laws, among which the following should be noted:

[9] – The Federal Constitution,⁴ article 150 (II) of which prohibits unequal treatment for taxpayers who are in an equivalent situation and forbids any distinction by reason of professional occupation or function performed by them, independently of the juridical designation of their incomes, titles or rights. In addition, paragraph 6 of that article provides that “*Any subsidy or exemption, reduction of assessment basis, concession of presumed credit, amnesty or remission, related to taxes, fees or contributions, may only be granted by means of a specific federal, state or municipal law, which provides exclusively for the above-enumerated matters or the corresponding tax, fee or contribution, without prejudice to the provisions of article 155, paragraph 2, item XII, g.*”⁵

[10] – Decree 7.386 of December 8, 2010, Annex I,⁶ article 14 of which attributes the following responsibilities, among others, to the Federal Revenue Service (*Secretaria da Receita Federal do Brasil*), the “RFB”, a unique and specific agency which falls directly under the Ministry of Finance:

[11] “*I: to plan, coordinate, supervise, execute, control and assess the activities of the federal taxation and customs administration, including those relating to social contributions intended to finance social security and contributions owed to third parties, as well as other entities and funds, pursuant to existing legislation; II: to propose measures for improving, regulating and consolidating federal tax legislation; III: to interpret and enforce taxation, customs, social security and related legislation, issuing regulations and instructions as necessary to their execution; IV: to establish the associated tax obligations, and to oversee the delivery of declarations; V: to prepare and judge, in first instance, administrative proceedings for determining and enforcing tax credits and the*

2. This document was received on February 21, 2011 and may be consulted at the following webpage:

http://www.oas.org/juridico/portuguese/mesicic3_bra.htm

3. For the purposes of this report, the MESICIC Committee of Experts defines favorable tax treatment as all exemptions and any deductible items used for the purposes of determining the income tax base, and other treatment that gives rise to favorable reductions in the amount of tax payable by taxpayers.

4. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra.htm

5. Federal Constitution, Article 155 (2) XII: “*A supplementary law shall:... (g) regulate the manner in which, through deliberation by the states and the Federal District, tax exemptions, incentives and benefits shall be granted and revoked.*”

6. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_dec7386.pdf

recognition of claims relating to the taxes it administers; (...) VIII: to plan, direct, supervise, guide, coordinate and execute audit, assessment, collection, recovery, and control of taxes and other revenues of the Union under its administration; (...) XI: to estimate and quantify the waiver of revenues administered and to evaluate the effects of tax rate reductions, tax exemptions and tax incentives, without prejudice to the competence of other bodies in this area; XII: to encourage cooperation and integration among the tax administrations of the country, between the tax authorities and the taxpayer, and to promote tax education, as well as to prepare and disseminate tax and customs information; (...) XIV: to sign agreements with organs and entities of the public administration and public and private entities to exchange information, to rationalize activities, to develop shared systems, and to conduct joint operations; (...) XVI: to negotiate and participate in the implementation of international agreements, treaties and conventions in the taxation and customs area; (...) XXII: to coordinate with national, international and foreign organs, entities and agencies working in the economic aspects of taxation, social security and foreign trade on the conduct of studies and the holding of technical conferences, congresses and similar events; (...) XXIV: to guide, supervise and coordinate the production and dissemination of strategic information in the area of its competence, in particular for purposes of risk management or for use by organs and entities involved in joint operations, seeing to the quality and reliability of the information for preventing or combating fraud and illegal practices within the federal taxation and customs administration.”

[12] – Decree 3.000 of March 26, 1999,⁷ regulating the Income Tax in Brazil, which expressly establishes the permitted grounds for tax deductions.

[13] With respect to natural persons domiciled or residence in Brazil,⁸ the basis for calculating income tax owed during the calendar year is the difference between the amounts of taxable income less the permitted deductions (article 83 (sections I and II)).

[14] The grounds for deduction from income tax for individuals are established in Title V of Book I,⁹ article 73 of which provides that "*all deductions are subject to proof or justification, in the judgment of the tax assessor*" and that "*if the deductions claimed are exaggerated in relation to the income declared, or if such deductions are unreasonable, they may be denied without a hearing with the taxpayer*" (article 73 §1). Moreover, "*deductions denied for lack of proof or justification may not be reinstated after the act has become unappealable in the administrative sphere*" (article 73 §2). As well, paragraph X of article 55 includes among taxable income "*the proceeds derived from unlawful activities or transactions or received in violation of the law, regardless of the applicable penalties*".

[15] With respect to the legal personsⁱ listed in article 246,ⁱⁱ the basis for calculation used for taxable income is that of actual earnings (*lucro real*) for the accrual period, which consists of net income for the accrual period adjusted by add-backs, exclusions or offsets prescribed or authorized by the decree (article 247). Net income for the period, in turn, "*are the sum of operating income (Chapter V), non-operating results (Chapter VII), and profit sharing, and must be determined in light of the precepts of commercial law*" (article 248).

7. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_dec3000.pdf

8. Article 2 of decree 3000/99 provides that "natural persons domiciled or resident in Brazil, who have economic or legal disposal over income or proceeds of any kind, including profits and capital gains, are subject to income tax, without regard to nationality, sex, age, civil status or profession".

9. Pursuant to articles 74, 75 and 78 to 82 of Decree 3000/99, grounds for deduction include the following: social security contributions; dependents; alimony payments; pensions and allowances for persons over 65 years; as well as certain medical and education expenses.

[16] Items deductible from corporate income tax include operating costs and expenses (art. 300). Pursuant to article 299, "*operating expenses are those not computed in costs and required for the company's activities and maintenance of its source of production.*" Necessary expenses are those paid or incurred to carry out transactions or operations required by the company's activities (art. 299, para. 1). The operating expenses allowed are "*those usual or normal in the type of transactions, operations or activities carried out by the company*" intrinsically related to the production or marketing of goods and services (art. 299, para. 2).

[17] Excluded from this concept are, among other things, deductions expressly prohibited by the tax legislation,¹⁰ such as expenditures on gifts (art. 249, sole paragraph (section VIII)) and meal expenses of partners, shareholders and administrators (ibid, VI). Also prohibited are deductions for any donations or contributions except those relating to articles 365ⁱⁱⁱ and 371, lead paragraph^{iv} (art. 249, sole paragraph (section VII)).

[18] Article 304 provides that "*deductions shall not be allowed for amounts paid or credited as commissions, bonuses, premiums or the like, when the transaction or reason giving rise to the payment is not indicated and when the receipt demonstrating the payment does not identify the beneficiary (Law n° 3.470, of 1958, art. 2)*".¹¹

[19] In addition, pursuant to article 256, and without prejudice to any criminal liability, any person who falsifies the substance or meaning of account records and documentation or financial statements for purposes of reducing or deferring the tax owed is liable to a fine.

[20] – Law n° 9.532, of December 10, 1997,¹² article 61 of which provides that for purposes of proving operating costs and expenses in connection with Income Tax Act and the Social Contribution on Profits,^v expenses paid to the legal person must be supported by a tax receipt (*nota fiscal*) or coupon issued by a special piece of equipment (ECF, "tax coupon issuer"),¹³ showing the minimum data with respect to individual or corporate buyer: a) identification using the official ID number: CPF (*Cadastro de Pessoas Físicas*, for individuals) or CNPJ (*Cadastro Nacional de Pessoas Jurídicas*, for legal persons); b) description of the good or service covered by the transaction (may be summarized or coded); c) the date of the transaction.

[21] Any other means for issuing the tax receipt, including manually, must be authorized by the Secretariat of State for Finance (*Secretaria de Estado da Fazenda*), with jurisdiction over the tax domicile of the interested company (art. 61, para 2).

[22] – The interpretive note from the Federal Revenue Service (*Ato Declaratório Interpretativo da Receita Federal do Brasil*) n° 32, of October 15, 2009,¹⁴ which prohibits the deduction of expenses incurred in violation of anticorruption laws in the following terms: "*payments made in compensation for or in connection with legal violations, in particular those mentioned in article 1 of*

10. Article 13 of Law n° 9.249, of December 26, 1995 available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_lei9249.pdf.

11. At pages 2 and 3 of the Response to the Questionnaire for the Third Round, Brazil presents, by way of example, a judgment handed down by the Federal Revenue Service tribunal in Porto Alegre, RS, on February 26, which upheld a tax assessment in disallowing expenses claimed for commissions paid abroad, on the grounds that the underlying international transactions were not proven; it also upheld the fine of 150% imposed for evident intent of fraud.

12. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_lei9532.pdf

13. Article 61, lead paragraph, of Law n° 9.532/97 provides that "businesses engaged in the sale or resale of goods at retail and service providers must use ECF equipment".

14. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_ato32.pdf

the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, may not be deducted in calculating the income tax and the social contribution on profits."

[23] – Law nº 8.137, of December 27, 1990,¹⁵ article 1 of which makes it a crime to avoid or reduce the amount of tax or social contributions owing through any of the following devices: “*I – to omit information or to submit a false declaration to the tax authorities; II - to deceive the tax supervisors by inserting inaccurate elements or omitting transactions of any kind in the documents or books required by tax legislation; III - to falsify or alter tax receipts, invoices, duplicates, sales slips, or any other document relating to taxable transactions;; IV - to prepare, distribute, supply, issue or use a document that the person in question knows or ought to have known to be false or inaccurate; V - to refuse or fail to provide, when required, a tax receipt or equivalent document concerning the sale of merchandise or provision of services effectively delivered, or to provide it in a manner not consistent with legislation*¹⁶”. The penalty for this crime is imprisonment for 2 to 5 years, and a fine.

[24] In addition, pursuant to article 2 the following conduct constitutes a crime of the same nature: “*I - to make a false declaration or to fail to make a declaration of income, property or facts, or to employ other fraudulent means to exempt the person, wholly or in part, from the payment of tax; II - to fail to recover, within the legal time limit, through collection or withholding at source, the amount of tax or social contributions that must be forwarded to the public treasury; III - to demand, pay or receive, for the legal person or for the beneficiary taxpayer, any percentage on the amount deductible or deducted from tax or contribution as a tax incentive; IV - to fail to apply, or to apply contrary to regulation, a tax incentive or portions of tax released by a development organ or entity; V - to use or disclose a data processing program that allows the taxpayer to hold accounting information different from than that which is by law provided to the fiscal authorities*”. The penalty for this crime is detention from six months to two years and a fine.

[25] – Decree nº 6.022, of January 22, 2007,¹⁷ implementing the Public Digital Bookkeeping System (Sped),¹⁸ to standardize and unify the reception, validation, storage and authentication of books and documents that comprise the commercial and tax accounts of business persons and business corporations, through a single, computerized flow of information (art. 2, lead paragraph).

[26] Users of the system are: I- Federal Revenue Service (RFB), II- the tax administrations of the states, the Federal District and municipalities, by agreement with the RFB, and III- the organs and entities of the direct and indirect Federal public administration with legal powers for regulation, control and supervision of business persons and business corporations (art. 3 (I, II and III)).

[27] The system is administered by the RFB, with participation by representatives of the other users (art. 5). The information stored in the system is shared with its users, “*within the limits of their respective responsibilities and without prejudice to legislation governing commercial, tax and banking secrecy*” (art. 4).

15. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_lei8137.pdf

16. “*Failure to comply with the authority’s requirement, within the limit of 10 days, which may be converted into hours, depending on the complexity of the matter or the difficulty in meeting the requirement, shall constitute the violation mentioned in section V*” (Art. 1, sole paragraph, Law nº 8.137/90).

17. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_dec6022.pdf

18. For further information on the *Sistema Público de Escrituração Digital* (Sped) see: <http://www1.receita.fazenda.gov.br/Sped>

[28] – RFB Normative Instruction nº 787, of November 19, 2007,¹⁹ instituting Digital Accounting Bookkeeping (*Escrituração Contábil Digital*, ECD), for tax and social security purposes, which is mandatory for business corporations subject to the *Lucro Real*²⁰-based corporate income tax (art. 3 (II)) and optional for other business corporations (art. 3, para 1).

[29] The ECD includes a digital version of the following books: “*I – Journal and subsidiary ledgers, if any; II - General ledger and subsidiary ledgers, if any; III – Daily trail balances and balance sheets and entry cards that substantiate entries posted to them*” (art. 2, (I, II and III)). These books and documents must be digitally signed, using as a minimum the security certificate type A3 issued by the certifying authority accredited by ICP-Brasil in order to guarantee the authorship, authenticity, integrity and legal validity of the digital document (art. 2, sole paragraph).

[30] – The Internal Regulation of the RFB, approved by *Portaria* nº 587 of the Ministry of Finance, of December 21, 2010,²¹ article 225 of which establishes the following powers of the RFB special units for large taxpayers (Demac): “*I - to issue assessments ex officio, impose fines and other penalties for violations of tax legislation, and make the corresponding representations; II - to perform the inventory of property and seek a court order for precautionary tax measures; III - to conduct tax inspections and appraisals including inquiries under prosecution procedure; IV - to revise assessments ex officio; V - to promote tax education; VI - to analyze, monitor and provide information requested by external authorities and organs, including in judicial actions relating to the unit's responsibilities; and VII - to pursue audit activities concerning taxation on a universal basis, the movement of funds abroad, international remittances involving foreign exchange transactions and international transfers in domestic currency, and other transactions that have an external connection and a tax impact.*”.

[31] Training events sponsored by the School of Financial Administration (*Escola de Administração Fazendária*, ESAF) in 2009 and 2010, such as the distance education course on Corporate Income Tax and the Social Contribution on Profits, specifically aimed at career taxation officials²² and those programmed for 2011 on "Tax Intelligence – Research and Investigation" and “Audit Procedures -- Technological Update”, among others.²³

1.2. Adequacy of the legal framework and/or other measures

[32] With respect to provisions related to the denial or prevention of favorable tax treatment for expenditures made in violation of the anticorruption laws, the Committee notes that based on the information available to it, they can be said to constitute a set of pertinent measures for promoting the purposes of the Convention.

[33] Notwithstanding, the Committee believes that it would be beneficial for the country under review to consider taking such steps as it deems appropriate to make it easier for the appropriate authorities to detect sums paid for corruption in the event that they are being used as grounds for obtaining such treatment. (See Recommendation 1.4(a) in Section 1.4 of this Report).

19. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_in787.pdf

20. See endnote nº II.

21. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_reg.pdf

22. More information about the content of these courses are available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_curso.pdf

23. Further information on the ESAF training events scheduled for 2011 is available at :

http://www.esaf.fazenda.gov.br/esafsite/agenda-eventos/arquivos/Modelo_Catalogo_v_impressa_21_2CESAF_SITE.pdf

1.3. Results of the legal framework and/or other measures

[34] The country under review states that no data is available at this time.²⁴

[35] Considering that the Committee does not have information that might enable it to make a comprehensive evaluation of the results of this topic, the Committee will formulate a recommendation to the country under review so that, through the tax authorities that process applications for favorable tax treatment and the other authorities or organs with jurisdiction in that respect, it consider the selection and development of procedures and indicators, when appropriate and where they do not yet exist, to analyze objective results obtained in this regard and to follow-up on the recommendations made in this report in relation thereto. (See Recommendation 1.4 (b) in Section 1.4 of this Report).

1.4. Conclusions and recommendations

[36] Based on the review conducted in the foregoing sections, the Committee offers the following conclusions and recommendations with respect to the implementation in the country under review, of the provisions contained in Article III, paragraph 7 of the Convention:

[37] **Brazil has considered and adopted measures intended to create, maintain and strengthen standards on the denial or prevention of favorable tax treatment for expenditures made in violation of the anticorruption laws, as described in section 1 of Chapter II of this Report.**

[38] In light of the comments formulated in that section, the Committee suggests that Brazil consider the following recommendation:

[39] Strengthen the standards and measures for the denial or prevention of favorable tax treatment for expenditures made in violation of the anticorruption laws. To comply with this recommendation, Brazil could take the following measures into account:

- a. Consider adopting the measures deemed appropriate to make it easier for the appropriate authorities to detect sums paid for corruption in the event that they are being used as grounds for obtaining such treatment, such as the following: (see Section 1.2 of this Report).
 - i. Continue to prepare manuals, guidelines or directives that will guide them in reviewing those applications, so that they are able to verify that the applications contain the established requirements, to confirm the truthfulness of the information provided, and to confirm the origin of the expenditure or payment on which the claims are based.
 - ii. Continue to develop computer programs that facilitate data consultation and cross-checking of information whenever necessary for the purpose of fulfilling their functions;
 - iii. Continue to strengthen institutional coordination mechanisms that will provide the timely collaboration needed from other authorities, on such aspects as certifying the authenticity of the documents submitted in accordance with the procedures related to favorable tax treatment;

24. See Response of Brazil to the Questionnaire in the Third Round, p. 5, available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf

- iv. Continue to develop training programs designed specifically to alert officials to the methods used to disguise payments for corruption and to instruct them in ways of detecting such payments in the procedures related to favorable tax treatment;
 - v. Continue to develop channels of communication permitting the prompt report of the anomalies detected or of any irregularity that could affect the decision to the authorities responsible for the procedures related to favorable tax treatment.
- b. Select and develop, through the tax authorities that process applications for favorable tax treatment and the other authorities or organs with jurisdiction in that respect, procedures and indicators, when appropriate and where they do not yet exist, to analyze objective results obtained in this regard and to follow up on the recommendations made in this report in relation thereto. (See Section 1.3 of this Report).

