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 December 12, 2008 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 SECOND ROUND, AND ON FOLLOW-UP TO THE RECOMMENDATIONS FORMULATED TO THAT COUNTRY IN THE FIRST ROUND [1]

INTRODUCTION

1. Contents of the Report

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 second round: Article III, paragraphs 5 and 8, and Article VI.

Second, the report will examine follow-up to the implementation of the recommendations that were formulated to Brazil by the MESICIC Committee of Experts in the first round, which are contained in the report on that country adopted by the Committee at its Ninth meeting, and published at the following web page: http://www.oas.org/juridico/english/mec_rep_bra.doc

2. Ratification of the Convention and adherence to the Mechanism

According to the OAS General Secretariat's official records, the Federative Republic of Brazil deposited the instrument of ratification of the Inter-American Convention against Corruption on July 24, 2002.[2]

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

I. SUMMARY OF INFORMATION RECEIVED

1. Response of the Federative Republic of Brazil

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, 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, available at: www.oas.org/juridico/spanish/mesicic2_br_sp.htm

For its review, the Committee took into account the information provided by Brazil up to May 21, 2008, and that requested by the Secretariat and the members of the review subgroup, to carry out its functions in keeping with its Rules of Procedure and Other Provisions.

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[1] This report was adopted by the Committee in accordance with the provisions of Article 3(g) and 26 of its Rules of Procedure and Other Provisions, at the plenary session held on December 12, 2008, at its Fourteenth meeting, held at OAS Headquarters, December 8-12, 2008..

[2] Brazil presented a reservation to Article XI,1(c) at the moment of the deposit of its instrument of ratification.

2. Document submitted by civil society

The Committee also received, within the deadline established in the Calendar for the Second Round adopted at its Ninth Meeting,[3] a document from the civil society organization "*Movimento Voto Consciente*".[4]

II. REVIEW OF IMPLEMENTATION BY THE STATE PARTY OF THE CONVENTION PROVISIONS SELECTED FOR THE SECOND ROUND

A. SCOPE OF THIS REPORT

Brazil responded to the questionnaire sections, providing a description of what are considered the main systems at the federal level, and referring to all the specific aspects on which the questionnaire sought information in particular. It should also be noted that the bulk of the legislation cited is also applicable to the states and municipalities.

This report will focus on an analysis of the federal government; however, the Committee considers it important to recognize the efforts that the Federative Republic of Brazil has made to work jointly with the federative entities in order to obtain information on implementation of the Convention, and the plan it has adopted to provide them with technical assistance to this end, as described in part A of Chapter IV of the report. The Committee urges Brazil to continue those efforts, and to strengthen cooperation and coordination between the federal government and the state and municipal governments, and to provide them with the technical assistance required to ensure effective implementation of the Convention. The Committee will formulate a recommendation in this regard (see recommendation in part A of Chapter III of this report).

B. REVIEW OF THE IMPLEMENTATION IN THE FEDERAL GOVERNMENT OF BRAZIL OF THE PROVISIONS OF THE CONVENTION SELECTED FOR THE SECOND ROUND

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

1.1. SYSTEMS OF GOVERNMENT HIRING

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

At the federal level, Brazil has a set of provisions relating to systems of government hiring in the three branches of government, among which the following should be noted:

Constitutional provisions applicable to all public servants, such as those found in Article 37 of the Federal Constitution, which provides that "*the direct or indirect public administration of any of the powers of the Union, the states, the Federal District and municipalities shall respect the principles of legality, impartiality, morality, publicity, and efficiency*". Article 37.1 provides that "*public offices, positions and functions are accessible to all Brazilians who meet the requirements established by law, as well as to foreigners, under the conditions prescribed by law*." In this respect, Article 7

[3] This Meeting was held from March 27 to 31, 2006, at OAS Headquarters in Washington D.C., United States
[4] This document was received electronically on May 21, 2008, and is available at: http://www.oas.org/juridico/spanish/mesicic2_br_sp.htm

(XXX) on social rights prohibits "*any difference in wages, in the performance of duties and in hiring criteria by reason of sex, age, color or marital status*".

The Federal Constitution enshrines public competition as the general rule for access to public office.[5] Article 37 (II) provides that "*investiture in a public office or position depends on previously passing an entrance examination consisting of tests or of tests and presentation of academic and professional credentials, depending on the nature and complexity of the office or position, in the manner stipulated by law, with the exception of appointments to a commissioned office declared by law as being of free appointment and dismissal*".[1] Article 37 (paragraphs III and IV, respectively), provides that "*the period of validity of the public entrance examination shall be up to two years, extendable once, for a like period of time", and that "during the un-extendable period established in the public notice, a person who has passed a public entrance examination of tests, or of tests and presentation of academic and professional credentials, shall be called with priority over newly approved applicants, to take a career office or position*."

Article 37 (V) provides that positions of trust are to be filled exclusively by existing permanent public servants, and that commissioned ("at pleasure") positions are to be filled by career public servants in the cases, conditions and minimum percentages prescribed by law, and are reserved solely for executive, leadership and advisory positions.

With respect to temporary public servants, Article 37 (IX) declares that "*the law shall establish the cases of hiring for a limited period of time to meet a temporary need of exceptional public interest*".[6]

With respect to the training of public servants, Article 39 (2) provides that "*the Union, the states and the Federal District shall maintain schools of government for the training and skills upgrading of public servants, and participation in courses shall be one of the requirements for career promotion, to which end covenants or contracts may be signed between federative entities*."

The Constitution also provides mechanisms for challenging selection processes through the courts[ii]: These include a writ of mandamus[iii] (*mandado de segurança*, Article 5 (LXIX)), "popular action"[iv] (Article 5 (LXXIII)) and "public civil suit"[v] (Article 129 (III)).

- Legislative provisions applicable to public office[7] in the three branches of government, among which the following should be noted:

- Law 8,112 of December 11, 1990, governing public servants of the federal government, autonomous agencies and federal foundations, provides (Article 3) that "*public offices, accessible to all Brazilians, shall be created by law, with their own title, and paid from the public purse, and shall be filled by permanent appointment or by commission*".

Article 5 stipulates the requirements[vi] that candidates for any public office must meet.

Article 11 provides that "*the competition shall consist of tests or of tests and presentation of academic and professional credentials, and may be conducted in two stages, in accordance with the*

[5] The exceptions to the constitutional requirement of public competition, applies to commissioned offices (Article 37.II of the constitution) and to the hiring of term employees to meet a temporary need of exceptional public interest (Article 37.IX of the Constitution)).
[6] See Law 8,745 December 9, 1993.
[7] Article 3 of Law 8,112/90 defines public office as "the set of attributes and responsibilities stipulated in the organizational structure which must be entrusted to a public servant".

law and the respective career regulations, and registration of the candidate is conditional upon payment of the amount established in the notice of competition, when indispensable for covering its costs, with due regard to the grounds for exemption expressly set forth therein".[8]

Article 12 establishes that the validity period of public competitions shall be up to two years, extendable once for an equal period. The validity of the competition and the conditions for conducting it must be established in the notice of competition, which must be published in the Official Gazette of the Union and in a newspaper of broad circulation (Article 12.1).

A public servant who holds office by permanent appointment is subject to a probationary period of 36 months, during which that person's aptitude and capacity for the position assessed in terms of: diligence, discipline, capacity for initiative, productivity, and responsibility[vii] (Article 20). If the person fails the probationary period, he will be dismissed or, if already a permanent employee, will return to his previous position (Article 20.2).

Article 117 (VIII) prohibits public servants from "*having their spouse, partner, or any relative within the second degree in a position or office of trust under their direct supervision*".

- Law 8,745 of December 9, 1993 governs the hiring of persons for a specified time to meet a temporary need of exceptional public interest, under the terms of Article 37(IX) of the Constitution, and contains other provisions. Article 2 establishes the grounds for temporary need of exceptional public interest.[viii]

Article 3 provides that hiring shall be done through a simplified selective process, widely publicized through the Official Gazette of the Union, and that public competition may be waived. Article 3.1 establishes that hirings to meet needs arising from a public calamity[9] or environmental emergency[10] are exempt from the selective process.

- And when Regulatory and legal provisions applicable to positions in the federal executive branch, among which the following should be noted:

- Decree 5,497 of July 21, 2005 provides that appointments to commissioned positions of the Senior Management and Advisory Services Group (DAS), levels 1 to 4, shall be filled by career public servants of the Federal public administration, and it limits access to such positions for persons who have no association with the public service. Article 1 requires that at least 75% of commissioned positions at DAS levels 1, 2 and 3 must be held by career public servants,[ix] and for commissioned positions at DAS level 4, at least 50%. The Ministry of Planning, Budget and Management is to enforce observance of those percentages (Article 1 .2).

[8] Brazil reports that exemption from competition registration fees requires the presentation of a declaration of poverty signed by the person concerned or their representative, which shall be presumed to be true pursuant to Article 1 of Law 7115 of August 29, 1983.

[9] Article 3 (IV) of Federal Decree 5376/2005 defines the "*state of public calamity*" as "*recognition by government of an abnormal situation, provoked by disasters, causing serious damage to the affected community, including [threats to] the safety and lives of its members*".

[10] Article 3 (III) of Federal Decree 5376/2005 defines "*emergency situation*" as "*recognition by the government of an abnormal situation, provoked by disasters, causing surmountable damage to the affected community*".

- Ministerial order (*Portaria*) 450 of November 6, 2002 of the Ministry of Planning, Budget and Management establishes general rules for the holding of public competitions within the direct federal public administration, the autonomous agencies, and federal foundations (Article 1).[11]

Article 7 requires the notice of competition[12] to be published within six months after the date of publication of the ministerial order authorizing the competition, and to contain at least the following information: a) number of vacancies available in each public office or job category; b) the number of vacancies reserved for persons with disabilities; c) title of the public office or position, entry classification, and initial pay; d) a description of the responsibilities of the public office or position; e) registration time limit and location(s); f) cost of registration; g) documentation to be submitted upon registration; h) indication of the existence and conditions of training courses, if any; and i) validity period of the competition.

Article 9 provides that competitions shall consist of tests or tests plus credentials, and may be conducted in two stages, consistent with the rules of appointment to public office and position.

According to Article 10, "*the first stage of the public competition may consist of one or more phases, designed to demonstrate general and specific knowledge for purposes of elimination and ranking, and may include an assessment of credentials, purely for ranking purposes*." The sole paragraph provides that, where there are legal grounds, the first stage shall include psycho-technical examinations, proof of physical strength and other attributes, for the selection of candidates to public offices or positions of a nature that justifies such demands.[13]

Article 11 provides that if the public competition is to be held in two stages, the second must consist of a training course or program for purposes of elimination, which may also be used for ranking candidates if so provided in the regulatory instruments for the competition. The ranking may be done separately by stages or by totaling the points obtained in the two competition stages (Article 11.1). Candidates who qualify in the first stage will be invited by public notice to register in the training course, with due regard to the time limit established by the organ or entity conducting the competition (Article 11.2).

According to Article 12, "*the period of validity for public competitions may be for up to one year, extendable for an equal period, from the date of publication of authorization of the competition or of the first round, in the case of two-stage competitions, pursuant to Article 11*".

Article 13 establishes that the organ or entity responsible for holding the competition must approve and publish, in the Official Gazette, a list of qualified candidates from the competitions, containing at least twice as many names as there are vacancies announced in the notice for each position or office, by order of ranking.

Article 14 provides that during the validity period of the competition, the Ministry of Planning, Budget and Management may authorize the appointment or hiring of candidates who have qualified but have not been called, up to a limit of 50% of the original number of vacancies.

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[11] Ministerial Decree for 50/2002 of the Ministry of Planning, Budget and Management does not apply to career diplomats, career employees of the Ministry of Foreign Relations, or to federal attorneys, national finance prosecutors, legal assistants and federal prosecutors, or the Advocate General's Office (Article 20).

[12] The notification must be published in the Official Gazette, and disseminated by electronic means (Article 8 of Ministerial Order 450/2002).

[13] In this respect, STF note (*Súmula*) 686 provides that "*a candidate for public office may be subjected to psycho-technical examination only as provided by law*".

According to paragraph 1, *"in the case of a two-stage competition, the Ministry of Planning, Budget and Management may authorize the calling of candidates who were approved but not called in the first stage, and their appointment will depend on their success in the second stage."*

According to paragraph 2, "*the appointment or hiring of candidates shall adhere strictly to the order of ranking in the public competition*".

According to Article 15, if candidates withdraw during the selection process, before the appointment or signature of the contract, the administration may replace them by calling up candidates with lower rankings, observing the limit established in Article 13, for filling vacancies listed in the notification. The body or entity responsible for holding the competition may issue as many calls as necessary, during the period of validity of the competition, according to the ranking order, up to the limit of vacancies authorized in the notification (Article 15, sole paragraph).

- Legal provisions applicable to public office in the Federal Legislative Branch, among which the following should be noted:

- Resolution 17 of 1989, which approves the Internal Bylaws of the Chamber of Deputies, enshrines the following principles with respect to the chamber's administrative services: "*the chamber's human resources policy shall be designed to ensure that administrative and legislative activities, including institutional advisory services, are executed by members of rosters of suitably qualified personnel who have been recruited through public competition involving tests or tests and presentation of academic and professional credentials, with the exception of commissioned positions reserved for preferential internal recruitment among career public servants of the technical or professional streams, or declared of free appointment and dismissal, in the terms of the specific resolution*" (Article 262, sole paragraph (II)); "*adoption of a human resource development policy, through ongoing and systematic training, development and professional evaluation programs and activities; institution of the career and merits system, and processes for rotating and reassigning personnel among the various administrative and legislative activities*" (Article 262, sole paragraph (III)); and "*the existence of unified institutional advisory services of a technical and legislative or specialized nature, for the committees, commissions, deputies and administration of the Chamber, in the form of a specific resolution, which must of course make public competition mandatory for filling any vacancies, provided there are no previously qualified candidates for any of the areas of specialization or thematic fields included in the activities of the legislative advisory office*" (Article 262, sole paragraph (IV)).

- Resolution 42 of 1993, dealing among other things with the career plan for employees of the Federal Senate, establishes (Article 16) that *"entry into the career and to the respective area of the category is dependent exclusively on approval through a public competition involving tests or tests and presentation of academic and professional credentials, at the beginning level of the category for which the candidate was qualified."*

Article 17 establishes the minimum education requirements for career entry. The public competition is used for elimination and ranking of candidates (Article 18), and once the results are approved, the qualified candidates are appointed, in accordance with existing vacancies and the needs of the administration, with due regard to the validity period of the competition as established in the notification and the order of ranking (Article 19). An employee named to a position by permanent appointment is subject to a probationary period of 24 months, during which his aptitude and capacity

for performance in the position is to be assessed in terms of diligence, discipline, capacity for initiative, productivity and responsibility (Article 21).

- Regulatory and legal provisions applicable to the federal judiciary, among which the following should be noted:

- The Federal Constitution, which establishes (Article 93.1) that admission to the judicial career shall be through public competition based on tests and credentials. The Brazilian Bar Association is involved at all stages of the competition. A bachelor's degree in law, as a minimum, as well as three years legal experience[14] are required; in appointments to the bench, the order of ranking must be respected. Article 93 (IV) requires participation in an official magistrates' training course, or one recognized by a national school, as a mandatory step for securing lifelong tenure.[15]

- Supplementary Law 35 of March 14, 1979 (Organic Law of the Judiciary), Article 78 of which provides that "*admission to the career judiciary shall be by appointment, following public competition based on tests and credentials, organized and conducted with the participation of the Sectional Council of the Brazilian Bar Association*".

- Resolution 7 of the National Council of Justice,[x] of October 18, 2005, governs the exercise of office, positions and functions by relatives, spouses and partners of magistrates and public servants in management and advisory positions, within the organs of the judiciary and contains other provisions. Article 1 prohibits nepotism in all organs of the judiciary, and renders null and void any acts tainted by nepotism.

According to Article 2, "*nepotism includes, among other things: I. Exercise of a commissioned position or remunerated function within the jurisdiction of each court or tribunal, by a spouse, partner or relative in direct or collateral line, or by affinity, to the third degree, of the respective member or judge; II. The exercise of commissioned office or remunerated functions, in tribunals or courts, by spouses, partners or relatives in direct or collateral line, or by affinity, to the third degree, of two or more judges, or of public servants in management or advisory positions, in circumstances designed to thwart the above rule, through reciprocity in appointments or designations; III. Exercise of a commissioned office or remunerated function within the jurisdiction of each court or tribunal, by a spouse, partner or relative in direct or collateral line or by affinity, to the third degree, of any public servant in a management or advisory position; IV. The hiring for a specified time, to meet a temporary need of exceptional public interest, of a spouse, partner or relative in direct or collateral line or by affinity, to the third degree, of the respective members or judges, as well as of any public servant in a management or advisory position (...)*".

Article 2.1 allows, as exceptions to the provisions of paragraphs I, II and III, the appointment or designation of permanent public servants in the judicial career who have been admitted through public competition, in consideration of the degree of education required for the position, the professional qualifications of the public servant, and the inherent complexity of the commissioned position to be filled; in all cases, appointment or designation to serve in a capacity subordinate to the magistrate or public servant in question is prohibited.

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[14] The "*legal experience*" rule for entry into the national magistrates' career is regulated by Resolution 11 of January 31, 2006 of the National Council of Justice (CNJ).

[15] Article 95 (I) guarantees lifelong tenure for judges of first instance after two years in office. During that time, loss of position depends on a decision of the court to which the judge belongs.

In the same vein, Article 2.2 provides that the prohibition of paragraph IV shall not apply if a temporary hiring to meet a need of exceptional public interest was preceded by a regular selection process, pursuant to law.

- Regulatory and legal provisions applicable to employment in the Federal Public Prosecutor's Office (*Ministério Público Federal*, MPF)

- The Federal Constitution (Article 129.3) provides that career employees of the MPF must be selected through public competition based on tests and credentials, with participation of the Brazilian Bar Association in the process. Candidates must have a bachelor's degree in law, and at least three years of legal experience, and must be appointed in the order of ranking.

- Law 8,625 of February 12, 1993 (Organic Law of the Public Prosecutor's Office) provides (Article 59) that *"entry to the initial positions of the career shall depend on prior success in a public competition based on tests and credentials, organized and conducted by the Office of the Prosecutor General, with participation by the Brazilian Bar Association"*.

- Resolution 93 of the National Council of the MPF,[xi] of September 4, 2007, sets forth further details on the competitive process for employment in the MPF.

- Resolution 1 of the National Council of the MPF, of November 7, 2005 regulates the exercise of office, positions and functions by relatives, spouses and partners of members of the MPF, and contains other provisions. Under that resolution (Article 1), no spouse, partner or relative of the member in question, to the third degree, may be appointed or designated to a commissioned office or commissioned function in any body of the federal or state prosecution offices. This prohibition does not apply to public servants holding office by permanent appointment within the prosecution office, and is limited in this case to appointment or designation to serve together with the member in question (Article 2). According to Article 3, "*appointments to bodies of the MPF are not allowed if they constitute reciprocity for appointments of the persons indicated in Article 1 to a commissioned office in any body of the direct or indirect public administration of the Union, the states, the Federal District, or the municipalities*".

- Regulatory and legal provisions governing the administrative authorities of the selection systems

  - Federal Executive Branch

- Law 10,683 of May 28, 2003 gives to the Ministry of Planning, Budget and Management, among other responsibilities, that of coordinating and managing the federal systems for planning and budgeting, civilian personnel, administrative organization and modernization, the administration of information and computer resources, and general services (Article 27 (XVII.g)).

- Decree 99,328 of June 19, 1990 establishes the Integrated Human Resources Administration System (SIAPE) and contains other provisions. Article 1 includes among its purposes that of "*serving the Department of Human Resources of the Federal Administration Secretariat in the work of planning, coordinating, supervising, controlling and developing human resources for the direct federal public administration, the former territories, the autonomous agencies, and the public foundations*" (Article 1 (II)) and "*serving the personnel units of the organs and entities referred to in the previous*

paragraph in the pursuit of their activities" (Article 1 (III)). The Department of Human Resources of the Federal Administration Secretariat is responsible for supervising and coordinating the development and maintenance of the SIAPE (Article 1, sole paragraph).

- Decree 6,081 of April 12, 2007, approving the Organization Structure and Illustrative Table of Commissioned Offices and Remunerated Functions of the Ministry of Planning, Budget and Management, and which contains other related provisions, establishes (Article 34) the powers of the Human Resources Secretariat, which include: exercising normative responsibilities in the area of civilian personnel in the federal direct administration and autonomous agencies (including those under the special regime and public foundations (Article 34 (I)); managing activities relating to public competitions, changes in the workforce, and temporary contacting of personnel (Article 34 (VII)); and proposing policies and directives for the recruitment and selection, training, career development and performance evaluation of public servants in the federal direct administration, agencies and foundations, as well as supervising observance therewith (Article 34 (VIII)).

- Federal Legislative Branch

- Annex IV of Act (*Ato da Mesa*) 27 of the Chamber of Deputies of August 20, 2003, creates the Human Resources Division of the Chamber of Deputies and contains other provisions, gives the Human Resources Division the power to *"plan, organize, coordinate, order, control and guide its component bodies, control activities inherent to the Chamber's personnel management, and see to observance of personnel policy guidelines and programs"*.