2. PREVENTION OF BRIBERY OF DOMESTIC AND FOREIGN GOVERNMENT OFFICIALS (ARTICLE III (10) OF THE CONVENTION)

2.1. Existence of provisions in the legal framework and/or other measures

[40] Brazil has a set of provisions related to prevention of bribery of domestic and foreign government officials, among which the following should be noted:

[41] – The Brazilian Civil Code (Law 10.406 of 10 June 2002)²⁵, article 967 of which requires business persons²⁶ to register in the Register of Companies of their respective jurisdiction (managed by the *Juntas Comerciais*, Boards of Trade) before they begin their activity.

[42] Pursuant to article 1179 of the Civil Code, business persons and corporations²⁷ are required to use an accounting system, mechanized or not, based on standardized bookkeeping, in accordance with the respective documentation, and to produce annual financial statements including balance sheets and income statements.²⁸

[43] The “journal” (*diário*) book is compulsory and indispensable for all corporations, regardless of their branch of activity, but this may be replaced by entry cards (*fichas*) in the case of mechanized or electronic bookkeeping (article 1180). The journal must record, in a clear and individualized manner, identifying the respective documents, day by day, by direct entry or by reproduction, all transactions relating to the company's business (article 1184).

[44] If the business person or corporation adopts the entry card system it may replace the “journal” book by the “trial balances and balance sheet” (*Balancetes Diários e Balanços*) book, following the same required formalities (article 1185). The “trial balances and balance sheet” book

25. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_codigo_civil.pdf

26. Article 966 of the Civil Code defines a business person as one who “exercises professionally an organized economic activity for the production or circulation of goods or services”.

27. Article 1195 of the Civil Code establishes that the provisions of articles 1179 to 1194 concerning accounting records are applicable as well to the Brazilian branches, subsidiaries and agencies of business persons or companies with headquarters in a foreign country.

28. The balance sheet must present a true and clear picture of the real situation of the company and, with due regard to its particular features and the provisions of special laws, must indicate its assets and liabilities separately (article 1188 of the Civil Code). The income statement (profit and loss account) must accompany the balance sheet and constitute debits and credits thereto, in the form of the special law (article 1189 of the Civil Code)

shall record the daily position for each account or accounting item, in its respective amount, in the form of trial balances (article 1186, lead paragraph and section I).

[45] The Civil Code requires, furthermore, that the books and entry cards shall be authenticated, before use, in the Register of Companies, except as otherwise provided in a special law (article 1181). The accounting records of Brazilian companies must be entrusted to a legally authorized accountant, unless none is available locally (article 1182), and are to be kept in the national language and currency, in chronological order by day, month and year, with no gaps, erasures, changes or moves to the margin (article 1183).

[46] Business persons and corporations are required to ensure the safe keeping of their records, correspondence and other paperwork concerning their activity until the statutory expiry date of the acts to which they refer (article 1194).²⁹

[47] With respect to the examination of their records, article 1191 provides that the judge may only authorize full disclosure of their books and records when necessary to resolve questions relating to succession, community of goods or incorporation, administration or management on behalf of another person, or in the case of bankruptcy. However, the judge or court hearing a precautionary motion or action may, upon request or ex officio, order the books of either party, or both, to be examined in the presence of the business person or the corporation to whom they belong, or persons appointed by them, to extract from them matters of material interest (article 1191 (1)). According to article 1192, lead paragraph, if presentation of the books is refused, they may be seized by court order and the opposing party's claim will be deemed proven upon examination of the books, in the case of article 1191 (1).³⁰

[48] Restrictions on the examination of account records and documentation, in part or in whole, established in articles 1191 and 1192 do not apply to the finance authorities when auditing the payment of taxes, within the strict terms of special legislation (article 1193).

[49] – The Corporations Act (Law 6404 of 15 December 1976)³¹, article 100 of which establishes, in addition to the general provisions of the Civil Code governing account records and documentation, a series of compulsory books for publicly held corporations (which negotiate securities on capital markets) and large-sized companies³², including the records of registered shares,

29. Article 195 of the National Tax Code (Law 5172 of 25 October 1966) renders inapplicable for purposes of tax legislation any legal provisions that would exclude or limit the right to examine merchandise, books, records, documents, papers or commercial or fiscal effects of merchants, manufacturers or producers, or the duty of such persons to present them. The mandatory commercial and tax books and records and supporting documentation must be retained until the expiry of potential tax liabilities flowing from the transactions to which they refer. Under Article 173 of the National Tax Code, the right of the finance authorities to constitute a tax claim expires five (5) years after: "(I) the first day of the year following that in which the assessment could have been made; (II) the date of confirmation of a decision that, because of a formal flaw, annulled the previous assessment (...)." Currently, the right to bring action in a tax claim expires after five years (National Tax Code, Article 174).

30. Moreover, article 240 of the Code of Criminal Procedure provides that the judge may order the search and seizure of any elements of evidence, including accounting documentation and computer equipment containing such information: "*Home or personal search. §1. The home may be searched when there are substantiated reasons, in order to: [...] e) discover objects necessary to prove the charge or the defense; [...] h) collect any element of evidence.*"

31. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_lei6404.pdf

32. Since 1 January 2008 large-sized companies (even those not organized as joint-stock companies) are subject to the book keeping and reporting requirements set out in the Corporations Act, as well as to compulsory auditing of their financial statements by an independent auditor accredited with the Brazilian Securities Commission (CDM). Under law 11,638 of 28 December 2007 a company or group of companies under common control that has posted total assets above R\$240,000,000

transfer of registered shares, minutes of general meetings of shareholders, lists of attendance of shareholders, minutes of meetings of the Board of Directors (if any), minutes of meetings of the Executive Committee, and minutes and opinions of the Fiscal Board (*Conselho Fiscal*).

[50] The company's accounts must be kept as permanent records, in accordance with the provisions of commercial legislation and Law 6404/76 as well as generally accepted accounting principles, using accounting methods or criteria that are uniform over time and recording changes in assets on an accrual basis (article 177, lead paragraph).

[51] The financial statements of publicly-held corporations must be signed by the directors and the legally authorized accountants and must observe the rules set forth by the Securities Commission. They must also be audited by independent auditors registered with the Securities Commission (article 177, paragraph 3 and 4). Those rules, issued by the commission, must be prepared in accordance with international accounting standards adopted in the major securities markets (article 177, paragraph 5).

[52] Closely-held corporations may choose to be guided by the rules on financial disclosure issued by the Securities Commission for publicly held companies (article 177, paragraph 6).

[53] According to article 161, corporations must have a “fiscal board” that exists either on a permanent basis or in those fiscal years in which it is established at the request of shareholders. The fiscal board comprises at least three and at most five members, with the same number of alternates, who may be shareholders or not, elected by the corporation's general assembly. The requirements and disqualifications for election as a member of the fiscal board are established in article 162³³.

[54] Among the powers of the fiscal board listed in article 163, the following deserve particular attention: “*to oversee, through any of its members, the acts of managers and verify compliance with their legal and statutory duties*” (article 163 (I)); “*to render an opinion on the annual report of management, noting in its opinion any supplementary information it deems necessary or useful for deliberation by the general assembly*” (article 163 (II)); “*to report, through any of its members, to the organs of administration and, if these do not take the necessary action to protect the interests of the company, to the general assembly, any instances of error, fraud or crime that may be discovered, and to suggest remedial measures useful to the company*” (article 163, (IV)); “*to convene the regular general assembly, if the organs of administration are late in doing so by more than one month, and to convene extraordinary sessions, for grave or urgent reasons, including on the agenda of the assemblies matters that it deems necessary*” (article 163, (V)); “*to analyze, at least quarterly, the trial balance and other financial statements prepared periodically by the company*” (article 163, (VI)); and “*to examine the financial statements for the fiscal year and to issue an opinion on them*” (article 163, (VII)).

[55] The organs of administration are required, by means of written communication, to make available to members of the fiscal board, within 10 days, copies of the minutes of their meetings and within 15 days of their receipt, copies of the trial balances and other financial statements prepared periodically and, if any, reports on budget execution (article 163, paragraph 1).

(approximately US\$151,038,480) or annual gross revenues above R\$300,000,000 (approximately US\$180,798,100) will qualify as a large- sized company (article 3, sole paragraph, of Law 11,638/2007).

33. Pursuant to article 162 of law 6404/76, persons eligible for election to the fiscal board must be individuals resident in Brazil, who have a university degree or have held the position of company manager or fiscal board member for at least three years. In order to guarantee the impartiality and independence of the board, its members may not be members of the Board of Directors or employees of the company or of the controlling company or a company of the same group, or a spouse or relative to the third degree of a company manager (article 162, paragraph 2).

[56] The fiscal board, at the request of any of its members, has the power to request clarifications or information from the organs of administration, provided they relate to its supervisory function, and to prepare special financial or accounting statements (article 163, paragraph 2). The fiscal board is also required to provide to any shareholder or group of shareholders representing at least 5% of corporate capital, upon request, information on matters within its competence (article 163, paragraph 6).

[57] If the company has independent auditors, the fiscal board, at the request of any of its members, may request clarifications or information from those auditors, and the investigation of specific facts (article 163, paragraph 4). If the company does not have independent auditors, the fiscal board may, for better performance of its functions, choose an accountant or audit firm and decide its fees, within reasonable levels, as prevailing locally and as compatible with the company's economic dimensions, which shall be paid by the company (article 163, paragraph 5). In addition, pursuant to paragraph 8 of that article, the fiscal board may, in order to verify a fact the clarification of which is necessary to performance of its functions, formulate substantiated questions to be answered by experts and request management to indicate, for this purpose, within 30 days, three experts who may be natural or legal persons of recognized expertise in the area in question, from among whom the fiscal board will select one, whose fees shall be paid by the company.

[58] Finally, article 133 provides that, until one month prior to the date set for the ordinary general assembly, administrators must communicate the availability to shareholders of, among other things, the financial statements, the opinion of the independent auditors (if any) and the opinion of the fiscal board, including any dissenting votes (article 133 (II, III, and IV)). That communication must indicate the location or locations where shareholders may obtain copies of the documents, which must also be sent to shareholders who so request in writing (article 133, paragraphs 1 and 2). In addition, members of the fiscal board, or at least one member, must appear at meetings of the general assembly and respond to requests for information put to them by the shareholders (article 164, lead paragraph). The opinions and statements of the fiscal board, or of any of its members, may be presented and read at the general assembly, independent of publication and even if the matter is not on the agenda (article 164, sole paragraph).

[59] – Law 6385 of 7 December 1976³⁴, creating the Securities Commission³⁵ (article 5), which possesses among other things the power to regulate, in observance of the policy established by the National Monetary Council, the matters expressly stipulated in this law and in the Corporations Act (article 8 (I)) and to provide permanent supervision of the activities and services of the securities market (article 8 (III)).

[60] Article 9 grants the Securities Commission various supervisory powers: for example, to examine and extract copies of accounting records, books or documents, including electronic programs, magnetic and optical files, as well as any other files, and also the paperwork of independent auditors (article 9 (I)); of publicly held companies and other issuers of securities³⁶

34. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_lei6385.pdf

35. Under the terms of article 5 of law 6385/76, the Securities Commission is “an autonomous government entity linked to the Ministry of Finance, with its own legal identity and assets, endowed with independent administrative authority, absence of hierarchic subordination, fixed mandate and stability of its Board of Commissioners, and financial and budgetary autonomy.”

36. And their respective parent companies, subsidiaries, affiliates and companies under common control, when there is reasonable suspicion of illegal activities (article 9 (I.b)).

(article 9 (I.b)). Companies must maintain such documents in perfect order and state of conservation for at least five years (article 9 (I)).

[61] Among other powers, the Securities Commission may “*require publicly-held corporations to re-issue their published financial statements, reports or information, duly corrected or amended*” (article 9 (IV)) and “*investigate, through administrative proceedings, illegal acts and unfair practices of managers, members of the fiscal board and shareholders of publicly-held corporations, intermediaries, and other market participants.*” (article 9 (V)). The Securities Commission may also impose penalties for violations, ranging from a warning and a fine to suspension of authorization or registration and temporary disqualification from operating on securities markets, regardless of civil or criminal liability (article 9 (VI) and article 11). When the inquiry, instituted in accordance with the second section of article 9,³⁷ concludes that a publicly actionable crime has occurred, the CVM shall also advise the Attorney General's office to take criminal action (article 12).

[62] Article 26 of the law provides that, for its purposes, only audit firms or independent auditors registered with the Securities Commission may audit the financial statements of publicly held companies. Audit firms and independent auditors bear civil liability for damages caused to third parties by virtue of negligence or fraud in the exercise of their functions (article 26, paragraph 2).

[63] – The “New Market Regulations”³⁸ and the Differentiated Levels of Corporate Governance³⁹ of the BM&FBOVESPA for the listing of companies committed to high standards of corporate governance. Inclusion in these segments is voluntary, but companies that decide to participate in one of them must demonstrate additional requirements of corporate governance: they must, for example, prepare, publish and send to BM&FBOVESPA a code of conduct setting out the values and principles that they will observe in their relations with managers, officials, service providers and other persons and entities with which the company has contact.

[64] – The National Tax Code (Law 5172 of 25 October 1966)⁴⁰, article 195 of which renders inapplicable for purposes of tax legislation any legal provisions that would exclude or limit the right to examine merchandise, books, records, documents, papers or commercial or fiscal effects of merchants, manufacturers or producers, or the duty of such persons to present them. In addition, the mandatory commercial and tax books and records and supporting documentation must be retained until the expiry of potential tax liabilities⁴¹ flowing from the transactions to which they refer (article 195, sole paragraph).

[65] – Decree 3000 of 26 March 1999⁴², regulating the income tax, article 257 of which requires corporate taxpayers to maintain, in addition to their financial books, a commercial book known as the “Journal” (article 258)⁴³, and also, for corporations taxed on the basis of actual earnings (*lucro real*),

37. Article 9(§2) of Law 6385/76 provides that “*The process, in the cases provided for in section V of this article, may be preceded by an investigative stage, ensuring the secrecy necessary for clarifying the facts or as required by the public interest, and observing the procedure established by the Commission.*”

38. Available at: <http://www.bmfbovespa.com.br/Empresas/download/RegulamentoNMercado.pdf>

39. Available at: <http://www.bmfbovespa.com.br/Empresas/download/RegulamentoNivel1.pdf> and <http://www.bmfbovespa.com.br/Empresas/download/RegulamentoNivel2.pdf>

40. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_codigo_trib.pdf

41. Article 173 of the National Tax Code provides that “the right of the finance authorities to constitute a tax claim expires five years after: (I) the first day of the year following that in which the assessment could have been made; (II) the date of confirmation of a decision that, because of a formal flaw, annulled the previous assessment.”

42. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_dec3000.pdf

43. Decree 3000/99 provides that the books or cards of the Journal must contain opening and closing terms and must be submitted for authentication to the competent body of the Commercial Registry (article 258, paragraph 4).

a general ledger (“*Razão*”, article 259). Such firms must keep the general ledger or entry cards used to summarize and total (by account or subaccount) the entries in the Journal, in good order and in accordance with recommended accounting standards, with due regard to the other requirements and conditions stipulated in legislation.

[66] Article 264, lead paragraph, requires legal persons to maintain in good order, for as long as potential actions concerning them are not prescribed, all books and records pertaining to their activity or referring to acts or transactions that modify or could modify their financial situation. In addition, paragraph 3 of that article provides that “*substantiating documentation of the records of legal persons relating to facts that affect accounting entries of future years shall be conserved until expiry of the right of the finance authorities to constitute tax claims concerning those years.*”⁴⁴

[67] Article 256 provides that, without prejudice to criminal liability, any person who falsifies the substance or meaning of account records and documentation or financial statements for purposes of reducing or deferring the tax owed is liable to a fine. In addition, if the authority determines, before the close of the assessment period, that the taxpayer has failed to record income, in whole or in part, or has recorded costs or expenses that cannot be substantiated, or has conducted any act intended to reduce the corresponding tax, including acts covered by article 256, the taxpayer will be subject to a fine equal to half the omitted income or the improper deduction, which shall be due and payable even though the period for assessing the tax has not ended (article 981).

[68] The balance sheet, the income statement for the assessment period, the extracts, the breakdown of accounts or entries, and any accounting documents must be signed by chartered accountants or other legally registered accounting technicians, indicating their registration numbers (article 819). These professionals, within the scope of their activity and with reference to its technical aspect, are liable together with the taxpayers for any falsehood in the documents they sign and for any irregularities in the accounts and books that might constitute tax fraud (article 819, paragraph 1).