- Article 2 of Act 18 of the Federal Senate Executive Committee, of 2001, provides that *"the Human Resources Secretariat shall plan, supervise, coordinate and direct human resource administration activities"*.

- Federal Judicial Branch

- Article 96 (I)(e) of the Federal Constitution gives the courts the exclusive power to fill the offices required for the administration of justice, except for positions of trust as defined by law, through public competition based on tests, or on tests and credentials, with due regard to the provisions of Article 169 (sole paragraph).

- Federal Public Prosecutor's Office (MPF)

- Article 127.2 of the Federal Constitution, which establishes the financial and administrative independence of the MPF, empowers it to propose legislation to create and eliminate its offices and auxiliary services, with due regard to Article 169, by means of public competition based on tests or on tests and credentials, as well as its remuneration policy and career plans.

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

At the federal level, the rules and measures referring to the main systems of government hiring that were examined by the Committee, on the basis of available information, constitute a set of measures suitable for promoting the purposes of the Convention.

However, the Committee considers it useful to offer some observations and to suggest that the country under review consider supplementing its legal framework as follows:

According to Article 37 (V) of the Federal Constitution, commissioned offices, which are exempt from public competition and are reserved solely for executive, leadership and advisory positions, are to be filled by career public servants in the cases, conditions and minimum percentages prescribed by law.

In this respect, the Committee considers that the provisions contained in decree 5497/2005 represent a step forward, within the federal public administration, and that they establish minimum percentages for commissioned offices at the DAS 1, 2, 3 and 4 levels. The Committee notes however, that the legislation referred to in the Constitution has not yet been approved. Bearing in mind the need for rules, applicable to the three branches of government, which govern the cases, conditions and minimum percentages of career public servants who must fill commissioned offices, the Committee will formulate a recommendation in this respect (see Recommendation 1.1(a) in Section 1 of Chapter III of this Report).

Similarly, with respect to commissioned offices, with the few significant exceptions,[16] the Committee was unable to verify that there is any general rule expressly prohibiting the practice of nepotism or of "cross nepotism", i.e. arrangements designed to circumvent this prohibition through reciprocal appointments or designations.[17] In observance of the principle of equity established in Article III (5) of the Convention, the Committee will formulate a recommendation in this respect (see Recommendation 1.1(b) in Section 1 of Chapter III of this Report).

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

With respect to results, Brazil reported in its response that *"22,112 public servants entered careers in the federal executive branch through public competition in 2006. In 2007, the number was 11,939. The competitions held to fill these vacancies correspond to 72 different categories in the federal executive branch"*.[xii]

With respect to publicizing selection processes, the Committee notes that, beyond publication in the Official Gazette and in newspapers of wide circulation, the notifications for all stages of public competitions and simplified selection processes, as well as their outcomes, are widely disseminated via the Internet, on government web pages[xiii] and on the web pages of specialized journals or of schools and preparatory courses for public competitions.

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[16] See CNJ Resolution 7/2005; CNMP Resolution 1/2005; and Article 117 (VIII) of Law 8112/90.

[17] 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.*"

In this respect, Brazil notes in its response that *"the broad publicity given to public competitions in Brazil has contributed significantly to increasing participation in the entry examinations, thus increasing the ratio of candidates to vacancies. In the most hotly contested careers, such as those of prosecutors, auditors, legal workers and the police, this participation amounted to as many as 134 candidates per vacancy for the competition sponsored by the National Finance Prosecutor, 134 for the Labor Judge of the Regional Labor Court of the Ninth Region, and 98 for the Finance and Control Analyst position*".[18]

The Personnel Statistics Bulletin 144 of April 2008[xiv] provides the following data on the number of public servants in the federal government:

Federal Public Servants by Branch, according to employment status

				Position–Mar/2008
Branch of government	Number of Federal Public Servants, by employment status			Total
	Active	Retired	Pension Inst.	
Executive	996,369	505,253	439,355	1,940,977
Civil [19]	527,525	364,992	247,128	1,139,645
-Direct Administration	219,561	210,197	187,956	617,714
-Independent agencies	205,326	118,419	43,297	367,042
-Foundations	102,638	36,376	15,875	154,889
Central Bank of Brazil	5,080	3,332	335	8,747
Federal Prosecution Office	8,384	1,481	622	10,487
Public Enterprises [20]	19,265	-	-	19,265
Mixed Economy Corporations [21]	12.681	-	-	12,681
Military	423,434	135,448	191,270	750,152
Legislative	24,608	7,246	3,732	35,586
Judicial	93,593	16,318	6,348	116,259
Total	1,114,570	528,817	449,435	2,092,822
Prepared by: SRH/MP.				
Source: SRH/MP and STN/MF				

[18] Brazil's response to the questionnaire, page 4.
[19] Workforce = number with status (-) decentralized (-) provisional (-) resigned (Includes temporary contracts).
[20] Receiving treasury funds.
[21] *Id*.

The Bulletin also provides the following information on employment in commissioned offices:

Employment in commissioned positions: March 2008

DAS Level	Total number of public servants	Permanent public servants [22]		Seconded by other bodies and areas [23]		No official status[24]		Retired	
		No.	%	No.	%	No.	%	No.	%
DAS - 1	6,865	4,777	69.6	143	2.1	1,725	25.1	220	3.2
DAS - 2	5,609	4,013	71.5	140	2.5	1,268	22.6	188	3.4
DAS - 3	3,728	2,516	67.5	193	5.2	874	23.4	145	3.9
DAS - 4	2,988	1,515	50.7	372	12.4	955	32.0	146	4.9
DAS - 5	960	428	44.6	165	17.2	322	33.5	45	4.7
DAS - 6	200	63	31.5	43	21.5	84	42.0	10	5.0
TOTAL	**20,350**	**13,312**	**65.4**	**1,056**	**5.2**	**5,228**	**25.7**	**754**	**3.7**

From the information presented above, the Committee observes that the great majority (approximately 96.3%) of civilian positions in the federal executive branch are filled by public competition or by a simplified selection process (in the case of temporary employees). Commissioned or "at pleasure" offices, which do not require prior public competition, represent approximately 3.7% of all positions in the federal executive branch, and are for the most part filled by career public servants (hired through competition).

The Committee also notes that roughly 1% of all civilian positions in the federal executive branch are filled by persons not associated with the public administration (i.e. not hired through competition), and that Brazil intends to reduce this number further, as indicated in its response to the questionnaire, as follows:

"*In pursuit of the policy of upgrading the professional status of the public service, the President of the Republic recently sent a draft law to Congress, Bill 3,429/2008, which would reserve a group of commissioned functions to permanent public servants in the direct administration, agencies and foundations of any branch of the federal government. According to that bill, 2,496 positions of the Senior Executives and Advisory Group (DAS) will be replaced by Commissioned Functions of the Executive Branch, which may only be filled by career public servants. The intent is to restrict the number of commissioned positions held "at pleasure", and thereby to increase professionalism in essential areas and enhance the technical capacity of government for the conduct of public policies*."[25]

With respect to the oversight of public competitions in the federal executive branch, Brazil reports in its response that *"the Office of the Federal Comptroller General has a specific audit procedure for examining the way public offices are filled. Each state of the Federation has its own internal control body and its own court of accounts. The Office of the Federal Comptroller General examines all*

[22] Permanent Public Servants of the Direct Federal Public Administration, Independent Agencies and Foundations.
[23] Seconded by States, Municipalities, Federal District, Public Enterprises, Mixed Economy Corporations, Tribunals, Chamber of Deputies, Federal Senate, and Federal Public Prosecutor's Office.
[24] No public office.
[25] Response of Brazil to the questionnaire, pages 8-9.

processes involving admission, retirement and the award of pensions in the federal executive branch and sends them for review and approval by the Federal Court of Accounts."[26]

Brazil's response to the questionnaire indicates that the Office of the Federal Comptroller General examined 35,938 records of admission for public servants in 2006, and 49,809 in 2007. That response also notes that *"the Federal Court of Accounts examined 238,793 personnel actions in 2006 and 2007, of which 8,029 were denied registration because of irregularities* [approximately 3,3%]. *In these cases, the originating organ was ordered to take suitable steps to rectify the situation, and to cease any payments flowing from the rejected action. Considering the average pay of federal public servants in the executive branch, the savings from the suspension of such payments amount to R$424.8 million.*"[27]

The Committee considers that the above information supports the conclusion that the internal and external control bodies have been performing an important function in overseeing the legality of personnel actions, but the lack of detailed information does do not allow the Committee to make a comprehensive evaluation of the results of this topic. The Committee will formulate a recommendation in this respect (see General Recommendation 4.2 of Chapter III of this report).

Finally, the Committee notes that it has no information regarding the objective results from the hiring processes in the legislative and judicial branches, nor in the MPF. The Committee will formulate a recommendation in this respect (see General Recommendation 4.2 of Chapter III of this report).

1.2. GOVERNMENT SYSTEMS FOR THE PROCUREMENT OF GOODS AND SERVICES

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

At the federal level,[28] Brazil has a set of provisions relating to government procurement systems, among which the following should be noted:

- Constitutional provisions governing public procurement, such as those established in Article 37 (XXI) of the Federal Constitution, which requires the use of bidding procedures for the contracting of works, goods and services, with due regard to the principles of legality, impartiality, morality, publicity and efficiency: *"except for those cases specified in legislation, all works, services, purchases and disposals shall be contracted by public bidding proceedings that ensure equal conditions to all bidders, with clauses that establish payment obligations, maintaining the effective conditions of the bid, as provided by the law, which shall require only those technical and economic qualifications essential to guarantee the performance of obligations."*

The Constitution also provides judicial mechanisms for controlling bidding procedures and administrative contracts, such as the writ of mandamus (*mandado de segurança*, Article 5 (LXIX)), "popular action" (Article 5 (LXXIII)) and "public civil suit" (Article 129 (III)).

[26] Response of Brazil to the questionnaire, page 5.
[27] Response of Brazil to the questionnaire, page 6.
[28] It is important to note that, pursuant to Article 22 (XXVII) of the Federal Constitution, the Union has exclusive power to legislate on "general rules for all types of tendering and contracting, in all their forms, for the direct public administration, autonomous agencies and foundations of the Union, states, Federal District and municipalities, pursuant to Article 37 (XXI), and for public enterprises and mixed economy corporations, pursuant to Article 173 §1, III".

- Regulatory and legal provisions applicable to the three branches of the federal government, among which the following should be noted:

- Law 8,666 of June 21, 1993 (with subsequent amendments), regulating Article 37 (XXI) of the Federal Constitution, which institutes standards for tendering and contracting in the public administration,[29] and makes other provisions. Article 2 declares that works, services, including advertising, purchases, disposals, concessions, permits and leases by the public administration, when contracted with third parties, must be preceded by bidding, except in the cases stipulated in the law.