[69] Lastly, article 820 provides that if any falsehood is detected in the balance sheet or any other accounting document, or in the bookkeeping of the taxpayers, the professional who signed such documents shall be declared by the Federal Revenue Officers and Inspectors to be ineligible to sign any accounting documents for submission to the bodies of the *Secretaria da Receita Federal do Brasil*, without prejudice to any criminal action.

[70] – Decree n° 6.022, of January 22, 2007,⁴⁵ implementing the Public Digital Bookkeeping System (Sped),⁴⁶ to standardize and unify the reception, validation, storage and authentication of books and documents that comprise the commercial and tax accounts of business persons and business corporations, through a single, computerized flow of information (art. 2, lead paragraph).

[71] Users of the system are: I- Federal Revenue Service (RFB), II- the tax administrations of the states, the Federal District and municipalities, by agreement with the RFB, and III- the organs and entities of the direct and indirect Federal public administration with legal powers for regulation, control and supervision of business persons and business corporations (art. 3 (I, II and III)).

44. Article 173 of the National Tax Code provides that “the right of the finance authorities to constitute a tax claim expires five years after: (I) the first day of the year following that in which the assessment could have been made; (II) the date of confirmation of a decision that, because of a formal flaw, annulled the previous assessment.”

45. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_dec6022.pdf

46. For further information on the *Sistema Público de Escrituração Digital* (Sped) see: <http://www1.receita.fazenda.gov.br/Sped>

[72] The system is administered by the RFB, with participation by representatives of the other users (art. 5). The information stored in the system is shared with its users, “*within the limits of their respective responsibilities and without prejudice to legislation governing commercial, tax and banking secrecy*” (art. 4).

[73] – RFB Normative Instruction n° 787, of November 19, 2007,⁴⁷ instituting Digital Accounting Bookkeeping (*Escrituração Contábil Digital*, ECD), for tax and social security purposes, which is mandatory for business corporations subject to the *Lucro Real*⁴⁸-based corporate income tax (art. 3 (II)) and optional for other business corporations (art. 3, para 1).

[74] The ECD includes a digital version of the following books: “*I – Journal and subsidiary ledgers, if any; II - General ledger and subsidiary ledgers, if any; III – Daily trail balances and balance sheets and entry cards that substantiate entries posted to them*” (art. 2, (I, II and III)). These books and documents must be digitally signed, using as a minimum the security certificate type A3 issued by the certifying authority accredited by ICP-Brasil in order to guarantee the authorship, authenticity, integrity and legal validity of the digital document (art. 2, sole paragraph).

[75] – Decree Law 9295 of 27 May 1946,⁴⁹ creating the Federal Board of Accountancy and the Regional Boards of Accountancy (article 1), establishes that such institutions shall exercise supervision over the accounting profession⁵⁰ and provides that such professionals shall be known as accountants and technicians in accountancy (article 2).

[76] The responsibilities of the Federal Board of Accountancy, listed in article 6, include the power to regulate accounting principles, the “Competency Examination”, the technical qualification register, and in-service education programs, and to issue Brazilian Accounting Standards of a technical and professional nature.

[77] Article 12, lead paragraph, establishes the requirements for exercising the accounting profession: candidates must have a bachelor's degree in accounting sciences, recognized by the Ministry of Education; they must pass the “Competency Examination”; and they must register with the pertinent Regional Board of Accountancy. Exercise of the profession without registration is deemed an infraction and is subject to a fine (article 12, sole paragraph).

[78] In terms of supervision of the accounting profession, article 27 provides that infractions are punished with a fine, suspension and cancellation of professional authorization, to be applied by the Regional Boards of Accountancy, with possibility of recourse, in the case of a fine, to the Federal Board of Accountancy.

[79] Pursuant to article 27, the fines apply to individuals who fail to comply with the basic requirements for exercise of the profession. They represent from 1 to 10 times the value of the annual fee owed by registered accountants to the Regional Boards of Accountancy. The penalty of

47. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_in787.pdf

48. See endnote n° II.

49. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_dec_lei9295.pdf

50. According to Article 25 of Decree-Law 9295/46, technical accounting work includes: “organization and execution of accounting services in general; the keeping of mandatory accounting books, as well as all those necessary in the accounting organization as a whole and preparation of the respective balance sheets and statements; giving of judicial or extrajudicial testimony, revision of balance sheets and accounts in general, verification of assets, permanent or periodic revision of accounting entries, judicial or extrajudicial regulations of general averages, assistance to the fiscal boards of corporations and any other attributes of a technical nature assigned by law to accounting professionals.”

suspension from exercise of the profession, for a period of up to two years, is applicable to professionals who, within the scope of their activity as it refers to the technical part, are responsible for any falsehood in the documents they sign and for any accounting irregularities that constitute fraud against the public revenues; for a period of six months to one year, for a professional with demonstrated technical incapacity in the performance of his functions. In addition, disqualification from professional exercise is applicable when there is demonstrably serious technical incapacity, a crime of an economic or tax nature, production of false evidence of any of the requirements for professional registration, and misappropriation of the property of customers entrusted to the safekeeping of the professional. Lastly, ethical penalties of private warning, private censure and public censure are applied in the cases stipulated in the Code of Professional Ethics of Accountants.

[80] – The Code of Professional Ethics of Accountants (Resolution 803 of the Federal Board of Accountancy of 10 October 1996)⁵¹, article 2 of which lists the duties of the accountant, among which are: “to exercise the profession with zeal, diligence and honesty, observing existing legislation and safeguarding the interests of his clients and/or employers, without prejudice to professional dignity and independence” (article 2 (I)); “*to maintain confidential over what he knows by reason of his professional exercise, including within the scope of public service, with the exception of those cases stipulated by law or when required by the competent authorities, including the Regional Boards of Accountancy*” (Article 2 (II)); and “*to report immediately to the client or employer, by private communication, any adverse circumstance that could influence the decision of the person consulting him or entrusting work to him, extending this obligation to partners and executors.*” (Article 2 (IV)).

[81] According to article 3, in the performance of his functions, the accountant is prohibited from, among other things, “*helping to perform any act contrary to legislation or intended to defraud, and from practicing, in the exercise of his profession, any act defined as a crime or contravention*” (article 3 (VIII)); “*prejudicing, by negligence or deceit, an interest entrusted to his professional responsibility*” (article 3 (X)); “*revealing a confidential negotiation by the client or employer for an agreement or transaction of which he has demonstrated knowledge*” (article 3 (XV)); “*deceiving or attempting to deceive the good faith of the client, employer or third persons, altering or distorting the exact tenor of documents, or supplying false information or preparing inappropriate accounting documents*” (article 3 (XV)) and “*preparing accounting statements without observing the Fundamental Principles and Brazilian Standards of Accounting issued by the Federal Board of Accountancy*” (article 3 (XX)).

[82] Infringement of the rules of the Code of Professional Ethics of Accountants constitutes an ethical violation punishable, depending on the severity, by the penalties of private warning, private censure and public censure, to be applied by the regional tribunals of ethics and discipline of the Regional Boards of Accountancy, with possibility of recourse to the Federal Board of Accountancy (articles 12 and 13).

[83] – Resolution 750 of the Federal Board of Accountancy of 29 December 1993⁵², establishing the Principles of Accounting, which are mandatory in the exercise of the accounting profession and constitute a condition of legitimacy of the Brazilian Accounting Standards (article 1, paragraph 1).

51. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_codigo_etica.pdf

52. Available at: http://www.oas.org/juridico/portuguese/res_750.pdf

[84] – Resolution 1328 of the Federal Board of Accountancy of 18 March 2011⁵³, regulating the structure of the Brazilian Accounting Standards, article 1 of which provides that Brazilian Accounting Standards issued by the Federal Board of Accountancy must follow the same models of preparation and style used in international standards and must include the standards themselves, the technical interpretations, and the technical communiqués.

[85] – Resolution 563 of the Federal Board of Accountancy of 28 October 1983⁵⁴, issuing Brazilian Accounting Standard T 2.1, dealing with the accounting records of Brazilian companies. That standard describes the models and formalities that must be followed by companies in their bookkeeping.

[86] – Resolution 1203 of the Federal Board of Accountancy of 27 November 2009,⁵⁵ approving Brazilian Accountancy Standard T 11, Standards for Independent Audit of Accounting Statements. The standard regulates all the work of the independent auditor, including standards relating to the planning, procedure and execution of financial statement audits.

[87] – Resolution 1207 of the Federal Board of Accountancy of 27 November 2009,⁵⁶ approving Brazilian Accounting Standard TA 240, “The Auditor's Responsibilities Relating to Fraud in an Audit of Financial Statements”, prepared in accordance with its international equivalent ISA 240.

[88] With respect to the obligation to report fraud to the regulatory and control authorities, item 43 provides that “*if the auditor has identified or suspects a fraud, he must determine whether there is a responsibility to report the occurrence or suspicion to a third 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.*”

[89] In addition, items A65 and A66 provide respectively: “*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 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 also has a duty to report misstatements to authorities in those cases where management and those charged with governance fail to take corrective action.*”

[90] “*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.*”

[91] – Resolution 1323 of the Federal Board of Accountancy of 21 January 2011,⁵⁷ instituting the External Quality Review, also known as the “Peer Review”, for independent auditors registered with the Securities Commission (CVM). Auditors must submit to this review at least once in every four-year cycle (Provision 6). The peer review is managed by the Administrative Committee of the External Quality Review Program (CRE), comprising members of the Federal Board of Accountancy

53. Available at: http://www.oas.org/juridico/portuguese/res_1328.pdf

54. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_res563.pdf

55. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_res1203.pdf

56. Available at: http://www.oas.org/juridico/portuguese/res_1207.pdf

57. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_res1323.pdf

and the Brazilian Institute of Independent Auditors (IBRACON). The responsibilities of the CRE as listed in provision 6 include the selection of auditors to be assessed each year, the preparation of guidelines and general instructions for the peer review, approval of the final reports and action plans submitted by the reviewing auditors, and reporting to the Federal Board of Accountancy and the Securities Commission of any situations that suggest the need for follow-up with the reviewers or the persons reviewed.

[92] – The Brazilian Penal Code (Decree Law 2848 of 7 December 1940),⁵⁸ article 297 of which criminalizes the falsification of public documents in the following terms: “*to falsify, in whole or in part, any public document or to alter a true public document: penalty – imprisonment of 2 to 6 years, and a fine (...)*”. Article 297 (2) defines “public document” to include “commercial books”.

[93] The falsification or alteration, in whole or in part, of a private document is criminalized by article 298. The penalties are imprisonment of one to five years, and a fine.

[94] Article 299 penalizes the omission “*in any public or private document of a statement that should be contained therein, or the insertion therein of a statement that is false or different from that which should be entered, for the purpose of prejudicing a right, creating an obligation, or altering the truth about a legally relevant fact.*” The penalties are imprisonment of one to five years and a fine, in the case of a public document, and imprisonment of one to three years and a fine in the case of a private document.

[95] In addition, article 304 applies to the use of any falsified or altered document mentioned in these articles. The penalties are equivalent to those for falsification or alteration prescribed in the relevant articles.

[96] Lastly, article 305 makes it a crime for a person to destroy, suppress or conceal, “*to his own benefit or that of another person, or to the prejudice of another person, a true public or private document which he was not entitled to possess.*” The penalty is 2 to 6 years imprisonment and a fine, for a public document, and 1 to 5 years imprisonment and a fine, for a private document.

[97] – Law n° 8.137, of December 27, 1990,⁵⁹ article 1 of which makes it a crime to avoid or reduce the amount of tax or social contributions owing through any of the following devices: “*I – to omit information or to submit a false declaration to the tax authorities; II - to deceive the tax supervisors by inserting inaccurate elements or omitting transactions of any kind in the documents or books required by tax legislation; III - to falsify or alter tax receipts, invoices, duplicates, sales slips, or any other document relating to taxable transactions;; IV - to prepare, distribute, supply, issue or use a document that the person in question knows or ought to have known to be false or inaccurate; V - to refuse or fail to provide, when required, a tax receipt or equivalent document concerning the sale of merchandise or provision of services effectively delivered, or to provide it in a manner not consistent with legislation*⁶⁰”. The penalty for this crime is imprisonment for 2 to 5 years, and a fine.

58. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_codigo_penal.pdf

59. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_lei8137.pdf

60. “*Failure to comply with the authority’s requirement, within the limit of 10 days, which may be converted into hours, depending on the complexity of the matter or the difficulty in meeting the requirement, shall constitute the violation mentioned in section V*” (Art. 1, sole paragraph, Law n° 8.137/90).

[98] – Resolution 62 of the Council of Ministers of the Chamber of Foreign Trade, of 17 August 2010⁶¹, which makes financing and the granting of credit conditional upon the signature by companies of the Exporter's Declaration of Commitment. In signing this document, the company declares that it is aware of the crimes against a foreign administration established in the Brazilian penal code and it undertakes to comply at all times with anticorruption rules and regulations. It also declares its understanding that if it, or any person representing it, should be found guilty in law of bribing a foreign public official, it will lose access to the export finance line of the National Bank for Economic and Social Development (BNDES) and the Export Finance Program (PROEX) for eight years from the date the penalty is imposed by the competent authority.

[99] – The various measures for raising awareness and promoting integrity in the private sector, conducted by the Brazilian government, in particular by the CGU, in partnership with the *Instituto Ethos de Responsabilidade Social*, such as:⁶²

[100] The Business Pact for Integrity and against Corruption, launched in June 2005. The pact has been signed by 500 firms of the private sector since its creation and represents a set of suggestions, guidelines and procedures to be adopted by firms and entities that have voluntarily committed themselves to promoting integrity.⁶³

[101] The manual, “Social Responsibility of Firms in Combating Corruption”, a publication created in June 2009 by the working group for the Pact, of which the CGU is part. It compiles good practices in the area of integrity, transparency and relationships with the productive chain of the firm, and how to implement a program for integrity and combating corruption.⁶⁴

[102] The project entitled “Dialogue with Business”, implemented by the CGU, through its regional offices, in which CGU staffers enter into contact with business corporations and associations to encourage the implementation of integrity measures, including good practices in relations with the public sector. In 2010, 10 regional CGU offices carried out project activities with the participation of some 680 firms and 25 private sector associations. Activities included workshops and working groups, participation in entrepreneurial fairs and mobilizing firms to sign the Business Pact for Integrity and against Corruption.

[103] The CGU website, launched in 2010, devoted to raising awareness among business people as to their role and responsibility in combating corruption⁶⁵. The site carries information on how to implement good practices in order to establish an atmosphere of trust and integrity in relations between the public sector and the private sector.

[104] The National Register of Businesses Committed to Ethics and Integrity (*Cadastro Empresa Pró-Ética*), launched in December 2010. Its objective is to recognize firms that invest in ethics and integrity by instituting measures of corporate governance and bribery prevention.⁶⁶

61. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_res62.pdf

62. See Brazil's Response to the Questionnaire for the Third Round, pages 14-16, available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf

63. Further information on the Pact can be found at the webpage of the *Empresa Limpa* company: <http://www.empresalimpa.org.br/>

64. Available at: http://www.cgu.gov.br/Publicacoes/ManualRespSocial/Arquivos/ManualRespsocialEmpresas_baixa.pdf

65. Available at: : <http://www.cgu.gov.br/AreaPrevencaoCorrupcao/AreasAtuacao/IntegridadeEmpresas/index.asp>

66. Further information on *Cadastro Empresa Pró-Ética* can be found at: <http://www.cgu.gov.br/empresaproetica/index.asp>

2.2. Adequacy of the legal framework and/or other measures

[105] With respect to the provisions that refer to the prevention of bribery of domestic and foreign government officials that the Committee has examined, based on the information available to it, they constitute a set of measures relevant for promoting the purposes of the Convention.

[106] Notwithstanding, the Committee considers it appropriate to express some comments regarding the advisability of developing, complementing and adjusting certain measures that might be useful for the country under review to consider.

[107] First, the Committee believes it necessary for the country under review to continue adopting, through the appropriate means, pertinent measures to ensure that “professional confidentiality” is not an obstacle for accounting professionals to bring to the attention of the appropriate authorities any acts of corruption that they discover in the course of their work. The Committee will formulate a recommendation in this regard (see Recommendation 2.4(a) in Section 2.4 of this Report).

[108] Second, the Committee believes that it would be useful for the country under review to consider continuing its efforts with respect to awareness and integrity promotion campaigns that target the private sector. In this respect, the country could consider continuing to adopt measures such as the production of manuals and guidelines on best practices that should be implemented to prevent corruption (see Recommendation 2.4(b) in Section 2.4 of this Report).

[109] Third, the Committee believes it would be useful for the country under review to consider holding awareness campaigns targeted at persons responsible for maintaining accounts and verifying their accuracy, on the importance of observing the rules issued to guarantee the truthfulness of those records and the consequences of violation. The country could also consider implementing training programs designed specifically for internal comptrollers in publicly held companies and other types of associations who are required to keep accounts, to instruct them in ways of detecting acts of bribery in the course of their work (see Recommendation 2.4(c) in Section 2.4 of this Report).

[110] Lastly, the Committee believes that it would be beneficial for the country under review to consider adopting the measures it deems appropriate to make it easier for the organs and agencies responsible for the prevention and/or investigation of noncompliance with measures designed to safeguard the accuracy of accounting records to detect sums paid for corruption concealed in those records (see Recommendation 2.4(d) in Section 2.4 of this Report).