In accordance with Article 3, bidding must guarantee observance of the constitutional principle of equal rights (*isonomia*), and the proposal that is most advantageous to the administration must be selected, based on the principles of legality, impartiality, morality, equality, publicity, administrative probity, strict observance of the terms of the tender notification, and objective evaluation. Article 3 (1) prohibits public agents from admitting, anticipating, including or tolerating, *"in calls for tender, clauses or conditions that would compromise, restrict or frustrate the competitive nature of the process, and from establishing preferences or distinctions with respect to the place of birth, headquarters or domicile of bidders or any other circumstance irrelevant to the specific purpose of the contract"* (Article 3.1, §I).[xv]

Article 22 provides for five methods of tendering: (a) competition[xvi]; (b) price comparison[xvii]; (c) invitation[xviii]; (d) contest (*concurso*)[xix]; and (e) auction.[xx]

Article 23 establishes the ranges of values applicable to each of these methods,[xxi] and prohibits the splitting of amounts so as to use a less rigorous procedure than applicable (Article 23.5).

The first sentence (*Caput*) of Article 45 provides that the evaluation of bids must be objective, and must be conducted in accordance with the types of bidding, the rules previously established in the call for tenders, and exclusively in accordance with the factors mentioned therein, to make it possible for bidders and the control bodies to assess the award.

Article 45.1 establishes four types of bidding applicable to all the methods described above, except *concurso*: lowest price;[xxii] best technical offer; technical offer and price;[xxiii] and best offer. Procedures for "best technical offer" bidding are established by Article 46.1. Article 46.2 defines the procedures for "technical offer and price" bidding. Other types of bidding not stipulated in the law are prohibited (Article 45.5).

The bid processing and award are carried out by a bidding commission, permanent or special, comprised of at least three members, of whom at least two must be qualified public servants belonging to the permanent staff of the administrative bodies responsible for the tender (Article 51). In processing and awarding bids, the commission must observe the procedures established by Article 43, including verification that each bid is compliant with the requirements in the call for tenders and, as the case may be, with current market prices or those set by the competent official agency, or with those of the price registry system, which must be recorded in the act (Article 43 .IV); and the

[29] Article 1 of Law 8.666/93 provides that the "*Law establishes general rules for bidding and administrative contracts for works, services - including advertising, purchases, disposals, and leases in the framework of the powers of the Union, the states, the Federal District and municipalities*." In addition to organs of the direct administration, also subject to the provisions of Law 8.666/93, are special funds, autonomous agencies, public foundations, public enterprises, mixed economy corporations, and all other entities under the direct control of the *Union, the states, the Federal District and municipalities* (Article 1, sole paragraph).

evaluation and ranking of bids in accordance with the criteria[xxiv] established in the call for tenders (Article 43 .V). According to Article 50, the administration must respect the order of ranking of the proposals when it proceeds to sign the contract, under penalty of nullity.

With respect to the price registry system,[30] Article 15 stipulates that purchases must, wherever possible, be processed through the price registry, which is to be preceded by wide-scale market research (Article 15.1). Article 15.2 calls for quarterly publication of registered prices in the official press, and provides that any citizen *"has standing to challenge the price shown in the general list on the grounds that it is out of line with the actual market price"* (Article 15.6).

When it comes to procurement without competitive bidding, Article 24 defines the circumstances for waiving bidding.[xxv] [xxvi] Article 25 provides examples of situations where bidding is not required (exempt).[xxvii]

In those cases where bidding can be waived and where it is not required, a written justification must be submitted containing: I -- a description of the emergency situation[31] or calamity[32] that justifies the waiver of tendering; II -- the reason for selecting the supplier or service provider; III -- justification of the price; and IV -- a document approving the research projects to which the goods will be devoted (Article 26, sole paragraph). These justifications must be submitted to the senior authority within three days for ratification, and for publication in the official press, within five days, as a condition for such acts to be valid (Article 26, first sentence).

With respect to challenges and other control mechanisms, Article 49 provides that *"the authority competent for approving the procedure may only revoke the bidding for reasons of the public interest relating to a fact that is duly demonstrated, pertinent and sufficient to justify such conduct, [in which case] the bidding must be canceled for illegality, ex officio or at the instigation of third parties, through a duly substantiated written submission"*[33], and cross examination and ample defense are guaranteed (Article 49.3). When a bidding process is nullified, the contract is also nullified (Article 49.2), and that nullification is retroactive (Article 59, first sentence).

Article 109 provides the administrative remedies applicable to tendering and contracting procedures: appeal,[xxviii] representation,[xxix] and request for reconsideration.[xxx]

Appeals against qualification or disqualification and the evaluation of bids have mandatory suspensive effect. All other appeals have suspensive effect only if the competent authority, citing the public interest, attributes such effect to them (Article 109.2). According to Article 109.3, other bidders have five working days to challenge an appeal.

Article 109.4 requires the appeal to be addressed to the senior authority, through the authority whose act is being challenged, which may reconsider its decision within five working days or, within the same time limit, elevate the decision, properly informed, in which case the decision must be rendered within five working days from receipt of the appeal, under penalty of liability.

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[30] The Price Registry System (SRP) stipulated in Article 15 of Law 8,666/93 is regulated by Decree 3931 of September 19, 2001.
[31] See footnote 10.
[32] See footnote 9.
[33] Article 49, first sentence, of Law 8,666/93 also applies to cases where bidding can be waived or is not required (Article 49.4).

In the case of irregularities in the call for tenders, Article 41.1 provides that any citizen has standing to challenge it up to five working days before the date on which the qualification envelopes are to be opened, and the administration must judge and respond to the challenge within three working days.

Article 113.1 also establishes the right of any bidder, contractor or natural or legal person to apply to the Court of Accounts[xxxi] or to the bodies of the internal control system, against irregularities in the application of Law 8,666/93.

With respect to registry of contractors, Article 34 provides that *"the organs and entities of the public administration that frequently issue calls for tender shall maintain registries for qualification purposes, in a manner established by regulation, valid for at most one year."* Administrative units are authorized to use the registries of other organs or entities of the public administration (Article 34.2). The registry is to be updated at least annually through public notice, and must be widely disseminated and permanently available to interested parties (Article 34.1). The registry contains records of the performance status of the bidder vis-à-vis contracted obligations.

With respect to publicity for the tendering process, Article 3.3 provides that *"tendering must not be secret: the records of proceedings must be open and accessible to the public, except with respect to the contents of the bids, until they are opened*". In this respect, Article 4 guarantees that all participants in tendering procedures have the right *"to faithful observance of the procedure established in this law, and any citizen may monitor proceedings as long as he does not interfere in such a way as to disrupt or prevent the conduct of work."*

Article 21 governs the publication of notices containing summaries of the calls for tender, which must be published in the Official Gazette[xxxii] and in a daily newspaper of wide circulation. Such notices must indicate the place where interested persons may read and obtain the full text of the call for tenders, and complete information on the tender (Article 21.1). Article 21.2[xxxiii] sets time limits for receipt and opening of bids. A prior public hearing must be held in the case of tenders involving large amounts[xxxiv] (Article 39). According to Article 21.4, "*any amendment to the call for tenders must be published in the same manner as the original, and the time limit must begin again, except when the amendment clearly has no affect on the preparation of bids"*. Article 40 defines the mandatory content of the call for tenders.[xxxv]

According to Article 16,[34] "*there is to be monthly publication, in the official organ or in a publicly accessible notice, of all purchases made by the direct or indirect administration, identifying the good purchased, its unit price, the quantity purchased, the name of the vendor and the total value of the transaction; items for which tendering is waived or not required may be grouped"*.[xxxvi]

With respect to public works contracts, Article 7 provides that tenders for the performance of works and the provision of services must observe the following sequence: (a) basic [i.e. preliminary] project,[xxxvii] (b) executive project [i.e. with full details, ready for execution],[xxxviii] (c) execution of the work or service. Subsequent stages may only be executed after the work relating to the previous stages has been concluded and approved by the competent authority, with the exception of the executive project, which may be developed concomitantly with execution of the works and services, once it is approved by the administration (Article 7.1).

Article 7.2 provides that works and services may only be tendered when: I -- there is a basic project approved by the competent authority and available for examination by parties interested in

[34] Article 16 of law 8,666/93 does not apply in cases where bidding is waived because of national security considerations.

participating in the tender; II -- there is a detailed budget with spreadsheets showing the composition of all unit costs; III -- funds have been budgeted to ensure payment of obligations flowing from the works or services to be executed during the current fiscal year, in accordance with their respective timetable; IV -- the expected product must be included in the goals established in the Multiyear Plan to which Article 165 of the Federal Constitution refers, in the appropriate cases.

Article 8 provides that *"the execution of works and services must be programmed in full, with their current and final costs and the time limits for execution"*. Execution of the work or service, or portions thereof, may not be delayed without grounds, if their full execution has been budgeted, unless there is a financial shortfall or a demonstrable technical justification (Article 8, sole paragraph).

Article 9 prohibits the following persons from participating directly or indirectly[xxxix] in the tendering or execution of the work or service and in the provision of the required goods: I -- the author of the basic or executive project, whether a natural or legal person; II -- any firm, alone or in consortium, that has been responsible for preparing the basic or executive project or of which the project author is a director, manager, shareholder or owner of more than 5% of its voting or controlling capital, technical manager or subcontractor; III -- an employee or manager of the contracting body or the entity responsible for the tender.

The author of the project or the firm to which assumption II refers may participate in tendering for the good or service, or in its execution, as a consultant or technical advisor, in the functions of oversight, supervision or management, solely in the service of the interested administration (Article 9.1). Article 9.2 allows inclusion of executive project preparation as a duty of the contractor, or at a price set in advance by the administration.

With respect to amendment of contracts, Article 65 determines the cases in which amendments may occur,[xl] with due justification. Article 65.1 limits such amendments (additions or deletions) to 25% of the initial updated value of the contract and, in the specific case of building or equipment renovations, to a limit of 50% for increases. Article 65.6 requires the administration to reestablish the initial economic and financial balance if there is any unilateral change to the contract that increases the contractor's duties.