2.3. Results of the legal framework and/or other measures

[111] In its Response to the Questionnaire⁶⁷, concerning the results in this area, Brazil provides the following information:

[112] *“The Federal Board of Accountancy and the Regional Boards of Accountancy have an advanced system for supervising their members. Supervision is standardized by a Supervision Manual and its objectives are to see to their observance of the laws, principles and standards of the accounting profession; to encourage probity and ethical principles. The boards also monitor disciplinary proceedings through a computerized system so that no proceeding is left pending. A procedural manual was also instituted for the imposition of penalties.*”

67. See the Response of Brazil to the Questionnaire for the Third Round, pages 16 to 19, available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf

[113] *The inspectors of the regional boards have daily inspection targets to fulfill in accounting organizations, businesses in general, and public bodies, among others. When they find violations, the inspectors are required by law to prepare a report on their findings, indicating the nature of the offense and the person responsible. That report then serves as the basis for disciplinary proceedings which include full rights of defense and cross examination.*

[114] *The Regional Boards of Accountancy have provided the following statistics on the number of investigations, reports and penalties applied:*

YEAR	INVESTIGATIONS	VIOLATION REPORTS	NOTIFICATIONS OF PENALTY
1996	85.069	33.929	16.080
1997	147.159	19.526	19.520
1998	153.605	21.845	22.033
1999	184.936	20.215	19.985
2000	201.284	16.710	17.173
2001	239.721	13.930	20.122
2002	237.842	15.208	18.989
2003	281.945	13.018	18.002
2004	321.803	12.340	20.391
2005	332.071	9.121	29.167
2006	291.254	11.257	16.425
2007	478.963	7.401	24.597
2008	569.375	13.431	22.673
2009	528.645	12.144	32.166
2010*	537.165	11.932	27.857

** To November 2010*

Number of actions taken by the Securities Commission

[115] *During 2009, the Securities Commission (CVM) issued 633 notifications to persons investigated, and took 235 depositions. 68 disciplinary proceedings were opened, a number similar to the previous year, and 60 cases went to trial, representing an increase of roughly 43% over 2008.*

[116] *There was an increase in 2009 over 2008 in the number of penalties applied by the CVM. The number of fines rose from 132 to 148, imposed on a total of 115 persons, for a total value of R\$58 million.*

PENALTY APPLIED	2008	2009
Warnings	17	19
Fines	96	115
Suspensions	2	0
Disqualifications	7	1

[117] *There was a significant decline in the number of acquittals handed down by the tribunal in 2009, indicating an improvement in the quality of the accusations brought by the local boards.*

<i>ACQUITTALS</i>	<i>2008</i>	<i>2009</i>
Acquittals	150	69

[118] *As to the type of infraction, in the case of proceedings that required investigation by the Superintendency of Disciplinary Proceedings (SBS), the number of cases that involved accusations of the use of privileged information increased from 3 in 2008 to 22 in 2009. Violations involving fraudulent operations increased from 12 to 18 cases.”*

<i>INFRACTION</i>	<i>2008</i>	<i>2009</i>
Use of privileged information	3	22
Fraudulent operation	12	18
Breach of due diligence by the manager of a publicly held company	3	5
Conflict of interest on the part of a manager	0	1
Errors/omissions of relevant facts	3	7

[119] The Committee considers that the above information serves to demonstrate that the Regional Boards of Accountancy of Brazil have processed a great many cases involving the investigation and punishment of accounting professionals. However, the information is not sufficiently detailed to indicate what type of penalties were applied and for which cases, such as for example the suspension of exercise of the profession for up to two years, in the case of documentary falsification (article 27 (d) of Decree Law 9295/46) or disqualification from professional exercise for crimes against economic and tax legislation (article 27 (f) of Decree Law 9295/46).

[120] As well, with respect to information on the results of the CVM, it indicates progress in the supervision and punishment of violations of securities market rules in general. However, no specific information was presented on the work of the CVM in supervising the internal controls and internal audit of regulated companies, or on application of penalties in these cases. Such information would be useful for analyzing the results in this section.

[121] In the absence of additional information, presented in such a manner as to allow a comprehensive evaluation of the results in this area, the Committee will formulate a recommendation to the country under review to the effect that, through the organs and agencies responsible for prevention and/or investigation of violations of measures designed to safeguard the accuracy of accounting records and ensure that publicly held companies and other types of associations required to establish internal accounting controls do so in the appropriate manner, it consider the selection and development of procedures and indicators, when appropriate and where they do not yet exist, to analyze objective results obtained in this regard and to follow-up on the recommendations made in this report in relation thereto (see Recommendation 2.4(e) in Section 2.4 of this Report).

2.4. Conclusions and recommendations

[122] Based on the review conducted in the foregoing sections, the Committee offers the following conclusions and recommendations with respect to the implementation in the country under review of the provisions contained in Article III, paragraph 10 of the Convention:

[123] **Brazil has considered and adopted measures intended to create, maintain and strengthen provisions for the prevention of the bribery of domestic and foreign government officials, as described in section 2 of Chapter II of this Report.**

[124] In light of the comments formulated in the above-noted sections, the Committee suggests that Brazil consider the following recommendation:

[125] Strengthen the standards and measures on the prevention of bribery of domestic and foreign government officials. To comply with this recommendation, Brazil could take the following measures into account:

- a) Continue adopting, in accordance with its legal system and through the means it deems appropriate, pertinent measures to ensure that “professional confidentiality” is not an obstacle for accounting professionals to bring to the attention of the appropriate authorities any acts of corruption that they discover in the course of their work (see section 2.2 of Chapter II of this report).
- b) Continue with awareness and integrity promotion campaigns that target the private sector and continue to adopt measures such as the production of manuals and guidelines on best practices that companies should implement to prevent corruption (see section 2.2 of Chapter II of this report).
- c) Conduct awareness campaigns that target individuals responsible for the entry and accuracy of accounting records, on the importance of abiding by the standards in force to ensure the veracity of said records and the consequences of their violation, in addition to implementing training programs specifically designed to instruct those who work in the area of internal control in publicly held companies and other types of associations required to keep accounting records, on how to detect corrupt acts through their work (see section 2.2 of Chapter II of this report).
- d) Consider adopting the measures it deems appropriate to facilitate the detection, by the organs and entities responsible for preventing and/or investigating violations of measures designed to safeguard the accuracy of accounting records and protect their contents, of sums paid for corruption that are concealed in those records, such as the following ((see section 2.2 of Chapter II of this report):
 - i. Investigation tactics, such as follow-up on expenditures, crosschecking of information and accounts, and requests for information from financial entities in order to determine if such payments occurred;
 - ii. Handbooks, manuals or guidelines that will provide guidance for control organs or entities that do not yet have them in conducting their review of accounting records to detect sums paid for corruption;
 - iii. Continue using computer programs that provide easy access to the necessary information to verify the veracity of accounting records and of the supporting documents on which they are based;
 - iv. Institutional coordination mechanisms that make it easier for those organs or entities to obtain the timely collaboration of other institutions needed to verify the veracity of accounting records and of the supporting documents on which they are based or to establish their authenticity; and

- v. Continue conducting training programs for the officials of these organs and entities, specifically designed to alert them to the methods used to disguise payments for corruption in those records and to instruct them on how to detect them.
- e) Through the organs and entities responsible for preventing and/or investigating violations of measures designed to safeguard the accuracy of accounting records and for ensuring that publicly held companies and other types of associations required to establish internal accounting controls do so in the proper manner, select and develop procedures and indicators, when appropriate and where they do not yet exist, to analyze the objective results obtained in this regard and to follow-up on the recommendations formulated in this report in relation thereto (see section 2.3 of Chapter II of this report).

3. TRANSNATIONAL BRIBERY (ARTICLE VIII OF THE CONVENTION)

3.1. Existence of provisions in the legal framework and/or other measures

[126] Brazil has the following provisions related to transnational bribery:

[127] – Article 337-B of the Brazilian Penal Code (Decree Law 2848 of 7 December 1940)⁶⁸, which criminalizes active bribery in international business transactions in the following terms:

[128] *“Promising, offering, or giving, directly or indirectly, any improper advantage to a foreign public official or to a third person, in order for him or her to put into practice, to omit, or to delay any official act relating to an international business transactions.*

[129] *Penalty – deprivation of liberty of from one year to eight years plus a fine.*

[130] *Sole paragraph. The penalty is increased by one-third if, because of the advantage or promise, the foreign public official actually delays or omits, or puts into practice the official act in breach of his or her functional duty.”*

[131] – Article 337-C of the Brazilian Penal Code, which criminalizes passive bribery in international business transactions in the following terms:

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

[133] *Penalty – deprivation of liberty of from 2 to 5 years, plus a fine.*

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

[135] – Article 337-D of the Brazilian Penal Code, which defines a foreign public official in the following terms:

68. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_codigo_penal.pdf

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

[137] *Sole paragraph. Anyone who holds a position, a job or function in an organization or enterprise directly or indirectly controlled by the public authorities of the foreign country or in international public organizations is deemed to be equivalent to a foreign public official.”*

3.2. Adequacy of the legal framework and/or other measures

[138] With respect to the provisions by which Brazil has criminalized transnational bribery as provided for by Article VIII of the Convention, the Committee notes that based on the information available to it, they may be said to be relevant for promoting the purposes of the Convention.

[139] Notwithstanding the foregoing, the Committee believes it would be useful for the country under review to consider adopting measures to allow application of appropriate penalties, subject to its constitution and the fundamental principles of its legal order, to companies domiciled in its territory that engage in the conduct described in article VIII of the Convention, regardless of the penalties that may be applicable to the persons linked to those companies who may be involved in the commission of acts constituting such conduct. The Committee will formulate a recommendation in this regard to the country under review (see recommendation 3.4.1 in section 3.4 of this report).⁶⁹

3.3. Results of the legal framework and/or other measures

[140] With respect to the results, the response of Brazil to the Questionnaire⁷⁰ notes that *“there are currently three criminal inquiries underway in Brazil relating to possible cases of bribery by Brazilian firms targeted at United Nations officials under the UN “Oil for Food” Program.*

[141] *In addition to those inquiries, measures have been taken to investigate five Brazilian firms suspected of bribing government officials in Argentina, Russia, Bolivia, Italy and the Dominican Republic.*

[142] *These investigations were initiated on the basis of information contained in the Matrix of the Organization for Economic Cooperation and Development (OECD). The CGU requested the department for asset recovery and international juridical cooperation of the Ministry of Justice to provide legal cooperation to the countries where the cases allegedly occurred. To date, two requests for cooperation have been answered and referred to the Federal Police and the Federal Attorney General's office for action.”*

[143] Taking into account the foregoing information, and the fact that Brazil has criminalized transnational bribery since 2002, the Committee considers it advisable that the country under review continue to give attention to detecting, investigating and sanctioning cases of transnational bribery, and that it seek to strengthen the capacities of the organs and agencies responsible for investigating and/or prosecuting the crime of transnational bribery, and to request and/or provide the assistance and cooperation called for in the Convention in this regard (see recommendation 3.4.2 of this report).

69. In its Response to the Questionnaire for the Third Round, pages 24-25, Brazil reports that the Executive Branch submitted to the National Congress, on February 8, 2010, a Draft Law on the Responsibility of Legal Persons for Acts of Corruption against National and Foreign Public Administration (PL No. 6.826/2010).

70. See the Response of Brazil to the Questionnaire for the Third Round, page 26, available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf

3.4. Conclusions and recommendations

[144] Based on the review conducted in the foregoing sections, the Committee offers the following conclusions and recommendations with respect to implementation in the country under review of the provisions contained in Article VIII of the Convention:

[145] **Brazil has adopted measures on the offense of transnational bribery as provided in Article VIII of the Convention, as described in Chapter II, Section 3 of this report.**

[146] In light of the comments formulated in that section, the Committee suggests that Brazil consider the following recommendations:

- 3.4.1 Adopt measures to allow application of the appropriate penalties, subject to its constitution and the fundamental principles of its legal order, to companies domiciled in its territory that engage in the conduct described in article VIII of the Convention, regardless of the penalties that may be applicable to the persons linked to those companies who may be involved in the commission of acts constituting such conduct (see Section 3.2 of Chapter II of this report).⁷¹
- 3.4.2 Continue to give attention to detecting, investigating and sanctioning cases of transnational bribery, seeking to strengthen the capacities of the organs and agencies responsible for investigating and/or prosecuting the crime of transnational bribery, and requesting and/or providing the assistance and cooperation called for in the Convention in this regard (see section 3.3 of Chapter II of this report).

4. ILLICIT ENRICHMENT (ARTICLE IX OF THE CONVENTION)

4.1. Existence of provisions in the legal framework and/or other measures

[147] Brazil has not established illicit enrichment as an offense as provided in Article IX of the Convention. However, it has the following provisions to punish such conduct in the civil and administrative spheres.

[148] – The Administrative Improbity Act (Law 8.429 of 2 June 1992)⁷², article 9 of which establishes:⁷³ "*An act of administrative improbity constituting illicit enrichment is deemed to be committed by any person who obtains an undue financial advantage by reason of his exercise of a position, mandate, function, employment or activity in the entities mentioned in article 1 of this law, and in particular (...)*"

71. In its Response to the Questionnaire for the Third Round, pages 24-25, Brazil reports that the Executive Branch submitted to the National Congress, on February 8, 2010, Draft Law on the Responsibility of Legal Persons for Acts of Corruption against National and Foreign Public Administration (PL No. 6.826/2010).

72. Available at http://www.oas.org/juridico/portuguese/mesicic3_bra_lei8429.pdf

73. This and other articles of law 8.429/92 have been challenged as unconstitutional through an action now pending before the Supreme Federal Tribunal (*Ação Direta de Inconstitucionalidade* No. 4295 of 10 September 2009).

[149] *VII: acquires, for himself or for another person, in the exercise of a mandate, position, employment or public function, goods of any nature the value of which is disproportionate to the evolution of the wealth or income of the public agent*⁷⁴.

[150] The person responsible for the enrichment is subject to the following disciplinary measures, which may be applied in isolation or cumulatively, depending on the gravity of the deed: (i) loss of the sums or assets illicitly added to wealth; (ii) full reparation for damages, if any; (iii) loss of public function; (iv) suspension of political rights for 8 to 10 years; (v) payment of a civil fine of up to three times the value of the increase in wealth; (vi) and prohibition from contracting with government or from receiving tax or financial benefits or incentives, directly or indirectly, even through the intermediary of a legal person of which he is the majority shareholder, for a term of 10 years (article 12 (I)).

[151] – Law 8.112 of 11 December 1990⁷⁵, article 132 (IV) of which provides for the dismissal of public servants of the federal government or federal agencies and foundations who commit acts of administrative improbity. This determination is made by an administrative inquiry or disciplinary proceeding, with full rights of defense for the accused (article 143).

[152] – Decree 5.483 of 30 June 2005⁷⁶, establishing mechanisms for detecting illicit enrichment in the administrative sphere, which serve as the basis for inaugurating administrative disciplinary proceedings.

[153] Article 7 establishes the competence of the Office of the Comptroller General of the Union (*Controladoria-Geral da União, CGU*), of the federal executive branch, to examine the evolution of a public official's wealth and to determine its compatibility with the resources and cash that make up the official's assets, if it deems necessary. If incompatibility is confirmed, the CGU shall open a financial inquiry or request an investigation by the competent entity (article 7, sole paragraph).

[154] Pursuant to article 9, the financial inquiry is a secret and merely investigatory procedure, and is not of a punitive nature. Once the inquiry is concluded, the commission responsible for conducting it files a report on the findings, recommending that the case be archived or that it be converted into an administrative disciplinary proceeding (article 9, paragraph 3). The commission must also report immediately to the Attorney General's Office (*Ministério Público Federal*), the Federal Audit Court (*Tribunal de Contas da União*), the CGU, the Federal Revenue Ministry (*Secretaria da Receita Federal*), and the Financial Activities Control Board (*Conselho de Controle de Atividades Financeiras*) (Article 10).

74. Under the terms of article 2 of Law 8.429/92, a public agent is deemed for purposes of that law to be "any person who exercises, even on a temporary basis and without remuneration, by election, appointment, designation, contract or any other form of investiture or linkage, a mandate, position, employment or function in the entities mentioned in the previous article." However, the Supreme Federal Tribunal, in a ruling on Complaint 2138/DF published in the DJ of 20 June 2007, set aside application of Law 8.429/92 to so-called "political agents", and instead applied to them Law 1.079 of 10 April 1950, which defines the "crimes of responsibility" of the President of the Republic, Ministers of State, Ministers of the Supreme Federal Tribunal, the Prosecutor General of the Union, Governors and Secretaries of States; and regulates the respective trial procedures. Illicit enrichment does not appear on the list of crimes of responsibility established by law 1079/50.

75. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_lei8112.pdf

76. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_dec5483.pdf

4.2. Adequacy of the legal framework and/or other measures

[155] As noted in the previous section, and bearing in mind that Law 8429/92 is of an administrative/civil nature, and is not applicable to so-called "political agents"⁷⁷, the Committee will formulate a recommendation to the country under review to the effect that, subject to its constitution and the fundamental principles of its legal order, it criminalize the offense of illicit enrichment described in article IX of the Convention (see recommendation 4.4.1 in section 4.4 of this report).⁷⁸

4.3. Results of the legal framework and/or other measures

[156] In the results section of Brazil's Response to the Questionnaire⁷⁹, the country under review presents general data on application of Law 8.429/92, compiled from the National Registry of Civil Convictions for Acts of Administrative Improbability of the National Justice Council. A report has also been published at the webpage of the CGU on application of the penalty of expulsion of civil servants from the federal public administration⁸⁰. The country under review reports that of the 933 federal public servants expelled for administrative improbity during the years 2003-2010, 167 were expelled on grounds of illicit enrichment and of those persons only 10 were reinstated in their functions by the courts.

[157] With respect to the issue of assistance and cooperation in relation to this offense, in addition to the information on requests for mutual legal assistance sent to other countries to obtain evidence and recover assets in proceedings based on Law 8.429/92, the country under review reports that "*Brazil stands ready and available to conduct inquiries and provide information whenever requested in matters relating to illicit enrichment*"⁸¹. It has also presented general information on the number of requests for international legal cooperation from 2004 to 2009. However, that information is not sufficiently detailed to determine how many requests for legal cooperation in criminal matters were made to Brazil in cases of illicit enrichment, and what the results have been.

[158] In this respect, bearing in mind that illicit enrichment has not been made a crime and that there is no further information beyond that mentioned above available in a format that allows for a comprehensive assessment of the results of cooperation in this area, the Committee will formulate a recommendation to the country under review to the effect that, through the organs or agencies responsible for investigating and/or prosecuting the crime of illicit enrichment as well as for requesting and/or providing the assistance and cooperation called for in the Convention, it consider selecting and developing procedures and indicators, when appropriate and where they do not already exist, for analyzing the objective results obtained in this regard and to follow up on the recommendations made in this report in relation thereto (see recommendation 4.4.2 in section 4.4 of this report).

77. See Note 74 above.

78. In its Response to the Questionnaire for the Third Round, pages 27-28, Brazil reports that the Executive Branch submitted to the National Congress, in 2005, a draft law criminalizing illicit enrichment (PL 5586/2005).

79. See Brazil's Response to the Questionnaire for the Third Round, pages 29-33, available at http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf

80 Available at http://www.cgu.gov.br/AreaCorreicao/Arquivos/Expulsoes_2010_Estatutarios.pdf

81. See Brazil's Response to the Questionnaire for the Third Round, pages 29-33, available at http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf

4.4. Conclusions and Recommendations

[159] Based on the review conducted in the foregoing sections, the Committee offers the following conclusions and recommendations with respect to implementation in the country under review of the provisions contained in Article IX of the Convention:

[160] **Brazil has not criminalized the offense of illicit enrichment as provided in Article IX of the Convention, as described in Chapter II, Section 4 of this report.**

[161] In light of the comments formulated in that section, the Committee suggests that Brazil consider the following recommendations:

- 4.4.1. Criminalize, subject to its Constitution and the fundamental principles of its legal system, the conduct of illicit enrichment as described in Article IX of the Convention. (See Section 4.2 of Chapter II of this report).⁸²
- 4.4.2. Select and develop, through the organs and agencies responsible for requesting and/or providing assistance and cooperation, in so far as its laws permit, with respect to the offense of illicit enrichment, as provided in the Convention, procedures and indicators, when appropriate and where they do not yet exist, to analyze objective results obtained in this regard and to follow-up on the recommendations made in this report in relation thereto. (See Section 4.3 of Chapter II of this report).

5. NOTIFICATION OF CRIMINALIZATION OF TRANSNATIONAL BRIBERY AND ILLICIT ENRICHMENT (ARTICLE X OF THE CONVENTION)

5.1. Existence of provisions in the legal framework and/or other measures

[162] Brazil criminalized transnational bribery as provided for by article VIII of the Inter-American Convention against Corruption prior to the date on which it ratified the Convention⁸³ and it notified that act to the Secretary General of the OAS by verbal note from its Permanent Mission to the Organization of American States, dated February 7, 2011.

[163] Brazil has not criminalized illicit enrichment as provided for in article IX of the Inter-American Convention against Corruption.

5.2. Adequacy of the legal framework and/or other measures

[164] The Committee notes that Brazil criminalized transnational bribery as provided for by article VIII of the Inter-American Convention against Corruption prior to the date on which it ratified the Convention and that, although it was not required to do so pursuant to article X of the Convention, it notified that act to the Secretary General of the OAS on February 7, 2011.

82. In its Response to the Questionnaire for the Third Round, pages 27-28, Brazil reports that the Executive Branch submitted to the National Congress, in 2005, a draft law criminalizing illicit enrichment (PL 5586/2005).

83. Brazil criminalized transnational bribery by means of Law No. 10.467, of June 11, 2002. Brazil deposited its instrument of ratification of the Convention on July 24, 2002.

[165] On the other hand, bearing in mind that Brazil has not criminalized illicit enrichment as provided for by article IX of the Convention, the Committee will recommend that when it does so, it should notify that fact to the Secretary General of the OAS pursuant to article X of the Convention (see the recommendation in section 5.3 of this report).

5.3. Conclusion and recommendation

[166] Based on the review conducted in the foregoing sections, the Committee offers the following conclusion and recommendation with respect to implementation in the country under review of the provisions contained in Article X of the Convention.

– Brazil has not criminalized illicit enrichment as provided in Articles IX of the Convention. Accordingly, when it does so, the Committee recommends that it notify the OAS Secretary General of that fact, in accordance with Article X of the Convention.

6. EXTRADITION (ARTICLE XIII OF THE CONVENTION)

6.1. Existence of provisions in the legal framework and/or other measures

[167] Brazil has a set of provisions related to extradition, among which the following should be noted:

[168] – The federal Constitution⁸⁴, article 5 (LI) of which provides that "no Brazilian may be extradited⁸⁵, except for naturalized Brazilians in the case of a common crime committed before naturalization, or proven involvement in the unlawful traffic of narcotics and similar drugs, as set forth in the law."

[169] – Law 6.815 of 19 August 1980⁸⁶, article 76 of which provides that "extradition may be granted when the requesting government bases its request on a treaty, or when it promises reciprocity to Brazil."

[170] Under the terms of article 77, extradition will not be granted when: I. The person in question is a Brazilian, unless that nationality was acquired after the offense motivating the request; II. The offense motivating the request is not deemed a crime in Brazil⁸⁷ or in the requesting state; III. Brazil

84. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_const.pdf

85. Brazil presented the following jurisprudential information regarding the obligation to bring to trial nationals subject to requests for extradition: "Supreme Federal Tribunal, Ext. 916-8 Argentina. EXTRADITION. ACCUSATION OF HOMICIDE IN THE COURSE OF ROBBERY. PROOF THAT THE PERSON WHOSE EXTRADITION IS SOUGHT IS BRAZILIAN. REQUEST COMPROMISED. APPLICATION OF THE PRINCIPLE "*AUT DEDERE AUT JUDICARE*". As it is impossible to grant the request for international cooperation, Brazil must in this case assume the obligation of proceeding against the person whose extradition is sought in order to prevent the impunity of the Brazilian national for crimes committed elsewhere. Extradition refused. (Rapporteur: Min. Carlos Britto, judgment of 19-5-05, Plenary, DJ of 21-10-05)."

86. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_lei6815.pdf

87. Brazil presented the following jurisprudential information on the requirement for dual criminality:

"Supreme Federal Tribunal, Ext. 1103/United States of America. EXTRADITION. CRIME OF MONEY LAUNDERING. ABSENCE FROM THE DEFINITIVE LIST OF THE EXTRADITION TREATY BETWEEN BRAZIL AND THE UNITED STATES OF AMERICA. The request for extradition for the crime of conspiring to engage in money laundering is appropriate, despite its absence from the definitive list in the extradition treaty, because this court decided recently, by a majority of its plenary session (HC 90 2598, Marco Aurelio, j. on 13/12/07) that the crime of money laundering was automatically inserted in article II of the extradition treaty between Brazil and the United States of America because it is

is competent, under its laws, to try the offense of which the person in question is accused; IV. Brazilian law imposes for that offense a prison sentence of one year or less; V. The person in question is to stand trial or has already been convicted or acquitted of the same offense motivating the request; VI. The offense constitutes a political crime; and VIII. The person in question would have to stand trial before an exceptional tribunal or court in the requesting state.

[171] The request for extradition must be made via diplomatic channels or, in the absence of a diplomatic agent of the requesting state, directly from government to government, by means of a duly certified or authenticated copy of the final sentence or the warrant or the order for preventive detention, issued by the competent judge or authority. This document, or any other attached to the request, shall contain precise indications as to the location, date, nature and circumstances of the criminal act, the identity of the person whose extradition is sought, as well as a copy of the legal texts relating to the offense, the penalty and its statutory time limits (article 80). Upon receipt of the request, providing it meets all the requirements established in article 80, the Ministry of Foreign Relations will transmit it to the Ministry of Justice (Article 81).⁸⁸

[172] In addition, in cases of emergency, provisional arrest of the person in question may be ordered upon urgent request, whatever the means of communication, by competent authority, diplomatic or consular agent of the requesting state (article 82, lead paragraph). Once the arrest is made, the requesting state must formalize the request within 90 days (article 82, paragraph 2).

[173] – Decree Law 394 of 28 April 1938⁸⁹, article 1 (3) of which provides that, in cases where extradition of a Brazilian or a foreigner is refused, that person shall be tried in the country. In such cases the requesting government shall be asked to provide the elements of conviction for the proceedings and trial, and the resulting sentence or definitive ruling will be communicated to that government.

part of the list of crimes in the United Nations Convention against Corruption (the Palermo Convention) of which Brazil and the USA are signatories (Rapporteur: Min. Eros Grau, judgment of 13-3-08, Plenary, DJE of 7-11-08)."

Supreme Federal Tribunal, Ext. 953/Germany. EXTRADITION AND DUAL CRIMINALITY. The possible formal divergence concerning the legal name of criminal entities does not constitute grounds against extradition, as the alleged deed constitutes a crime under the existing laws of Brazil and the foreign state, and thereby requires giving effect to the extradition measure. The assumption of dual criminality – as an essential prerequisite for extradition – means that the offense with which the person is charged must be considered a crime both in Brazil and in the requesting state. What is really important, with respect to dual criminality, is the presence of the structuring elements of the offense (*essentialia delicti*), as defined in the primary precepts of incrimination in Brazilian legislation and in the positive law of the requesting state, regardless of the formal designation attributed by them to the criminal acts." (Rapporteur: Min. Celso de Mello, judgment of 28-9-05, Plenary, DJ of 11-11-05). See also: Ext 897, Rapp. Min. Celso de Mello, judgment of 23-9-04, Plenary, DJ of 18-2-05; Ext 549, Rapp. Min. Celso de Mello, judgment of 28-5-92, Plenary, DJ of 16-6-92; Ext 545, Rapp. Min. Celso de Mello, judgment of 19-12-91, Plenary, DJ of 13-2-98; Ext 669. Rapp. Min. Celso de Mello, judgment 6-3-96, Plenary, DJ of 29-3-96).

88. Upon receiving the request for extradition together with the necessary documents for pursuing the case, the Ministry of Justice, through the National Secretariat of Justice, must rule on the admissibility of the request. If the request is deemed admissible, the Ministry of Justice will send it to the Supreme Federal Tribunal (STF), which will determine whether the person sought should be arrested under the terms of article 5 (LXI) of the Federal Constitution, article 84 of law 6815/80 and article 208 of the Internal Rules of Procedure of the STF. If preventive arrest is ordered and the person sought is placed at the disposal of the STF, the case will be considered together with the documentary justification contained in the request in order to examine the nature of the offense, i.e. whether it is a political or a common crime, and to verify the legality and appropriateness of the request.

89. Available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_dec_lei394.pdf

[174] – The extradition treaties in force between Brazil and Argentina, Bolivia, Chile, Colombia, Dominican Republic, Ecuador, Mexico, Paraguay, Peru, Uruguay, United States of America, and Venezuela.⁹⁰

6.2. Adequacy of the legal framework and/or other measures

[175] With respect to provisions related to extradition, the Committee notes that, based on the information available to it, they can be said to constitute a set of pertinent measures for promoting the purposes of the Convention.

6.3. Results of the legal framework and/or other measures

[176] In its Response to the Questionnaire, Brazil presents the following information on results in this area:⁹¹

[177] “According to data from the Supreme Federal Tribunal, extradition proceedings were distributed and judged in the following manner during the last five years:

EXTRADITION PROCEEDINGS	2006	2007	2008	2009	2010
<i>Distributed</i>	46	39	48	27	26
<i>Judged</i>	149	208	118	96	79

[178] In addition, the Supreme Federal Tribunal has provided the following data on proceedings for provisional arrests for purposes of extradition, distributed and judged in the last five years:

PROCEEDINGS FOR PROVISIONAL ARREST (EXTRADITION)	2006	2007	2008	2009	2010
<i>Distributed</i>	34	26	19	9	18
<i>Judged</i>	56	37	20	18	37”

[179] The information presented is not sufficiently broken down to determine how many of the requests submitted concerned crimes covered by the Inter-American Convention against Corruption, and what the results were. Nor is there any additional information to indicate that the country under review has issued requests for extradition to states parties to the Inter-American Convention against Corruption relating to the offenses referred to in article XIII thereof and based on this provision of the Convention.

[180] In light of the foregoing, the Committee will formulate a recommendation to the country under review to the effect that, through the organs or agencies responsible for processing incoming and outgoing extradition requests, respectively, it may develop procedures and indicators, when appropriate and where they do not yet exist, for presenting information on use of the Inter-American Convention against Corruption as a legal basis for submitting extradition requests to other states

90. The texts of the bilateral extradition treaties ratified by Brazil are available at: <http://www.oas.org/juridico/mla/pt/bra/index.html>

91. See the Response of Brazil to the Questionnaire for the Third Round, page 38, available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf.

parties and as a basis for decisions relating to requests received from those states (see recommendation 6.4 (a) of this report).

[181] In addition, the Committee considers that it might be useful for the country under review to consider the utility of the Inter-American Convention against Corruption for extradition purposes in corruption cases. This could consist, among other measures, in the implementation of training programs detailing the possibility of applying the Convention to this respect, specifically designed for the administrative and judicial authorities with competence in this area (see recommendation 6.4(b) of this report).

6.4. Conclusions and recommendations

[182] Based on the review conducted in the foregoing sections, the Committee offers the following conclusions and recommendations with respect to implementation in the country under review of the provisions contained in Article XIII of the Convention:

[183] **Brazil has adopted measures regarding extradition as provided in article XIII of the Convention, as described in Chapter II, section 6, of this report.**

[184] In light of the comments formulated in that section, the Committee suggests that Brazil consider the following recommendations:

- a) Develop procedures and indicators, when appropriate and where they do not yet exist, for presenting information on use of the Inter-American Convention against Corruption as a legal basis for submitting extradition requests to other states parties and as a basis for decisions relating to requests received from those states (see section 6.3 of Chapter II of this report).
- b) Consider the utility of the Inter-American Convention against Corruption for extradition purposes in corruption cases, which could consist of, among other measures, the implementation of training programs detailing the possibility of applying the Convention for such purposes, specifically designed for the administrative and judicial authorities with competence in this area (see section 6.3 of Chapter II of this report).

III. OBSERVATIONS REGARDING THE PROGRESS MADE WITH IMPLEMENTING THE RECOMMENDATIONS ISSUED IN REPORTS FOR PREVIOUS ROUNDS

FIRST ROUND⁹²

[185] With respect to implementation of the recommendations issued to Brazil in the report from the First Round on which it did not supply information with regard to progress in their implementation in its response to Section II of the Questionnaire for the Second Round, or on those for which it supplied information but which the Committee considered in Section IV of the report for that round that they needed further attention, and on the basis of the information available to it dealing with further progress with their implementation made after that report, the Committee notes the following:

92. The references to sections that appear in italics in the recommendations and measures transcribed herein, refer to the report from the First Round of Review.

A. IMPLEMENTATION OF THE CONVENTION AT THE STATE AND MUNICIPAL LEVELS

Sole recommendation formulated by the Committee, which was satisfactorily considered in the terms set out in the Second Round report:⁹³

Recommendation:

“[t]he Committee recommends that Brazil should consider working with the state and municipal authorities to develop suitable cooperation mechanisms in order to expand information on Convention-related issues within their respective jurisdictions and to provide technical assistance for effective implementation of the Convention”.

[186] The Committee takes note that the foregoing recommendation was deemed to have been satisfactorily considered by Brazil within the framework of the report from the Second Round.⁹⁴ Bearing in mind that this recommendation, by its nature, requires continuity in its implementation, the Committee hopes that the country under review will report its actions to this purpose in the annual progress reports called for in Article 32 of the Committee's Rules of Procedure.