With respect to administrative sanctions and criminal behavior in tendering processes, Articles 81 to 85 establish general provisions relating thereto.[xli]

Article 87 provides the following penalties for contractors in total or partial default: "*I -- warning; II -- fine, in the form established in the call for tenders or in the contract; III -- temporary suspension of participation in tendering and disqualification from contracting with the administration for a term not to exceed two years; IV --declaration of disqualification to tender or contract with the public administration for as long as the reasons for punishment persist or until the party obtains re-qualification from the authority that applied the penalty, which may be granted if the contractor has reimbursed the administration for any resulting damages, and after expiry of the term referred to in the previous paragraph."*

A declaration of disqualification (blacklisting) to tender or contract with the administration may be issued only by the Minister of State or by the State or Municipal Secretary, when applicable, and the interested party is entitled to defend itself during proceedings, within 10 days of the public opening, and may apply for re-qualification two years after the declaration (Article 87.3).

The penalties of temporary suspension and blacklisting may also be applied to contractors who: "*I -- have been convicted of any type of tax fraud; II -- have engaged in unlawful behavior intended to frustrate the objectives of the tender; III -- are demonstrably unsuitable for contracting with the administration because of unlawful acts*" (Article 88).

Articles 89 and 99 define various types of conduct and establish their respective penalties for those who commit crimes in the tendering and contracting process.

- Law 10,520 of July 17, 2002 and its regulations[35] (Decree 3,555 of August 8, 2000) establish the tendering method known as "*pregão" (reverse auction)*[36, 37] for the procurement of off-the-shelf goods and ordinary services.[xlii]

Article 3 of Law 10,520/02[38] governs the preparatory phase for the *pregão*. It begins with a notice from the competent authority, justifying the procurement need, defining its objective, the qualification requirements, the rules for admission of bids, penalties for noncompliance, and contract clauses, and sets time limits for delivery (Article 3.1); these justifications will be recorded in the minutes of the proceeding (Article 3-III).[39] The objective must be precisely, sufficiently and clearly defined, and excessive, irrelevant or unnecessary specifications are prohibited (Article 3.II).[40] The terms of reference must include the essential elements for defining the objective, as well as the respective detailed budget, considering current market prices (Article 8-II of Decree 3,555/00).

Article 3 of Law 10,520/02 also requires the competent authority to designate an employee of the organ or entity as *pregoeiro* (auctioneer), and the respective support team, which must contain a majority of *"public servants holding effective office or employment in the administration, belonging preferably to the permanent staff of the organ or entity sponsoring the event"* (Article 3.1).[41] The support team is responsible for, among other things, assisting the auctioneer in receiving bids and analyzing their acceptability, and for examining the qualification documents (Article 3-IV).

The single paragraph of Article 7 of Decree 3,555/00 provides that "*the auctioneer must be a public servant with specific training for this task"*. The tasks of the auctioneer are defined in Article 9 of Decree 3,555/00.

With respect to publicity, Article 4 of Law 10,520/02 provides that calls for tender must be published by notice in the Official Gazette and, optionally, by electronic means and, depending on the size of the transaction, in newspapers of wide circulation (Article 4.1).[xliii] If the reverse auction (*pregão*) is conducted by an organ or entity of the General Services System (SISG), the notice must be available in its entirety at the website (www.comprasnet.gov.br), regardless of the estimated value (Article 11-I §d of Decree 3,555/00).

The notice must contain a precise definition of the objective and an indication of the place, date and time at which the full version of the tender documents can be read or obtained, and the place where

[35] Decree 5450 of May 31, 2005, regulating electronic reverse auction (*pregão*), will be examined below.
[36] *Pregão* is the reverse- auction method whereby the competition to supply off-the-shelf goods or ordinary services is conducted in a public session, through written price proposals and verbal bids (Decree 3,555/00, Article 2).
[37] The rules of law 8,666/93 apply in a subsidiary manner to the *pregão* method (Law 10,520/02, Article 9).
[38] See also Article 8 of Decree 3,555/00
[39] See also Article 8-IV, of Decree 3,555/00
[40] See also Article 8.I of Decree 3,555/00.
[41] See also Article 10 of Decree 3,555/00.

the public *pregão* session will be held (Article 4.II).[42] The deadline for submitting bids, counting from the publication of the notice, may not be earlier than eight working days (Article 4-V).[43]

An extract of the signed contracts must also be published in the Official Gazette, within 20 days after their signature, indicating the bidding method and the reference number (Article 20 of Decree 3,555/00).

Article 5 (§§I to III) of Law 10,520/02 prohibits any requirement for bid bonds and purchase of bidding documents as a condition for participating in the competition, as well as the payment of fees and emoluments, except those relating to supply of the bidding documents, which must not exceed the cost of reproducing them, and any costs for use of information technology resources.

With respect to selection criteria, Law 10,520/02 provides (Article 4-X) that bids shall be evaluated and ranked by the lowest price,[xliv] with consideration as well of maximum delivery times, technical specifications and minimum performance and quality parameters established in the call for tenders.

Qualification takes place subsequent to the competitive stage,[xlv] and the declared winner will be the bidder that fulfills the requirements established in the call for tenders. If the front runner is disqualified, the auctioneer will examine the documentation of the second runner-up, and so on successively until a bidder meets the established conditions (Article 4-XVI of Law 10,520/02).[44]

With respect to challenges and other control mechanisms, Law 10,520/02 provides that, once the winner is declared, any bidder wishing to challenge the award must declare and justify such intention immediately, and will have three days to submit the reasons for the appeal. Other bidders may present counterarguments, within three days after the end of that time, and they are assured immediate access to the documents[xlvi] (Article 5 §§XVIII and XX).[45] Acceptance of the appeal invalidates only those acts that are rendered ineffective (Article 5 .XIX),[46] and appeals against the auctioneer's decision do not have suspensive effect (Article 11-XVIII of Decree 10,520/02).

With respect to administrative sanctions, Article 7 of Law 10,520/02 provides that *"any person who is invited to negotiate a contract within the validity period of his bid, and who refuses to do so, fails to deliver the documentation required for the competition, or submits false documentation, seeks to delay execution of its objective, does not honor his bid, defaults or commits fraud in the execution of the contract, behaves improperly or commits tax fraud, shall be prevented from tendering and contracting with the federal government, states, federal district, or municipalities, and will be blacklisted in SICAF or in the supplier registration systems referred to in Article 4-XIV of this law, for a term of up to five years, without prejudice to the fines stipulated in the call for tenders and in the contract and other legal provisions*".[47]

- Decree 5,450 of May 31, 2005, regulating electronic reverse auctions (*pregões*) for the procurement of off-the-shelf goods or ordinary services,[48] establishes (Article 4.1) that the *pregão* must be

[42] See also Article 11-II of Decree 3,555/00
[43] See also Article 11-III of Decree 3,555/00
[44] See also Article 11-XV of Decree 3,555/00
[45] See also Article 11-XVII of Decree 3,555/00
[46] See also Article 11-XIX of Decree 3,555/00
[47] See also Article 14 of Decree 3,555/00
[48] The electronic *pregão* does not apply to contracts for engineering works or to real estate leases and property transfers in general (Article 6 of Decree 5,450/05).

conducted electronically, except in cases where this is demonstrated to be not viable, which must be justified by the competent authority.

The electronic reverse auction has rules similar to those of the normal *pregão*, and in addition some specific rules for challenging the notification. Article 18 of the Decree provides that any person may challenge it up to two working days before the date set for the public session, and the auctioneer, assisted by the sector responsible for preparing the call for tenders, must decide the challenge within 24 hours (Article 18.1). If the challenge is admitted, a new date for the competition will be established and published (Article 18.2). Article 19 allows clarifications of the bidding process to be sent to Internet addresses, up to three days before the date set for the public session.

In the case of amendments to the call for tenders, Article 21 requires that they be published by the same means as the original text,[xlvii] extending the initially established time limit, except when the change has no demonstrable effect on the preparation of proposals.

The electronic *pregão* is conducted by the organ or entity sponsoring the tender, with technical and operational support from the Logistics and Information Technology Secretariat of the Ministry of Planning, Budget and Management, which supplies the electronic system for the member organs of the General Services System (SISG) (Article 2.4).

The acts and documents relating to the bidding process contained in digital files and records are valid for all legal purposes, and must be permanently available for internal and external audit (Article 30.1 and 2). The report must be made publicly available via the Internet immediately after the close of the public session (Article 30.3).

- Supplementary Law 73 of February 10, 1993, instituting the Organic Law of the Federal Advocate-General's Office and making other provisions, establishes among the powers of the legal advisers of ministries and secretariats that of conducting a prior and conclusive examination of: *"(a) the wording of calls for tender, and of the respective contracts or related instruments, to be published and signed; (b) decisions recognizing that bidding is not required, or may be waived."*(Article 11 .VI).

- Law 8,443 of July 16, 1992, which makes provisions relating to the Organic Law of the Federal Court of Accounts and other provisions, stipulates (Article 41) that for effective control and the judging of accounts, the tribunal shall audit acts resulting in receipt or expenditure, and in particular shall inspect calls for tender, contracts, agreements, and amendments or other related instruments (Article 41.I.b). If the tendering is shown to have involved fraud, the tribunal must disqualify the fraudulent bidder from participating for up to five years in tendering by the federal public administration (Article 46).

- Regulatory and legal provisions applicable to the federal executive branch, among which the following should be noted:

- Decree 6,081 of April 12, 2007, approving the structure of the Ministry of Planning, Budget and Management and which contains other provisions, assigns to the Logistics and Information Technology Secretariat the responsibilities of planning, coordinating, supervising and providing normative guidance to the activities of the Information and Computer Resources Administration System (SISP) and the General Services System (SISG),[49] as well as proposing policies and

[49] In Brazil, the administration of materials, public buildings, official vehicles, administrative communications, tenders and contracts is organized in the form of a system known as the General Services System (SISG) (Article 1 of Decree 1,024/94).

guidelines relating thereto, within the federal direct administration, autonomous agencies and foundations (Article 29, Annex I). The Logistics and General Services Department of that Secretariat is responsible specifically for: *"I -- formulating and approving implementation of policies and guidelines relating to the administration of materials, works and services, transportation, administrative communications and tenders and contracts, adopted within the federal direct administration, autonomous agencies and foundations; and II -- managing and rendering operational the activities of the SISG, through installation, supervision and control of the Integrated General Services Administration System (SIASG)"*(Article 30, Annex I).

- Decree 1,094 of March 23, 1994, which creates and regulates the SISG, stipulates (Article 7) that the Integrated General Services Administration System (SIASG) is *"to assist in computerizing and making operational the SISG, for the purpose of integrating and providing the organs of the direct administration, autonomous agencies and foundations, with a modernization instrument, at all levels, and in particular: I -- the unified catalog of materials and services; II -- the unified registry of suppliers; III -- the registry of prices for goods and services."*

According to Article 9, the current Ministry of Planning, Budget is the central management and normative body of the SISG.

- Decree 3,722 of January 9, 2001, regulating the Unified Registry of Suppliers (SICAF) provides that the SICAF shall be the official registry of the federal executive branch, maintained by the organs and entities that comprise the SISG (Article 1), and that the Ministry of Planning, Budget and Management is responsible for taking the necessary steps to regulate and coordinate it and make it operational (Article 6).

According to Article 1.1, the qualification of suppliers may be done in advance through registration in the SICAF, which must contain records on the interested parties referring to their legal qualification, fiscal regularity, and economic and financial qualification, as well as any sanctions applied by the public administration that would prevent them from contracting with the government (Article 1.2). Article 1.3 provides that processing of registry information shall be done using information technology resources for constituting a permanent and centralized database.

Article 4 provides that supplier registration in the SICAF is valid for one year, with due regard to the validity period of the documentation presented for purposes of updating the system, which must be resubmitted periodically in order to ensure its complete and up-to-date status in the registry.

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

The rules and measures relating to systems for the procurement of goods and services that have been examined by the Committee, on the basis of available information, constitute a set of relevant measures for promoting the purposes of the Convention.

However, the Committee considers it useful to offer some observations and to suggest that the country under review consider supplementing, developing or adjusting certain provisions of its legal framework as follows:

With respect to procurement systems without competitive bidding, the Committee notes that Article 24 of Law 8,666/93 allows 28 reasons for setting aside a tendering process. As well, Article 25 describes three situations where tendering is not required at all. In both cases (with the exception of waiver for purchases of low value) the decision must be justified and reported to the superior

authority for ratification and publication in the official press. These publications are also made available over the Internet (www.comprasnet.gov.br). Nevertheless, bearing in mind the difficulty of consulting and obtaining information in this website, the Committee believes that it would be useful if the electronic mechanisms for disclosure of this information were improved in order to facilitate access to the data published by these means. The Committee will formulate a recommendation in this respect (see Recommendation 1.2.1 (a) in Section 1 of Chapter III of this Report).

With respect to control mechanisms, the Committee observes that Law 8,666/93 does not specifically provide that the sanctions of temporary suspension or blacklisting for bidding or contracting with the public administration should be applied also to the owners and managers of the contracted entity, which could compromise the effectiveness of such sanctions. The Committee will formulate a recommendation in this respect (see Recommendation 1.2.2 (a) in Section 1 of Chapter III of this Report). [50]

With respect to electronic bidding and information systems, the Committee believes it may be useful to consider the amendment of Law 8,666/93 to include, as an official communication channel for tendering processes and their outcomes, publication through the official Internet pages, which must have the required digital signatures to guarantee proof of authorship and the integrity of electronic documents. Such disclosure should be made, in a centralized and permanent manner, preferably through the www.comprasnet.gov.br website. The Committee will formulate a recommendation in this respect (see Recommendation 1.2.3 (a) in Section 1 of Chapter III of this Report). [51]

The Committee also considers it important that the electronic channels indicated in the preceding paragraph be used for publicizing registered prices, pursuant to Article 15.2 of Law 8,666/93, establishing for these purposes a single price registry for the federal government. Such a measure would enhance transparency and control by the administration, as well as by any citizen, who pursuant to Law 8,666/93, has the power to challenge a price that is incompatible with the prevailing market price. The Committee will formulate a recommendation in this respect (see Recommendation 1.2.3 (b) in Section 1 of Chapter III of this Report). [52]

With respect to the tendering of public works, the Committee suggests that Brazil consider implementing additional citizen oversight for large-scale public works tendering and contracts, with the requirement to hold public consultations as to the conditions that will be contained in the calls for tender and with facilities and encouragement for citizen oversight over contract execution. The Committee will formulate a recommendation in this respect (see Recommendation 1.2.4 in Section 1 of Chapter III of this Report).

[50] 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.

[51] 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).

[52] 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.

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

In its response to the questionnaire, Brazil provided information on the results achieved in this area, among which the following should be noted:

- With respect to procurement systems with competitive bidding, Brazil presents, on page 20 of its response to the questionnaire, a table containing the values of contracts negotiated by the federal public administration through each of the bidding methods.

An analysis of that table shows that, in 2007, Brazil purchased a total of R$23.7 billion through tenders for off-the-shelf goods and ordinary services. Of that amount, roughly R$16.5 billion (69.4%) was handled through the electronic reverse auction (*pregão)* method; R$4 billion (16.8%) through competitive bidding; 2.3 billion (9.9%) through the face-to-face reverse auction (*pregão*) method; R$455 million (1.9%) through the price comparison method; R$245 million (1.02%) through international competition; R$233 million (0.98%) through invitations to tender; and R$1.35 million (0.005%) through the "contests" method.

- With respect to procurement systems without competitive bidding, Brazil presents the following table at page 30 of its response to the questionnaire:

Value of purchases with bidding waiver or exemption x Total purchases – 2004 to 2008[1]			
	Bidding waiver	**Bidding exemption**	**Total purchases**
2004	3,920,495,086.36	2,766,882,268.40	15,846,598,120.62
2005	4,265,095,687.27	5,168,904,188.11	20,718,072,773.33
2006	3,824,648,129.88	4,100,332,937.87	27,372,570,662.50
2007	5,702,393,553.08	4,963,488,538.59	34,529,816,022.54
2008[1]	737,567,999.60	701,723,713.83	4,493,076,574.64
[1] January to March			

It will be seen that cases where bidding is waived or declared not necessary[53] accounted for 42.2% of the total value of purchases in 2004; 45.5% in 2005; 29% in 2006; 30.9% in 2007; and 32% in the months of January to March, 2008. These data demonstrate that the majority of procurement by the federal government was carried out through tenders.

The above data also show a decline in the relative values of direct purchases, following 2005, and a degree of stability between 2006 and 2008. The relative decline in direct purchases of off-the-shelf goods and ordinary services by the federal government appears to be directly related to the requirement to use the reverse auction (*pregão)*, preferably in electronic form, established by Decree 5,450/05.

In this respect, Brazil states the following in its response:[54] *"Moreover, in 2007, the federal government saved a total of R$3.2 billion with the use of the electronic pregão in the procurement of goods and services. This is equal to a savings of 16.3% in contracts worth R$16.5 billion, thanks to this procurement method. In 2006, savings were R$1.8 million, equivalent to 14% on tenders of R$11.1 billion."*

[53] See endnote XXV. See also Article 26 of Law 8,666/93, as found under section 1.2.1 in Chapter II of this Report.
[54] Response of Brazil to the Questionnaire, pp 20-21.

"These savings are calculated as the difference between the maximum or reference price accepted by the administration for each product or service and the price actually contracted after online competition between suppliers. The explanation is that the electronic pregão allows each bidder to know the price offered by its competitors, and to submit new bids that will be better than the competitors', and consequently the administration can achieve much lower prices. Some 260,000 suppliers are registered with the federal government."

"In the first quarter of 2008, the federal government saved R$590 million through electronic pregão, representing a 22% reduction in contract costs of the direct administration, autonomous agencies and foundations. During that time this method applied to R$2 billion or 68% of the value tendered. Of the 5,228 tenders conducted, 4537 or 87% were via electronic pregão."

Based on the above information, the Committee notes the high degree to which electronic tender methods are being used for procurement in Brazil. The Committee urges Brazil to continue using such methods, as an important tool for ensuring the principles of openness, equity and efficiency enshrined in the Convention. The Committee will formulate a recommendation in this respect (see Recommendation 1.2.3 (c) in Section 1 of Chapter III of this Report).

The Committee notes, however, that the information presented above on procurement systems with and without competitive bidding contains no data on bidding for engineering works and services. The Committee will formulate a recommendation in this respect (see Recommendation 4.2 of Chapter III of this Report).

- With respect to the registry of contractors, Brazil presents the following information on the Unified Suppliers Registry System (SICAF).

"SICAF is a computerized module of the SIASG, operating online, which the Ministry of Planning, Budget and Management has developed in order to simplify and facilitate the registry of federal government suppliers."

"The purpose of this system is to register and, in part, qualify natural or legal persons interested in participating in tenders called by organs and entities of the public administration that are members of the SISG, and to track the performance of registered suppliers and expand purchasing options for the federal government."

"SICAF also offers a number of benefits to suppliers: for example, a single registration with the federal public administration, a registration process that is free of red tape, reduced costs for the firm in maintaining its registration with organs and entities of the federal government, greater transparency and more opportunity to participate in tender processes."

In its response to the questionnaire, Brazil presents a table indicating annual numbers of firms registered and re-registered in the SIASG. That table shows a significant rise in the number of registered suppliers, from approximately 200,000 in 2003 to 280,000 in the first months of 2008.

On the basis of this information, the Committee considers that Brazil should continue to strengthen the system, expanding it and making it available to other organs and entities that are still not part of the SISG. The Committee will formulate a recommendation in this respect (see Recommendation 1.2.3 (d) in Section 1 of Chapter III of this Report).

- With respect to electronic procurement and information systems, Brazil presents the following information in its response to the questionnaire:[55]

"The www.comprasnet.gov.br address provides ready access to tender notices, completed procurement transactions, the execution of procurement processes using the pregão method, and other information relating to negotiations by the federal direct public administration, autonomous agencies and foundations."

"ComprasNet also provides access to the legislation governing general services and procurement, in addition to various publications on this topic. At the website, suppliers have access to various services, such as applying for registration in the federal government suppliers' registry, obtaining bidding documents, participating in electronic procurement processes, etc."

"In addition to ComprasNet, much of the information from the SIASG is published at the "Public Transparency Pages" of organs and entities of the federal government, created to provide greater transparency for data and information on the federal government's budgetary and financial execution."

"On the basis of SIASG data, these pages contain, for example, information on tendering processes under way, completed processes, the name of contractors, the object of the contract, the value of the contract, the term of the contract, and the tender method used."

Brazil also has a Federal Government Works Portal (www.obrasnet.gov.br) that offers information on all projects financed from the federal budget under way in the country, designed to enhance transparency in the planning, approval, contracting and monitoring of works.

The Committee recognizes the progress that the Federal Government of Brazil has made in using electronic procurement and information systems, and will formulate a recommendation for strengthening and making them available to other organs and entities that are not yet part of the SISG and centralizing all government procurement information at a single web portal, which would allow other agencies to join the system more readily and efficiently. The Committee will formulate a recommendation in this respect (see Recommendation 1.2.3 (e) in Section 1 of Chapter III of this Report).

- With respect to control mechanisms, Brazil presents the following information:

"Primary responsibility for imposing administrative sanctions on bidders and contractors lies with the contracting organ or entity. In this task, the fiscal do contrato administrativo ("administrative contract controller") plays an especially important role. However, penalties can also be imposed through administrative channels by the Courts of Accounts and the internal control organs."