B. CONCLUSIONS AND RECOMMENDATIONS AT THE FEDERAL LEVEL

1. STANDARDS OF CONDUCT AND MECHANISMS TO ENFORCE COMPLIANCE (ARTICLE III, PARAGRAPHS 1 AND 2 OF THE CONVENTION)

1.1. Standards of conduct intended to prevent conflicts of interests and enforcement mechanisms

Recommendation:

Strengthen the implementation of laws and regulatory systems on conflicts of interests, ensuring that they apply to all public officers, so as to permit practical and effective application of such systems.

Measures suggested by the Committee that require information on their implementation or which require additional attention within the framework of the Second Round:⁹⁵

- a. Bearing in mind the existing legislative initiative, consider incorporating, into a single body of rules, a regime on the system of conflicts of interests that applies to all public officers, so that all public servants, the governed and users know precisely what their duties and rights are and thereby, eliminate the existing gaps in coverage of the present rules. However, such a measure would not preclude the existence of rules targeted at specific sectors that may require special treatment or more restrictive rules.*
- b. Develop or strengthen, as appropriate, mechanisms to monitor and resolve cases of conflicts of interest for all public officers, in keeping with the previous recommendation.*
- c. Establish, as appropriate, proper restrictions upon those who leave public service, such as prohibiting them from having any role in matters in which they were involved by reason of*

93. See pages 46-47 of this report, available at: http://www.oas.org/juridico/english/mesicic_II_inf_bra_en.pdf

94. See pages 46-47 of this report, available at: http://www.oas.org/juridico/english/mesicic_II_inf_bra_en.pdf

95. See page 48 of this report, available at http://www.oas.org/juridico/english/mesicic_II_inf_bra_en.pdf

their office or position, or with any entity with which they were recently associated, for a reasonable period of time.

- d. Implement measures to ensure that the resignation of those parliamentarians, with knowledge of the possibility that disciplinary proceedings based on alleged acts of corruption are likely to be instituted against them, does not hinder those proceedings and avoid the applicable sanctions.*

[187] With respect to implementation of measures *a)* and *b)* of the foregoing recommendation, in its response, the country under review presents information additional to that reviewed by the Committee in the report from the Second Round. In this regard, the Committee notes, as steps that contribute to progress in implementing the measures, the following:

[188] *“Particular mention should be made, first, of Law 11.890 of 24 December 2008, which established, for the normal career positions in the Federal government, the rule of exclusive dedication, which prevents the exercise of any other remunerated activity, public or private, with the potential to cause conflicts of interest, with the exception of teaching positions where the work schedule is compatible. (Article 3 of Law 11.890/2008).*

[189] *Also noteworthy is Decree 7203 of 4 June 2010. Pursuant to article 3 §3 of that Decree, organs or agencies of the federal public administration may not enter into a contract directly, without a bidding process, with any legal person which has as a director or partner with powers of direction a relative of a holder of an appointed position or a position of trust acting in the area responsible for placing the order or the contract or a relative of the authority hierarchically superior to that position in each organ or agency.*

[190] *With respect to administrative measures for preventing conflicts of interest, some organs of the Federal Public Administration, for example, have issued codes of ethics and conduct which cover situations that constitute conflict of interest. An example is the Code of Conduct of Employees of the Central Bank of Brazil, which contains a chapter dealing exclusively with the specific conduct that employees of the Bank must avoid as constituting a conflict of interest or as exerting improper influence on the performance of public functions. As well, the National Bank for Economic and Social Development (BNDES) has adopted a Code of Ethics covering conflicts of interest, among other matters, again demonstrating the effort that the Federal Public Administration has been making to prevent conflicts of interest.*

[191] *Another important measure in preventing conflicts of interest was the issuance of the Resolution of the Public Ethics Commission (CEP) of 29 September 2008 regulating the procedure by which the Ethics Commissions are to deal with ethical lapses in the Federal Executive Branch.*

[192] *In addition, some ministries have issued their own standards for dealing with conflicts of interest. For example, the Ministry of State of the Comptroller General of the Union (CGU) issued Portaria (Decree) 292 of 17 February 2010 regulating the exclusivity of employment of professional staff of the CGU. That rule prohibits employees from engaging in remunerated activities except those related to teaching or those authorized by the Minister of State of the CGU, to the exclusion of consulting work or technical assistance in matters potentially conflicting with or relating to activities of the CGU.*

[193] *The CGU is also taking steps to provide guidance for preventing conflicts of interest within the Federal Executive Branch. For example, it has issued a recommendation to organs and agencies to regulate the granting of licenses to deal with private interests so that a licensed public servant will not exercise any private activity that would conflict with his public function (which has led federal bodies, for example the Ministry of Finance, to adopt internal rules on this matter), and also a recommendation to avoid contracting with consulting firms that provide services to controlled entities in order to prevent situations where information obtained in one of the spheres might be used to favor regulated firms that are receiving consulting advice from the same firm.*

[194] *With a view to improving the behavior of public servants and further strengthening the codes of conduct instituted in the federal government, in July 2010 the CGU introduced the Course on Ethics in the Public Administration, which will be offered to all federal public servants. The first round of the course, now underway, has nearly 400 participants. The objective of the classes, which are conducted by Internet, is to provide instruction on such issues as preventing conflicts of interest and the duty to report acts of corruption to the competent authorities. The course contents include illustrations and simulations, explanations of existing legislation, and recommendations from the Ethics Commission on how to react in certain situations that public servants are likely to encounter in their day-to-day work, particularly in the “Control” career.”⁹⁶*

[195] The Committee takes note of the steps taken by the country under review to advance in its implementation of measures *a)* and *b)* from the foregoing recommendation, and the need to continue to give attention thereto, recalling that Draft Law No. 7.528/2006, regulating conflicts of interest within the Federal Executive Branch, is still being processed in the National Congress.⁹⁷

[196] In its response, the country under review did not refer to measure *c)* of the foregoing recommendation. Consequently, the Committee reiterates the need for Brazil to give additional attention to its implementation, bearing in mind what was said in the previous paragraph with respect to Draft Law No. 7.528/2006.

[197] With respect to measure *d)* from the foregoing recommendation, the Committee notes, as a step that leads it to conclude that the measure has been satisfactorily considered, the following:

[198] ▪ The approval of Complementary Law No. 135, of June 4, 2010 (the “Clean Record Act”), which provides that members of Congress, among other public officials, who resign in the face of a petition or complaint leading to prosecution for violating any provision of the Federal Constitution, are barred from standing for election during the remainder of the term to which they were elected, and for 8 years after the end of the current legislative session [article 2° (*k*)].

[199] The Committee takes note of the satisfactory consideration by the country under review of measure *d)*, as described above.

96. See the Response of Brazil to the Questionnaire for the Third Round, pages 39-41, available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf

97. According to the website of the Chamber of Deputies of Brazil, the last action referring to that draft law took place on February 20, 2008: http://www.camara.gov.br/sileg/Prop_Detalhe.asp?id=334907

1.2. Standards of conduct and mechanisms to ensure the proper conservation and use of resources entrusted to government officials in the performance of their functions and enforcement mechanisms

Recommendation:

Continue strengthening the implementation of rules of conduct to ensure the proper conservation and use of resources entrusted to public officials.

Measures suggested by the Committee that require information on their implementation or which require additional attention within the framework of the Second Round:⁹⁸

Strengthen control mechanisms in general, in order to ensure even further, enforcement of the sanctions imposed.

[200] With respect to the foregoing recommendation, in its response, the country under review presents information additional to that reviewed by the Committee in the report from the Second Round. In this regard, the Committee notes, as steps that contribute to progress in implementing the recommendation, the following:

[201] *“In pursuit of its policy of reinforcing control mechanisms, Brazil has been strengthening the articulation and integration of the State organs for control and defense, such as the Federal Police, the Attorney General's office, the CGU and the Federal Audit Court. A number of projects have been undertaken in recent years, including the operations known respectively as Fumaça, Transparência and Gárgula, carried out jointly by the CGU, the Federal Police and the Attorney General's Office.*

[202] *In addition, the CGU is continuing to exercise its disciplinary authority, which gives it responsibility for investigating irregularities committed by federal public servants and to impose the appropriate administrative penalties. Thanks to the work of the CGU in combating corruption in government, 2,969 employees were dismissed from the federal public service for involvement in unlawful practices between 2003 and 2010.”*⁹⁹

[203] As well, Brazil's Response to the questionnaire for the Third Round reports a rising annual trend in the number of federal public servants sanctioned with dismissal, from 379 in 2008 to 521 in 2010.¹⁰⁰

[204] The Committee takes note of the steps that the country under review has taken to advance in implementing the foregoing recommendation and the need for it to continue to give attention thereto, recalling that, although there has been progress in the work of the CGU in applying the dismissal penalty for federal public servants involved in illicit practices, there is still no information on success in overcoming the practical difficulties in the satisfaction of public claims through the execution of decisions of the Federal Audit Court (TCU), as indicated in the report from the First Round.¹⁰¹

98. See pages 49-50 of this report, available at http://www.oas.org/juridico/english/mesicic_II_inf_bra_en.pdf

99. See the Response of Brazil to the Questionnaire for the Third Round, page 41, available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf

100. See Response of Brazil to the Questionnaire for the Third Round, page 42, available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf

101. See the Report on Implementation in the Federative Republic of Brazil of the Provisions of the Convention Selected for Review in the First Round, page 20, http://www.oas.org/juridico/english/mec_rep_bra.doc

1.3. Standards of conduct and mechanisms concerning measures and systems requiring government officials to report to appropriate authorities acts of corruption in the performance of public functions of which they are aware

Recommendation:

Strengthen the standards and mechanisms requiring public officials to report to the appropriate authorities acts of corruption in the performance of public functions of which they are aware.

Measures suggested by the Committee that require information on their implementation or which require additional attention within the framework of the Second Round:¹⁰²

a. Continue to take measures tending to strengthen measures of protection for public officials who report acts of corruption in good faith, to protect them from possible threats or reprisals against them as a result of compliance with this obligation.

b. Increase the awareness of public officials of the purposes of the duty to report to the appropriate authorities, acts of corruption in the performance of public functions of which they are aware.

[205] In its response, the country under review did not refer to measure a) from the foregoing recommendation. The Committee therefore reiterates the need for Brazil to give additional attention to its implementation.

[206] In its progress report submitted in December 2010,¹⁰³ the country under review provided information on implementation of measure b) from the foregoing recommendation. In this regard, the Committee notes, as a step that contributes to progress in implementing the measure, the following:

[207] *“With a view to improving the behavior of public servants and further strengthening the codes of conduct instituted in the federal government, in July 2010 the CGU introduced the Course on Ethics in the Public Administration, which will be offered to all federal public servants. The first round of the course, now underway, has nearly 400 participants. The objective of the classes, which are conducted by Internet, is to provide instruction on such issues as preventing conflicts of interest and the duty to report acts of corruption to the competent authorities. The course contents include illustrations and simulations, explanations of existing legislation, and recommendations from the Ethics Commission on how to react in certain situations that public servants are likely to encounter in their day-to-day work, particularly in the “Control” career”.*¹⁰⁴

[208] The Committee takes note of the step taken by the country under review to advance in implementing the foregoing recommendation, and of the need for it to continue giving attention thereto, bearing in mind that there are still no further details on that progress.

102. See page 50 of this report, available at http://www.oas.org/juridico/english/mesicic_II_inf_bra_en.pdf

103 See page 2 of this report, available at: http://www.oas.org/juridico/english/mec_avance_bra.pdf

104. See page 2 of this report, available at: http://www.oas.org/juridico/english/mec_avance_bra.pdf

2. SYSTEMS FOR REGISTERING INCOME, ASSETS, AND LIABILITIES (ARTICLE III, PARAGRAPH 4 OF THE CONVENTION)

Recommendation:

Strengthen the systems for registration of income, assets, and liabilities.

Measures suggested by the Committee that require information on their implementation or which require additional attention within the framework of the Second Round:¹⁰⁵

- a. *Regulate conditions, procedures, and other aspects related to publication, where appropriate, of records of income, assets, and liabilities, in keeping with the fundamental principles of the legal system of the Federative Republic of Brazil.*
- b. *Criminalize the act of illicit enrichment.*
- c. *Optimize systems for analyzing the content of declarations of income, assets and liabilities, with a view to making them a useful tool for detecting and preventing conflict of interests or violations of law, where appropriate.*
- d. *Strengthen the provisions related to review or audit of the content of declarations, so that the Court of Accounts of the Union and the Office of the Comptroller General of the Union have procedures that allow them to enhance the effectiveness of these processes, in keeping with the fundamental principles of the legal system of the Federative Republic of Brazil.*

[209] In its response, the country under review did not refer to measures a), b), c) and d) of the foregoing recommendation. The Committee therefore reiterates the need for Brazil to give additional attention to their implementation.

3. OVERSIGHT BODIES FOR THE SELECTED PROVISIONS (ARTICLE III, PARAGRAPHS 1, 2, 4 AND 11 OF THE CONVENTION)

Measures suggested by the Committee that require information on their implementation or which require additional attention within the framework of the Second Round:¹⁰⁶

Recommendation:

Continue strengthening the oversight bodies in their functions relating to application of paragraphs 1, 2, 4 and 11 of Article III of the Convention, especially the Public Ethics Commission, with a view to making such oversight effective; give them greater support as well as the necessary resources to carry out their functions; and strengthen mechanisms that will enable institutional coordination of their activities, as applicable, and on-going evaluation and supervision.

[210] With respect to the foregoing recommendation, in its response the country under review presents information additional to that reviewed by the Committee in the report from the Second Round. In this regard, the Committee notes, as steps that lead it to conclude that the recommendation has been satisfactorily considered, the following:

105. See pages 50-51 of this report, available at http://www.oas.org/juridico/english/mesicic_II_inf_bra_en.pdf

106. See pages 51-52 of this report, available at : http://www.oas.org/juridico/english/mesicic_II_inf_bra_en.pdf

[211] “Brazil is continuing to strengthen the principal control organs, namely the Comptroller General's Office (CGU) and the Federal Audit Court (TCU). In October 2009, the CGU hired 110 new employees and in December 2009 the TCU took on 128 new staff members. As well, the 2010 budget allocations for these organs represented a significant increase over the 2009 levels: the CGU budget went from R\$454,921,452 in 2009 to R\$578,787,865 in 2010, for an increase of 29%, while the TCU budget rose from R\$1,283,357,581 in 2009 to R\$1,330,097,924 in 2010, for an increase of 4%.

[212] *The budget of the Public Ethics Commission for fiscal year 2010 was increased by approximately 28% over that for 2009, to R\$450,000 from R\$353,000*.¹⁰⁷

[213] The Committee takes note of the satisfactory consideration by the country under review of the foregoing recommendation, which, by its nature, requires a continuation of efforts in its implementation.

4. MECHANISMS TO ENCOURAGE PARTICIPATION BY CIVIL SOCIETY AND BY NONGOVERNMENTAL ORGANIZATIONS IN EFFORTS TO PREVENT CORRUPTION (ARTICLE III, PARAGRAPH 11, OF THE CONVENTION).

4.1. General participation mechanisms

The Committee did not find it necessary to formulate recommendations in this section

4.2. Mechanisms for access to information

Recommendation:

Continue strengthening the mechanisms for access to government information.

Measures suggested by the Committee that require information on their implementation or which require additional attention within the framework of the Second Round:¹⁰⁸

Consider the advisability of integrating and systematizing in a single regulatory text the provisions that ensure access to government information.

[214] With respect to the sole measure from the foregoing recommendation, in its response, the country under review presents information in addition to that reviewed by the Committee in its report for the Second Round:

[215] – Submission to the National Congress of the Draft Law on Access to Public Information of May 13, 2009. That draft was approved by the Chamber of Deputies on April 13, 2010, and is currently under consideration in the Committee on Foreign Relations and National Defense of the Federal Senate (PLC No. 41/2010).¹⁰⁹

107. See the Response of Brazil to the Questionnaire for the Third Round, pages 42-43, available at:

http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf

108. See pages 52-53 of this report, available at http://www.oas.org/juridico/english/mesicic_II_inf_bra_en.pdf

109. See the Response of Brazil to the Questionnaire for the Third Round, page 44, available at:

http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf

[216] The Committee takes note of the need for the country under review to give additional attention to the sole measure from the foregoing recommendation, bearing in mind that the draft bill for its implementation has still not completed the necessary process to become law.

4.3. Mechanisms for consultation

Recommendation:

Continue strengthening the mechanisms for consultation.

Measures suggested by the Committee that require information on their implementation or which require additional attention within the framework of the Second Round:¹¹⁰

Continue promoting the use of existing mechanisms, in order to allow the consultation by interested sectors, on the design of public policies and the drafting of bills, decrees or resolutions in the various agencies of government.

[217] In its response, the country under review did not refer to the foregoing recommendation. The Committee therefore reiterates the need for Brazil to give additional attention to its implementation.