"Recent examples of action by the Federal Comptroller General's Office (CGU) in this respect include the blacklisting of two firms, Gautama and Planam, banning them from contracting with the federal public administration, for acts of corruption and fraud among other grounds. Gautama was found to have diverted public funds through fraud in government tendering in the states of Alagoas, Bahia, Goiás, Mato Grosso, Sergipe, Pernambuco, Piauí, Maranhão, São Paulo and the Federal District. Gautama executives were arrested in the course of Operação Navalha, conducted in 2007 by the Federal police with support from the CGU. The Planam company was the target of Operação

[55] Response of Brazil to the Questionnaire, page 31.

Sanguessuga, conducted in 2006 by the Federal Police, which broke up a crime ring that was defrauding municipalities in several states in the procurement of ambulances."

"The blacklisting of these firms, based on Articles 87 and 88 of Law 8,666/93, resulted in an investigation by the CGU, which detected irregularities in bidding and in the execution of administrative contracts by these firms."

"The sanctions applied by the public administration that involve a ban on contracting with the government are recorded in the Single Suppliers Registry, SICAF."

"In 2007, a total of 1,218 suppliers were suspended from the SICAF, for the following grounds:

- *884 firms were suspended from participating in tendering and other procurement processes and from signing contracts with the public administration.*
- *36 firms were deleted from the registry for delivering improper documentation, leading to their suspension from participation in procurement activities.*
- *6 firms were suspended by judicial decision.*
- *185 firms were temporarily blocked in the registry.*
- *107 firms were declared in default."*

"[I]n addition to the public administration, the Federal Court of Accounts (TCU) can also impose penalties on firms that act in an irregular manner in bidding processes and in the execution of contracts. At its website (www.tcu.gov.br)[56] *and in the Official Gazette of the Union, the TCU publishes a list of vendors that it has declared disqualified and ineligible for contracting with the federal public administration. That list does not include the names of the managers who have not yet been notified of the content of conviction orders and those whose cases have been suspended through filing of an appeal or by a judicial decision to this effect. To date, the TCU has blacklisted 27 firms for participation in tenders, and 162 individuals have been banned from the exercise of public office because of irregularities in the accounts of the organs and entities managed by them."*

"It is important to note that when there are indications of fraud in tendering processes, the TCU has the power to suspend or revoke the process."

"The following table presents statistics from the Federal Court of Accounts on penalties and tendering processes suspended or interrupted:

[56] *http://www2.tcu.gov.br/portal/page?_pageid=33,518475&_dad=portal&_schema=PORTAL*

PENALTIES AND TENDERING PROCESSES SUSPENDED OR INTERRUPTED BY THE TCU

	2006	***2005***
Executives sentenced to restitution or fines	*1,732*	*1,484*
Value of penalties	*502 million*	*362 million*
Processes referred to the federal prosecution for civil and criminal action	*953*	*754*
Executives banned from positions of commission or trust in the federal public administration	*13*	*21*
Firms blacklisted from participating in tenders for the federal public administration	*23*	*12*
Tenders and contracts suspended provisionally	*78*	*47*
Tenders and contracts formally canceled, suspended or adjusted	*44*	*39*

Based on the above information, the Committee concludes that Brazil has imposed penalties for violations of procurement rules. However, the Committee considers it important for Brazil to continue to strengthen the control bodies of the public procurement system, and will formulate a recommendation in this respect (see Recommendation 1.2.2 (b) in Section 1 of Chapter III of this Report).

- With respect to the training of public officials, Brazil reports the following:

"The Brazilian government has invested heavily in training the officials responsible for tendering and contracting works, goods and services. Every organ and entity conducts regular courses on these topics."

"Through the "Virtual School for the Training of Federal Government Auctioneers", for example, 4,591 employees were trained in 2007, throughout the country, in the use of the electronic pregão. In addition, 1,540 public servants received training in other procurement modules. The course is offered free and conveys knowledge about legislation and the principal functionalities of the electronic pregão system, giving participants the skills to conduct and execute tendering procedures swiftly and securely. The courses are open to employees in the electronic procurement area in units of the General Services Administration of the Federal Government, as well as in the 406 state and municipal bodies now included in the system for using the ComprasNet electronic auction system."

"Training courses are also offered by the National School of Public Administration (ENAP), a public foundation connected to the Ministry of Planning, Budget and Management, tasked with developing the skills of public servants so as to enhance the government's policy management capacity."

"The following table shows the principal courses and the number of participants over the last two years, with forecasts for 2008."

COURSES	*2006*		*2007*		*2008 (Planned)*	
	Nº of classes	*Nº of trainees*	*Nº of classes*	*Nº of trainees*	*Nº of classes*	*Nº of trainees*
Personnel legislation and SIAPE as a management tool	-	-	4	109	3	60
Preparation of public sector tender documents	25	613	20	413	19	380
Training of auctioneers: electronic auction (pregão)	48	1,033	20	426	22	440
Management of service contracts	11	243	19	455	12	240
Management of supply contracts	4	72	6	119	9	180
Price Registry	22	479	8	187	7	140
Electronic procurement systems	20	458	5	86	5	100
Ethics in the public service [57]	3	2,101	4	2,298	5	2,780
Legislation applied to supply logistics- Law 8,666/93[58]	3	953	4	2,252	3	1,560

"Another training initiative for public servants with respect to tendering is provided by the Office of the Federal Comptroller General as part of its Public Management Strengthening Program, designed to improve management especially in Brazilian municipalities, and to guide public agents in the proper use of public resources. Through that initiative, 1,287 municipal employees were trained in tendering and contracts. 173 employees were trained in the distance education course on tendering in 2007."

The Committee takes note of this information and considers it important that Brazil continue with its training programs for public officials responsible for tendering and contracting works, goods and services. The Committee will formulate a recommendation in this respect (see Recommendation 1.2.1 (b) in Section 1 of Chapter III of this Report).

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

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

Brazil has a set of measures and provisions related to systems for protecting public servants and private citizens who, in good faith, report acts of corruption, among which the following should be noted:

- Article 5(IV) of the Federal Constitution provides that *"the expression of thought is free, and anonymity is forbidden."*[59] Article 41 provides the following with respect to tenure[60] for public

[57] Distance course.
[58] Idem.
[59] However, Brazil reports, in its response to the questionnaire (page 46) that "[*t]he control organs also receive and process reports received without identification. Consistent with rulings of the Federal Supreme Court, anonymous reports may serve, in the Brazilian system, as an element of information to assist the verification of irregularities by the investigation organs."* See the ruling of the Supreme Court (1957-7/PR, j. 1.05.2205).
[60] In its response to the questionnaire (pages 45 and 46) Brazil also presents jurisprudence demonstrating the impossibility, in the Brazilian system, of using removal as a form of punishing or disciplining public officials.

servants hired through competition: *"Civil servants employed by virtue of public entrance examinations acquire tenure after three years of actual service.*

§1. A tenured civil servant shall lose his office only:

I. By force of a confirmed judicial decision;

II. By means of an administrative process, in which he is assured ample defense;

III. By means of a periodic performance appraisal, pursuant to a supplementary law, in which he is assured ample defense.

§2. If the dismissal of a tenured civil servant is voided by a judicial decision, he shall be reinstated, and the occupant of the vacancy, if tenured, shall be returned to his original position with no right to indemnity, posted to another position, or placed on paid stand-by with remuneration proportional to time in service.

§3. If the position is abolished or declared surplus, a tenured civil servant shall remain on paid stand-by, with remuneration proportional to time in service, until he is effectively placed in another position.

§4. As a condition of tenure, a special performance appraisal by the commission created for this purpose is mandatory."

- Law 8.443/92, Article 55 of which establishes that, in the protection of individual rights and guarantees, the Federal Court of Accounts shall treat complaints as confidential until the final decision is issued. Article 55.2 provides that *"the informant shall not be subject to any kind of administrative, civil or criminal penalty as a result of his report, except in the case of proven bad faith."*

- Law 9.807 of July 13, 1999 (regulated by Decree 3.518 of June 20, 2000), which establishes rules for the organization and maintenance of special protection programs for victims and witnesses under threat; institutes the Federal Program of Assistance to Threatened Victims and Witnesses; and contains provisions for the protection of accused or convicted persons who have voluntarily cooperated in the police investigation and the criminal proceedings.

According to Article 1 of Law 9.807/99, *"the protection measures required for victims or witnesses of crimes who faced coercion or serious threat because they cooperated with the investigation or the criminal process shall be provided by the Union, the States and the Federal District, within their respective jurisdictions, in the form of special programs organized on the basis of this law."*

Article 2 provides that *"the protection granted by programs and measures pursuant to this law shall take into account the severity of the coercion or threat to physical or mental integrity, the difficulty of preventing them or repressing them through conventional means, and their significance for producing proof."* In addition, paragraph 1 of Article 2 provides that protection may be extended to cover the spouse or partner, as well as the relatives and dependents, of the person concerned.

The following protection measures are established in Article 7: I - security of residence, including control of telecommunications; II - escort and security upon leaving the residence, including for purposes of work or the provision of evidence; III - transfer of residence or temporary

accommodation in a suitably protected place; IV - preservation of identity, image and personal data; V - monthly financial assistance to meet the basic needs of individual or family subsistence, in the case where a protected person is unable to pursue regular work or has no source of income; VI - temporary suspension of occupational activities, without prejudice to the respective pay or advantages, when the person is a public or military servant; VII - social, medical and psychological support and assistance; VIII - confidentiality with respect to the measures of protection granted; IX - support of the program executing agency in meeting civil and administrative obligations that require personal appearance.

Article 9 provides that, in exceptional cases, the public registry data on the victim or witness, as well as the persons mentioned in Article 2.1, may be altered.

The program is managed by a board comprising representatives of the Public Prosecutor's Office, the Judiciary and public and private bodies involved with public safety and the defense of human rights (Article 4).

Article 12 institutes the Secretary of State for Human Rights of the Office of the President of the Republic as the executing organ for the Federal Program of Assistance to Threatened Victims and Witnesses, which is responsible for taking the steps necessary to apply the program (Article 8 of Decree 3.518/00).

- The mechanisms available to the public for submitting complaints, either anonymous or identified, such as the "whistleblower's hotline" offered by various organs of the country[61] and the Internet pages of various organs and entities, such as the Office of the Federal Comptroller General, at: www.cgu.gov.br/Denuncias/

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

With respect to the legal provisions for protecting public servants and private citizens who, in good faith report acts of corruption, the Committee notes that, on the basis of the information available to it, they may be said to constitute a series of measures that are pertinent for promoting the purposes of the Convention.

However, the Committee considers it appropriate to offer some observations that Brazil could usefully consider for supplementing, developing and adjusting certain provisions of the relevant legal framework:

In the first place, the Committee notes that, although there is legislation on protection for witnesses and victims, that protection is linked to their cooperation in an investigation or criminal proceeding, and there is no reference to protection against other kinds of threats or reprisals in the case of complaints of acts of corruption that have not yet been investigated or that are being investigated through administrative channels, as in the cases of "administrative impropriety".