4.4. Mechanisms to encourage participation in public administration

Recommendation:

Strengthen and continue implementing mechanisms to encourage participation by civil society and nongovernmental organizations in efforts to prevent corruption

Measures suggested by the Committee that require information on their implementation or which require additional attention within the framework of the Second Round:¹¹¹

Establish mechanisms, in addition to those now in existence, for strengthening and encouraging participation by civil society and by nongovernmental organizations in public administration, and especially in efforts to prevent corruption, and promote understanding of established participation mechanisms and how to use them.

[218] With respect to the foregoing recommendation, in its response the country under review presents information additional to that reviewed by the Committee in the report from the Second Round. In this regard, the Committee notes, as steps that lead it to conclude that the recommendation has been satisfactorily considered, the following:

[219] “Continuing with its policy of encouraging and training civil society for exerting social oversight, the CGU has been reinforcing its ‘Olho Vivo no Dinheiro Público’ (roughly ‘keeping an eye on the public purse’) program, the objective of which is to mobilize and train citizens, municipal leaders and civic councilors to supervise the use of public funds within their municípios. In the year 2010 alone, the program trained 1,395 municipal councilors and 918 local leaders, as well as 399 citizens through the distance education course on social oversight (the CGU’s ‘Virtual School’).

110. See page 53 of this report, available at http://www.oas.org/juridico/english/mesicic_II_inf_bra_en.pdf

111. See page 53 of this report, available at http://www.oas.org/juridico/english/mesicic_II_inf_bra_en.pdf

[220] *The CGU has also invested in ethics and civics education. Each year it sponsors a drawing and writing competition in the schools, designed to awaken students' interest in issues of social oversight, ethics and citizenship. In 2010 the competition reached 58,564 pupils at the primary and intermediate education levels, and 1,778 teachers. Since the competition was first held, in 2007, it has mobilized 743,136 pupils and 23,600 teachers.*

[221] *Also worthy of note are the preparations that the federal government is making for the First National Conference on Transparency and Social Participation (CONSOCIAL), to be held October 13-15, 2011 in Brasilia. The theme of the conference will be 'Society's Role in Monitoring Public Affairs', and it will be coordinated by the CGU, with the collaboration of the General Secretariat and the Secretariat of Social Communication of the Office of the President of the Republic. Chaired by the Minister of State of the CGU, CONSOCIAL is intended to debate, propose and stimulate implementation of transparency mechanisms and training activities to enhance participation by civil society in the monitoring of public affairs, and it will include participation by delegates, representatives of civil society and of government. The conference will be preceded by local sessions at the municipal and state level where delegates will be elected and proposals will be approved for debate at the national event.'*¹¹²

[222] The Committee takes note of the satisfactory consideration by the country under review of the foregoing recommendation, which, by its nature, requires a continuation of efforts in its implementation. In this respect, it invites the country under review to report on results from the First National Conference on Transparency and Social Participation (CONSOCIAL) in the annual progress reports called for under article 32 of the Committee's Rules of Procedure.

4.5. Mechanisms to encourage participation in the follow-up of public administration

Recommendation:

Strengthen and continue to implement mechanisms to encourage participation by civil society and nongovernmental organizations in monitoring public administration.

Measures suggested by the Committee that require information on their implementation or which require additional attention within the framework of the Second Round:¹¹³

- a. *Where applicable, promote ways in which public officials can allow, facilitate or help civil society and nongovernmental organizations develop activities for monitoring public administration and preventing corruption.*
- b. *Design and implement specific programs for publicizing mechanisms for participation in monitoring public administration and, as appropriate, provide training and assistance to civil society and nongovernmental organizations for making use of those mechanisms.*
- c. *Give further publicity to official information through various electronic channels.*

112. See the Response of Brazil to the Questionnaire for the Third Round, pages 45-46, available at:

http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf

113. See pages 53-54 of this report, available at http://www.oas.org/juridico/english/mesicic_II_inf_bra_en.pdf

[223] With respect to measures *a)* and *b)* of the foregoing recommendation, in its response the country under review presents information additional to that reviewed by the Committee in the report from the Second Round. In this respect, the Committee notes, as steps that lead it to conclude that those measures have been satisfactorily considered, the measures mentioned in recommendation 4.4 on mechanisms for encouraging participation in public management.¹¹⁴

[224] The Committee takes note of the satisfactory consideration by the country under review of measures *a)* and *b)* of the foregoing recommendation, which, by its nature, requires a continuation of efforts in their implementation.

[225] With respect to measure *c)* of the foregoing recommendation, in its response the country under review presents information additional to that reviewed by the Committee in the report from the Second Round. In this respect, the Committee notes, as steps that lead it to conclude that the measure has been satisfactorily considered, the following:

[226] *“With a view to further strengthening mechanisms for access to public information in Brazil, in April 2010 the CGU launched two separate portals within the Transparency Portal with information on the 2014 Soccer World Cup and the 2016 Olympic and Paralympic Games. The objective is to bring broad transparency to federal government actions for holding these sporting events in the country, so that they can be monitored by civil society. The portals will provide the public with detailed and regularly updated information on the investments made in preparation for the two events, such as: the government program and action, sources of funding, executing bodies, timetables, calls for tender, contracts, credit transactions arranged by official development finance institutions, and photographs. When a project is being undertaken by a private entity but is being financed by an official development finance institution, the portals will carry information on the credit transaction, such as the lender and the beneficiary, the source of funding, the disbursement schedule and the repayment schedule, the maturity, the amount, the guarantees for the contract and the transaction, the status of the transaction and, when necessary, data on the project and its monitoring.*

[227] *As well, in order to comply with Supplementary Law 131 of 27 May 2009 which calls for real-time disclosure by federal entities of detailed information on budgetary and financial execution, in May 2010 the federal government instituted the "Daily Information" page at the Transparency Portal, where citizens can find detailed information, updated daily, on all expenditure acts of federal government management units.*

[228] *Again with respect to the Portal, on 9 December 2010 three new consultation options were introduced, offering citizens yet greater transparency and access to data. The first option is "consultation by government program", which presents detailed information on each budget line of the federal government. The "consultation download" option allows direct access to the consultation database available for download in spreadsheet format, appropriate for obtaining and storing data. In this way, users can download information from each consultation of the site, perform whatever crosschecking and analysis they wish and conduct studies and research with the data. Finally, the "graphics portal" option allows some consultations of the portal to be visualized in graphic form. This works, for example, with the "Bolsa Família" (family allowance), the Transferências de Recursos por Localidade ("transfers of resources by locality") and the Consulta por Função de Governo ("consultation by function of government"). With this option, research results can be*

114. See the Response of Brazil to the Questionnaire for the Third Round, pages 45-46, available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf

presented graphically in various formats (in bar charts and tables, for example), allowing the user to visualize and make comparisons of consultation results by year, region and state.

[229] *With respect to promoting mechanisms for access to information, the federal government has implemented the "Charter of Services to the Citizens" (Instrução Normativa N° of the Secretaria de Gestão of 6 January 2010). This "charter", which all organs of the federal executive branch are required to prepare, must contain full, objective and clear information on the services offered, the forms of access to those services, and the respective quality commitments and standards. This initiative is designed to provide citizens with the minimum information necessary to the satisfaction of their needs and the exercise of their rights, as well as to speed the delivery of services in the public sector.*"¹¹⁵

[230] The Committee takes note of the satisfactory consideration by the country under review of measure c) of the foregoing recommendation, which, by its nature, requires a continuation of efforts in its implementation.

5. ASSISTANCE AND COOPERATION (ARTICLE XIV OF THE CONVENTION)

Measures suggested by the Committee that require information on their implementation or which require additional attention within the framework of the Second Round:¹¹⁶

Recommendation 5.1.:

Establish legislation on mutual assistance and continue negotiating bilateral agreements on the subject, in addition to becoming a party to other pertinent international instruments that facilitate such assistance.

Recommendation 5.2.:

Continue efforts to exchange technical cooperation with other states parties concerning the most effective ways and means to prevent, detect, investigate, and punish acts of corruption.

Recommendation 5.3.:

Determine and prioritize specific areas in which Brazil considers that it needs the technical cooperation of other States Parties or multilateral cooperation institutions to strengthen its capacity to prevent, detect, investigate, and punish acts of corruption.

[231] In its response, the country under review did not refer to recommendations 5.1, 5.2 and 5.3. The Committee therefore reiterates the need for Brazil to give additional attention to their implementation.

115. See the Response of Brazil to the Questionnaire for the Third Round, pages 43-44, available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf

116. See page 55 of this report, available at http://www.oas.org/juridico/english/mesicic_II_inf_bra_en.pdf

6. CENTRAL AUTHORITIES (ARTICLE XVIII OF THE CONVENTION)

[232] The Committee did not formulate recommendations to Brazil with respect to this provision of the Convention, because it considered that Brazil has complied with Article XVIII, by designating the Ministry of Justice as the central authority for purposes of international assistance and cooperation under the Convention.

7. GENERAL RECOMMENDATIONS

Recommendation formulated by the Committee that was satisfactorily considered within the framework of the Second Round:¹¹⁷

Recommendation 7.1.:

Design and implement, as appropriate, programs to provide training for public officials responsible for implementing the systems, standards, measures and mechanisms considered in this report, in order to ensure that they are adequately understood, managed and implemented.

[233] The Committee takes note that the foregoing recommendation was deemed to have been satisfactorily considered by Brazil within the framework of the report from the Second Round.¹¹⁸ Bearing in mind that this recommendation, by its nature, requires continuity in its implementation, the Committee hopes that the country under review will report its actions to this purpose in the annual progress reports called for in Article 32 of the Committee's Rules of Procedure.

Measures suggested by the Committee that require information on their implementation or which require additional attention within the framework of the Second Round:¹¹⁹

Recommendation 7.2.:

Select and develop procedures and indicators, as appropriate, for verifying follow-up of the recommendations made in this report, and notify the Committee, through the Technical Secretariat, in this regard. For the purposes indicated, Brazil could consider taking into account the list of the most widely used indicators, applicable in the Inter-American system that were available for the selection indicated by the country under analysis, which has been published on the OAS website by the Technical Secretariat of the Committee, as well as information derived from the analysis of the mechanisms developed in accordance with recommendation 7.3, which follows.

Recommendation 7.3.:

Develop, when appropriate and where they do not yet exist, procedures for analyzing the mechanisms mentioned in this report, as well as the recommendations contained herein.

[234] In its response, the country under review did not refer to recommendations 7.2 and 7.3. Consequently, the Committee reiterates the need for Brazil to give additional attention to their implementation.

117. See page 56 of this report, available at http://www.oas.org/juridico/english/mesicic_II_inf_bra_en.pdf

118. See page 56 of this report, available at: http://www.oas.org/juridico/english/mesicic_II_inf_bra_en.pdf

119. See page 57 of this report, available at: http://www.oas.org/juridico/english/mesicic_II_inf_bra_en.pdf

SECOND ROUND¹²⁰

[235] The Committee offers the following observations with respect to the implementation of the recommendations made to Brazil in the report from the Second Round, based on information available to it:

A. COOPERATION BETWEEN FEDERAL GOVERNMENT AUTHORITIES AND THOSE OF THE FEDERATIVE ENTITIES

Recommendation:

“(...) the Committee urges Brazil to continue working with the subnational levels of government on joint actions to obtain information on implementation of the Convention and to continue strengthening cooperation and coordination between the federal authorities and the state and municipal authorities for the effective implementation of the Convention, providing them any technical assistance that may require.”

[236] The Committee takes note that the foregoing recommendation was deemed to have been satisfactorily considered¹²¹ by Brazil within the framework of the report from the First Round. As the measures taken to implement that recommendation, mentioned by Brazil in its response,¹²² also constitute steps that are deemed to satisfactorily consider it, the Committee takes note thereof and, bearing in mind that this recommendation, by its nature, requires continuity in its implementation, the Committee hopes that the country under review will report its actions to this purpose in the annual progress reports called for in Article 32 of the Committee's Rules of Procedure.

B. CONCLUSIONS AND RECOMMENDATIONS AT THE FEDERAL LEVEL

1. SYSTEMS OF GOVERNMENT HIRING AND PROCUREMENT OF GOODS AND SERVICES (ARTICLE III (5) OF THE CONVENTION)

1.1. Systems of government hiring

Recommendation:

Strengthen government hiring systems.

Measures suggested by the Committee:

- a) *Regulate the cases, conditions and minimum percentages of career public servants who must fill commissioned offices within the three branches of the federal government (see section 1.1.2 of chapter II of this report).*

120. The references to sections appearing in italics in the transcribed recommendations and measures refer to the report from the Second Round of Review.

121. See para. 188 of this report.

122. See the Response of Brazil to the Questionnaire for the Third Round, pages 47-51, available at:

http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf

- b) *Establish rules that prohibit the appointment to commissioned positions, in any organ of the three branches of the federal government, of spouses/partners or relatives, to the degrees considered appropriate, of those public agents responsible for appointments (see section 1.1.2 of chapter II of this report).*¹²³

[237] In its response, the country under review did not refer to measure a) of the foregoing recommendation. The Committee therefore reiterates the need for Brazil to give additional attention to its implementation.

[238] With respect to measure b) of the foregoing recommendation, in its response the country under review presents information from which the Committee notes, as steps that lead it to conclude that the measure has been satisfactorily considered, the following:

[239] *“The Supreme Federal Tribunal issued a ruling in August 2008 (Súmula Vinculante N°13) prohibiting nepotism in the three branches of government. It bans the hiring of relatives to the third degree, including spouses, for positions in the direct and indirect public administration of the federal government, the states, the Federal District and the municipalities. It also prohibits reciprocal appointments known as ‘cross nepotism’.*

[240] *In a move to improve the legal framework in this area, the federal government issued Decree 6906 in July 2009, obliging Ministers of State who occupy special positions and are members of the ‘Senior Management and Advisory Group of the Federal Public Administration’ to report any relations of kinship they may have with persons in appointed positions or positions of trust within the federal executive branch, under penalty of disciplinary action.*

[241] *In June 2010, the federal government issued Decree 7203 relating to the prohibition of nepotism in the Federal Public Administration. According to that decree, within each ministry and related entities, no position of trust may be filled by relatives of the minister, managers or holders of an appointed position, a position of trust, a chief or advisor. The ban extends to spouses, partners and direct or lateral relations by blood or affinity to the third degree. The decree prohibits so-called ‘cross nepotism’, by banning reciprocal appointments or designations involving organs or agencies of the Federal Public Administration designed to circumvent restrictions on nepotism. It also means that an organ or agency of the federal administration may not enter into a contract directly, without a bidding process, with any legal person which has as a director or partner with powers of direction*

123. In the Report on Brazil for the Second Round of Review, a footnote corresponding to this measure of recommendation 1.12, was included, and reads as follows: “Brazil reports that on August 21, 2008, the Federal Supreme Court published Binding Note No. 13, which prohibits nepotism, whether direct or indirect, in the Public Administration in the following terms: ‘The appointment of a spouse, partner or any relative in direct or collateral line or within the third degree of affinity, inclusive, of the authority responsible for appointments or of a servant of the same corporation who holds the position of director, chief, or adviser, in order to occupy a commissioned office or a position of trust, or, similarly, to discharge paid duties in the direct or indirect public administration of any of the powers of the Union, the states, the Federal District and municipalities, or any variation thereof through reciprocal designations, violates the Federal Constitution’
The procedure for publishing, revising and canceling summary judgments is established by Law 11.417/2006, article 2 of which requires the bodies of the judiciary and the Public Administration, direct and indirect, at the federal, state and municipal levels, to comply with binding summary judgments of the Federal Supreme Court.
Under the terms of article 7 of Law 11.417/2006, ‘any judicial decision or administrative act that runs counter to a summary judgment, denies its validity, or applies it improperly, may be appealed to the Federal Supreme Court, without prejudice to other appeals or means of challenge.’ In addition, paragraph 2 of that article provides that ‘if it accepts the appeal, the Federal Supreme Court shall nullify the administrative act or quash the judicial decision challenged, in order that another be issued, with or without application of the judgment, as the case may require.’”

a relative of a holder of an appointed position or a position of trust acting in the area responsible for placing the order or the contract.

[242] *Two Brazilian states have also adopted legislation to combat nepotism. By means of state decree 41.488 of 22 September 2008, the State of Rio de Janeiro prohibited the nomination to appointed positions or positions of trust within the direct and indirect public administration of relatives of the person making the nomination or of the public servant occupying the position of manager, chief or advisor within the same department or agency. In this way, the legislation prevents both direct and cross nepotism. The State of Bahia has passed similar legislation covering the direct and indirect state administration, its autonomous agencies and its justice system with a ban on nomination to appointed positions or positions of trust and on contracting, under any regime, with respect to the spouse, partner or relative to the third degree of authorities of the executive, legislative and judicial branches.*¹²⁴

[243] The Committee takes note of the satisfactory consideration by the country under review of measure b) of the foregoing recommendation.

1.2. Government systems for the procurement of goods and services

Recommendation 1.2.1.:

Strengthen government procurement systems.

Measures suggested by the Committee:

- a) *Improve the web site at www.comprasnet.gov.br in order to facilitate access to the justifications for setting aside the tendering process that are published thereon (see section 1.2.2 of chapter II of this report).*
- b) *Continue the training programs for public officials responsible for tendering and contracting works, goods and services (see section 1.2.3 of chapter II of this report).*

[244] In its response, the country under review did not refer to measure a) of the foregoing recommendation. The Committee therefore reiterates the need for Brazil to give additional attention to its implementation.

[245] With respect to measure b) of the foregoing recommendation, in its response the country under review presents information from which the Committee notes, as steps that lead it to conclude that the measure has been satisfactorily considered, the following:

[246] *“The federal government is continuing with its programs for training officials responsible for bidding and contracts, particularly those in the Ministry of Budget and Management (MPOG) and the Comptroller General's Office (CGU).*

124. See the Response of Brazil to the Questionnaire for the Third Round, pages 47-48, available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf

[247] *The virtual website ComprasNet of the MPOG contains manuals and a tutorial session on electronic bidding. The MPOG also offers a distance training course for bidders in keeping with the latest information and communication technology. It provides a fully integrated, virtual learning environment that allows interaction between tutors and students and among students themselves, who can discuss and clear up their doubts in real time, using Internet resources.*

[248] *Through its program for 'Strengthening Public Management', the CGU trained 7,231 public agents in 2008, 2009 and 2010, covering a total of 641 municipalities. These classroom-format courses focused on bidding and contracting for works, goods and services, among other topics.*

[249] *In addition to the classroom courses, the CGU also conducts distance education courses. From August 2008 to October 2010, 1,917 public agents were trained through the bidding and contracts course.*¹²⁵

[250] The Committee takes note of the satisfactory consideration by the country under review of measure b) of the foregoing recommendation, which, by its nature, requires a continuation of efforts in its implementation.

Recommendation 1.2.2.:

Strengthen the control mechanisms for the government procurement system.

Measures suggested by the Committee:

- a) *Consider amending Law 8,666/93, extending the sanctions stipulated in articles 87 and 88 to include the owners and managers of the contractor entity (see section 1.2.2 of chapter II of this report).*¹²⁶
- b) *Continue to strengthen the control bodies of the public procurement system, especially the TCU and the CGU, as well as the Logistics and Information Technology Secretariat of the Ministry of Planning, Budget and Management, as the system's administrative organ, and guarantee them the human and financial resources necessary to perform their functions adequately (see section 1.2.3 of chapter II of this report).*

[251] With respect to measure a) of the foregoing recommendation, in its response the country under review presents information from which the Committee notes, as a step that contributes to progress in implementation of the measure, the following:

[252] *"(...) the Draft Law on Corporate Responsibility for Acts against the National or International Public Administration – PL 6826/2010, submitted by the President to the National Congress on 8 February 2010, allows for the denial of legal personality if it is abused to facilitate, conceal or dissimulate unlawful acts, including those committed in bidding processes. This draft Law*

125. See the Response of Brazil to the Questionnaire for the Third Round, pages 48-49, available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf

126. In the Report on Brazil for the Second Round of Review, a footnote corresponding to this measure of recommendation 1.2.2., was included, and reads as follows: "Brazil reports that on January 24, 2007, the executive branch submitted Bill 7.709/07, to the National Congress, which would amend Law 8.666/93. Brazil also reports that the Bill has already been passed by the House of Deputies and is now in the process of approval in the Federal Senate. Among others, the aforesaid bill includes the possibility of the extension of sanctions of temporary suspension or blacklisting for bidding or contracting with the public administration to the owners and managers of the contracted entity."

also prohibits contracting with the public administration for new companies created by directors or partners of a company that has been convicted, in order to prevent fraudulent administrators from constituting new legal persons in order to evade penalties."¹²⁷

[253] The Committee takes note of the steps taken by the country under review to implement measure a) of the foregoing recommendation and of the need for it to continue to give attention thereto, bearing in mind that the two draft laws for its implementation (draft laws No. 7.709/2007 and No. 6.826/2010) have still not completed the necessary process to become law.

[254] With respect to measure b) of the foregoing recommendation, in its response the country under review presents information from which the Committee notes, as steps that contributes to progress in implementation of the measure, the following:

[255] *“Brazil is continuing to strengthen the principal control organs, namely the Comptroller General's Office (CGU) and the Federal Audit Court (TCU). In October 2009, the CGU hired 110 new employees and in December 2009 the TCU took on 128 new staff members. As well, the 2010 budget allocations for these organs represented a significant increase over the 2009 levels: the CGU budget went from R\$454,921,452 in 2009 to R\$578,787,865 in 2010, for an increase of 29%, while the TCU budget rose from R\$1,283,357,581 in 2009 to R\$1,330,097,924 in 2010, for an increase of 4%.”*¹²⁸

[256] The Committee takes note of the steps taken by the country under review to implement measure b) of the foregoing recommendation and of the need for it to continue to give attention thereto, bearing in mind that it still has not information on strengthening of the Logistics and Information Technology Secretariat of the Ministry of Planning, Budget and Management, as the administrative organ of the government's procurement system.¹²⁹

Recommendation 1.2.3.:

Continue to strengthen the electronic channels and information systems for public procurement.

Measures suggested by the Committee:

- a) *Consider amending Law 8,666/93 to include, as an official communication channel for tendering processes and their outcomes, publication in a centralized and permanent manner, preferably through the www.comprasnet.gov.br website, or through other official Internet*

127. See the Response of Brazil to the Questionnaire for the Third Round, page 50, available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf

128. See the Response of Brazil to the Questionnaire for the Third Round, pages 49-50, available at: http://www.oas.org/juridico/portuguese/mesicic3_bra_resp.pdf

129. On September 9, 2011, the country under review noted that: *“Brazil has in fact been making continuous efforts to strengthen the Logistics and Information Technology Secretariat of the Ministry of Planning, Budget and Management. An example of this is the permanent increase in budgetary allocations for the “0798 – Government Procurement” program, the objective of which is to “optimize administrative processes and the contracting of goods, works and services, with positive impacts on cost reduction and transparency with a view to social control”. In 2008, the budgetary allocation was R\$35,985,452; in 2009 it was R\$39,850,000; in 2010 it was R\$57,227,508; and in 2011, the allocation is R\$65,972,000, for a cumulative increase over this time of 83.33%. Moreover, in 2010, the Department of Logistics and General Services (DLSG), responsible for management of Siasg/Comprasnet, had its staff increased with the addition of 11 information technology analysts. Those positions were created by law 11,907 of 2 February 2009 and were filled by public competition in 2009.”*

pages, which must have the required digital signatures (see section 1.2.2 of chapter II of this report).¹³⁰

- b) Consider the possibility of instituting a single prices registry for the federal government and of using the web site, www.comprasnet.gov.br as a mechanism for official publication of the prices contained in that registry (see section 1.2.2 of chapter II of this report).¹³¹
- c) Continue using the electronic reverse-auction (pregão) method as an important tool for ensuring the principles of openness, equity and efficiency enshrined in the Convention (see section 1.2.3 of chapter II of this report).
- d) Continue to strengthen the Single Registry of Suppliers (SICAF) system, expanding it and making it available to other organs and entities that are still not part of the General Services System (SISG) (see section 1.2.3 of chapter II of this report).
- e) Continue to strengthen the Electronic Procurement System (ComprasNet), making it available to other organs and entities of the Federal Administration that are not yet part of the SISG; centralize all government procurement information at a single web portal; as well as consider broadening its scope to cover logistical aspects such as contract management systems (see section 1.2.3 of chapter II of this report).

[257] In its response, the country under review did not refer to measures a), b), c), d) and e) of the foregoing recommendation. The Committee therefore reiterates the need for Brazil to give additional attention to their implementation.¹³²

Recommendation 1.2.4.:

Strengthen the public works contracting systems.

Measure suggested by the Committee:

Consider implementing additional citizen oversight for large-scale public works tendering and contracts, with the requirement to hold public consultations on the conditions that will be contained in the calls for tender and with facilities and encouragement for citizen oversight over contract execution (see section 1.2.2 of chapter II of this report).

[258] In its response, the country under review did not refer to the single measure in the foregoing recommendation. The Committee therefore reiterates the need for Brazil to give additional attention to its implementation.

130. In the Report on Brazil for the Second Round of Review, a footnote corresponding to this measure of recommendation 1.2.3, was included, and reads as follows: “Brazil reports that, among others, Bill 7.709/07 includes the possibility of substituting publication in the official press with publication on official websites of the administration, provided that such publications are digitally certified by a certifying authority accredited by the Brazilian Public Codes System (ICP-Brazil)”.

131. In the Report on Brazil for the Second Round of Review, a footnote corresponding to this measure of recommendation 1.2.3, was included, and reads as follows: “Brazil reports that, among others, Bill 7.709/07 provides for the possibility of the creation of the National Prices Registry, which would be available to the administrative units of the Union, States, Federal District and Municipalities.”

132 On 9 September 2011, the state under review also reported on several improvements and new functions introduced into the SIASG and the ComprasNet system in recent years, together with training efforts over the same period aimed at the users of those systems.

2. SYSTEMS FOR PROTECTING PUBLIC SERVANTS AND PRIVATE CITIZENS WHO, IN GOOD FAITH, REPORT ACTS OF CORRUPTION (ARTICLE III(8) OF THE CONVENTION)

Recommendation 2:

Strengthen systems to protect public officials and private citizens who in good faith report acts of corruption.

Measures suggested by the Committee:

- Adopt, through the corresponding authority, a comprehensive regulation on the protection of public servants and private citizens who in good faith report acts of corruption, including protection of their identity, consistent with the Constitution and with the fundamental principles of Brazilian law. That regulation could include the following aspects, among others:

- a) Additional measures of protection for persons who in good faith report acts of corruption that may or may not be classified as crimes, but which may be the subject of a judicial or administrative investigation.*
- b) Additional measures of protection that include protection of the physical integrity of the whistleblower and his family, as well as protection of his employment situation, especially in the case of a public official who does not have tenure, and when the acts of corruption may involve his hierarchical superior or his work colleagues.*
- c) Mechanisms that facilitate international cooperation in this area, where appropriate.*

[259] With respect to measures a) and b) of the foregoing recommendation, in its response the country under review presents information from which the Committee notes, as a step that contributes to progress in implementation of the measure, the following:

[260] “(...) now in the final stage of processing in the Federal Senate, the Draft Law on Access to Information (PLC 41/2010) also contains important mechanisms in support of public officials who in good faith report acts of corruption.

[261] *PLC 41/2010 provides that public servants shall not be exposed to civil, criminal or administrative liability if they bring to the attention of their superior authority or, when they suspect the involvement of that authority, to the attention of another competent authority, information concerning crimes or impropriety of which they have knowledge, even if that knowledge is acquired in the exercise of a public position, employment or function. This constitutes, then, an important measure of protection for public servants who in good faith report acts of corruption, and is a means of ensuring that they will not be victims of unfair reprisals in the exercise of their functions.”*

[262] The Committee takes note of the steps taken by the country under review to implement measures a) and b) of the foregoing recommendation and of the need for it to continue to give attention thereto, bearing in mind that the draft law mentioned has still not completed the necessary process to become law and that comprehensive regulations have yet to be issued to protect public officials and private citizens who in good faith report acts of corruption.

[263] In its response, the country under review did not refer to measure *c*) of the foregoing recommendation. The Committee therefore reiterates the need for Brazil to give additional attention to its implementation.

3. ACTS OF CORRUPTION (ARTICLE VI (1) OF THE CONVENTION)

Recommendation 3:

Evaluate the need to modify Article 288 of the Criminal Code in order to establish that it only requires two persons to constitute the crime of criminal association (see Section 3.2 of Chapter II of this report).

[264] In its response, the country under review did not refer to the foregoing recommendation. The Committee therefore reiterates the need for Brazil to give additional attention to its implementation.

4. GENERAL RECOMMENDATIONS

Recommendation 4.1.:

Design and implement, when appropriate, training programs for public servants responsible for implementing the systems, provisions, measures, and mechanisms considered in this report, for the purpose of ensuring that the said systems, provisions, measures and mechanisms are adequately known, managed, and implemented.

[265] In its response, the country under review did not refer to the foregoing recommendation. The Committee therefore reiterates the need for Brazil to give additional attention to its implementation.

Recommendation 4.2.:

Select and develop procedures and indicators, when appropriate and where they do not yet exist, to analyze the results of the systems, provisions, measures, and mechanisms considered in this report, and to follow-up on the recommendations made herein (see Chapter II, Sections 1.1.3.; 1.2.3.; 2.3 and 3.3 of this report).

[266] In its response, the country under review did not refer to the foregoing recommendation. The Committee therefore reiterates the need for Brazil to give additional attention to its implementation.

ENDNOTES

ⁱ Pursuant to article 147 of Decree n° 3.000/99, the following are deemed legal persons:

I - legal persons under private law domiciled in the country, whatever their purpose, nationality or ownership structure (Decree-Law n° 5.844, of 1943, art. 27, Law n° 4.131, of September 3, 1962, art. 42, and Law n° 6.264, of 1975, art. 1);

II - subsidiaries, branches, agencies or representations in the country of legal persons headquartered abroad (Law n° 3.470, of 1958, art. 76, Law n° 4.131, of 1962, art. 42, and Law n° 6.264, of 1975, art. 1);

III - constituents domiciled abroad, as to the results of the transactions conducted by their agents or representatives in the country (Law n° 3.470, of 1958, art. 76)”.

ⁱⁱ Pursuant to article 246 of Decree n° 3.000/99 and article 14 of Law n° 9.718, of 1998, legal persons are by law subject to the *lucro real* corporate taxation regime if:

I - their total revenues in the previous calendar year exceed 24 million reais, or an amount proportional to the number of months during which the entity was operational, if shorter than 12 months;

II - their activities are those of commercial banks, investment banks, development banks, savings banks, credit, financing and investment companies, mortgage companies, brokerage companies, foreign exchange companies, securities distributions, merchant leasing companies, credit cooperatives, private insurance and capitalization companies, and open private retirement savings entities;

III - they receive profits, income or capital gains from foreign sources;

IV - they have been granted tax incentives by law, involving exemption from or reduction of income tax;

V - during the course of the calendar year, they have made monthly tax payments based on the estimated system pursuant to art. 222;

VI - they engage in the cumulative and continuous provision of credit advisory services, marketing, credit management, selection and risks, administration of accounts payable and receivable, or factoring;

Sole paragraph. Legal persons not covered in the paragraphs of this article may pay their tax liabilities on the basis of the provisions of this subtitle”.

ⁱⁱⁱ Article 365 of Decree n° 3.000/99 provides that: *Deductions flowing from any donations and contributions are prohibited, with the exception of the following (Law n° 9.249, of 1995, art. 13 (Section VI, and § 2(Sections II and III):*

I - those made to education and research institutions the creation of which has been authorized by federal law and which meet the requirements of Sections I and II of art. 213 of the Constitution, up to the limit of 1.5% of operating profit before its deduction and that covered in the following;

II - donations up to the limit of 2% of operating profit of the legal person, before their deduction, made to nonprofit civil entities legally constituted in Brazil that provide free services for the benefit of the legal person's employees and their dependents or for the benefit of the community in which it operates, with due regard to the following rules:

a) the donations, if in money, shall be made as a direct credit to a current bank account in the name of the beneficiary entity;

b) the legal person shall keep on file, available to the tax inspector, a statement provided by the beneficiary entity, using a model approved by the RSB, in which that entity undertakes to apply all the funds received in pursuit of its social objectives, with identification of the natural person responsible for such compliance, and not to distribute profits, bonuses or advantages to directors, supporters or associates under any form or pretext;

c) the beneficiary civil entity must be recognized as of public utility by a formal act of the competent organs of the Union, except in the case of an entity that is engaged solely in providing free services for the benefit of employees of the legal person making the donation and their dependents, or for the benefit of the community in which it operates”.

^{iv} The lead paragraph of article 371 of Decree n° 3.000/99 provides that “*without prejudice to deduction of the tax due, and in observance of article 475, the legal person taxed on the basis of lucro real may deduct in full, as an operating expense, the amounts actually committed in favor of cultural or artistic projects, pursuant to the regulations of the National Program of Support for Culture - PRONAC*”.

^v In addition, for purposes of submitting proof to the tax authorities, the ruling of the Taxation System Coordination Office (CST) of August 17, 1992 establishes the following rules that legal persons must observe with respect to per diems or travel allowances for their employees::

“a) the amounts paid under this heading must be reasonable, not only in relation to prevailing local prices for the provision of service but also in relation to the structure of duties and salaries of the legal person;

b) they must not be designed to cover expenses with persons who have no employment link;

c) they must correspond to expenditures on food, accommodation and related items in the location where the occasional and temporary service is performed;

d) at any time, the legal person must be able to demonstrate that it paid the per diem, that it recorded the per diem as an operating expense, and that the travel and the overnight stays (if any) that gave rise to the payment actually took place;

e) the above mentioned demonstration must be confirmed by presentation of the passenger ticket or tax receipt and the hotel receipt, when the trip includes overnight accommodation. That documentation must contain the name of the employee, and the legal person must maintain internal records demonstrating the amounts paid as per diems to each employee who received them.”