Similarly, the document submitted by the civil society organization, *"Movimento Voto Consciente"*, presents the following observations:[62]

[61] In its response to the questionnaire (pages 47-48), Brazil presents an illustrative list of such organs, with the respective telephone numbers for receiving complaints

[62] Document submitted by the civil society organization, *"Movimento Voto Consciente"* pages 29-30.

"The law governing the protection of threatened victims and witnesses, as well as the decree regulating the federal program of assistance for victims and witnesses, makes no direct mention of protection for public employees and citizens who report acts of corruption. Those legal provisions are however applicable to such persons, if they find themselves in a situation of risk and if their cooperation takes place in the context of a proceeding in which they are victims or witnesses. In this respect, it may be inferred that the legislation under review establishes a system of protection for collaborators and informants in criminal investigations or proceedings already under way, but not necessarily for the reporting of acts of corruption that may give rise to new proceedings against irregularities in the public administration."

With respect to protection for civil servants against retaliation and punishment, the Committee notes the following comments on the constitutional guarantee of tenure in the public service, presented by Brazil in its response to the questionnaire:[63]

"Tenure constitutes, therefore, the right to permanent employment in the public service, granted to a public servant who has successfully passed a probationary period, after three years of effective service. For the public servant, tenure represents the security of knowing that he may only lose his position by virtue of a court judgment or an administrative process in which he is assured ample defense and the right of cross examination."

"It will be seen, then, that in Brazil, a public official who refuses to carry out a manifestly illegal order and who in good faith reports an unlawful act that comes to his knowledge may not be dismissed, removed or subjected to any form of retaliation or punishment. Stability in employment encourages the official to act honorably and to report irregular deeds, and it protects him from persecution and prejudicial measures at work."

The Committee considers that the constitutional guarantee of tenure in public service, as well as its interpretation by the courts, are important factors that contribute to the protection of public servants against arbitrary retaliation and punishment. The Committee notes however, that if the whistleblower is a public servant hired through competitive examination who has not yet completed a probationary stage, or if he holds a commissioned office, such protection is not applicable, and he is vulnerable to retaliation or punishment if he reports an act of corruption.

The document submitted by the civil society organization, "*Movimento Voto Consciente*", makes the following observations:[64]

"Generally speaking, Brazilian legislation provides mechanisms for reporting acts of corruption. Reporting illegal acts committed in the public administration is stipulated as a functional duty of public agents, and failure to take steps to determine the responsibility of public servants is considered a crime. Yet such provisions are not always shown to be effective, because of the hierarchical relationship between the subordinate and his superior. While the complaint may be routed to an authority higher than that against which it was formulated, the legislation provides no mechanism for protection against threats of reprisals or for protection of the identity of the whistleblower, which could compromise the revelation of irregularities in the public administration."

On the basis of the above discussion, the Committee will formulate a recommendation to Brazil (see recommendation 2 in section 2 of chapter III of this report), suggesting that it consider adopting,

[63] Response of Brazil to the Questionnaire, pages 44 to 45.
[64] Pages 28-29.

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.

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

In its response to the questionnaire[65], Brazil presents the following information on results in this area:

"The Federal Public Prosecutor's Office, for example, investigated 167 reports submitted without identification in 2007 alone. The following table shows the number and percentage of anonymous reports received and investigated by the CGU:

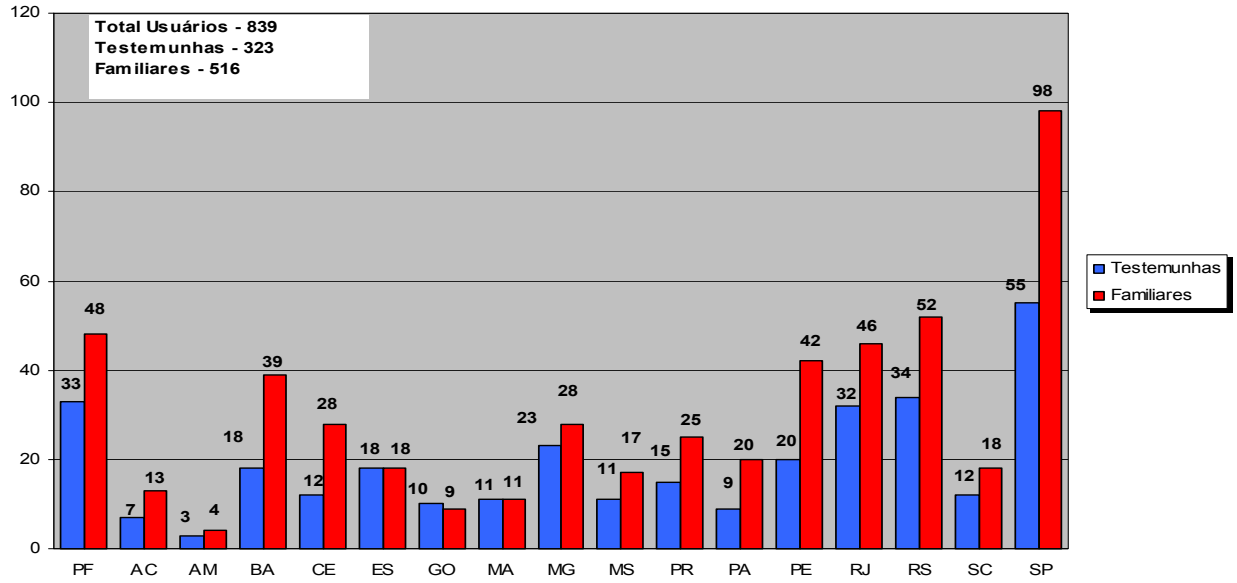
Classification of reports submitted to the CGU from 2006 through March 2008:

CLASSIFICATION OF REPORT	*NUMBER*	*%*
Anonymous	*2181*	*24.06*
Identified	*6893*	*75.94*
TOTAL	***9077***	***100.00***

"[T]he following are the numbers of users (witnesses and relatives) protected by the program between 2003 and 2007, by state agencies and by the Federal Police (PF). The second table shows specific figures for 2006, separating out witnesses and relatives.

Programs	2003	2004	2005	2006	2007	Total
AC	23	26	26	20	14	109
AM	9	21	5	7	15	57
BA	34	47	51	57	38	227
CF	2	17	26	40	41	126
DF	10	6	0	0	1	17
ES	15	7	27	36	14	99
GO	4	3	18	19	12	56
MA	13	31	19	22	16	101
MS	32	19	23	28	2	104
MG	32	21	30	51	29	163
PA	32	25	33	29	36	155
PF	63	44	67	62	19	255
PR	0	0	25	40	15	80
RJ	29	29	60	78	39	234
RS	20	39	116	86	39	300
SC	4	4	19	30	34	91
SP	67	52	124	153	114	510
PF	59	114	107	81	83	444
TOTAL	**448**	**504**	**776**	**839**	**651**	**3128**

[65] Response of Brazil to the Questionnaire, pages 46 and 49-50.



[Chart Legend:]

Total users: 839

Witnesses: 323

Relatives: 516

.....

"The federal government is investing considerable resources in specific programs to protect victims and witnesses. From 1997 to 2007, the federal government alone invested R$61,828,644. Over that same time, the state governments invested R$20,344,875. For 2008, the federal budget calls for expenditure of some R$10,640,000."

With respect to information on reports received by the Federal Comptroller General, the Committee considers that it demonstrates that the corruption reporting mechanism is effectively available to the public and that citizens are using the mechanism, something that deserves recognition.

With respect to the information on persons protected by the Federal Program and by the State Programs of Assistance to Threatened Victims and Witnesses, the Committee considers that, while the information indicates that such programs are functioning, the available data are insufficient to demonstrate that it is being used to cover people who report acts of corruption. The Committee will formulate a recommendation in this respect (see General Recommendation 4.2 of Chapter III of this report).

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

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

Brazil has a set of provisions related to the criminalization of the acts of corruption provided for in Article VI(1) of the Convention, among which the following should be noted:

- Article 327 of the Brazilian Criminal Code (Decree Law 2848 of December 7, 1940),[66] which contains the following definition of public official for criminal-law purposes: "*For the purposes of criminal law, a public official is defined as anyone who, even on a temporary basis or without pay, discharges a public office, employment or function.*

§ 1º - Anyone who discharges an office, employment or function in a parastatal, or who works for a company hired or contracted to provide a service for the execution of an activity typical of the public administration, is deemed equivalent to a public official.

§ 2º - The penalty is increased by one-third if the authors of the crimes recognized in this Chapter hold commissioned offices or serve as directors of or advisers to a direct administration organ, mixed economy corporation, public enterprise or a foundation created by government."

- With regard to paragraph (a) of Article VI(1):

Article 316 of the Brazilian Criminal Code (*Concussão*, "Public graft"): *"Demanding, for himself or for another person, directly or indirectly, even outside his official functions or before assuming those functions, but by reason of them, an undue advantage. Penalty: imprisonment for two to eight years, and a fine."*

[66] Brazil reports that the definition of public official for the purposes of criminal law in the Brazilian legal system is determined by the performance of the public function; what matters is not the public or private nature of the individual, but the nature of the function discharged. Accordingly, the following are public officials for the purposes of criminal law: The President of the Republic, Governors, Mayors, Judges, Police Chiefs, clerks, justice officials, interns, representatives of nongovernmental organizations who receive public funds, lawyers and other professionals hired by the public administration to exercise delegated functions, employees of companies that hold licences or concessions to provide public utility services. In other words, anyone who discharges a public function in which there is a prevalent public interest, be it permanently or part-time, or with or without pay, is considered a public official for the purposes of criminal law.
Following are a number of judgments presented by Brazil that demonstrate the scope of the definition of public official for the purposes of criminal law as adopted by the Brazilian legal system:
'Superior Court of Justice. SPECIAL APPEAL - 252081. Minister Arnaldo Esteves Lima. CRIMINAL. SPECIAL APPEAL. PUBLIC GRAFT. HOSPITAL ADMINISTRATORS CONTRACTED BY THE SUS. PUBLIC OFFICIALS. EXERCISE OF DELEGATED PUBLIC FUNCTIONS. 1. The doctor and hospital administrator contracted by the SUS exercise a delegated public function and, therefore, are equivalent to public officials for the purposes of criminal law, a position supported even before the introduction of Law 9983/00, which amended Article 327, Paragraph 1 of the Criminal Code. 2. According to the first sentence (*caput*) of Article 327 of the Criminal Code, the concept of public official for criminal purposes is broad and includes anyone who discharges a public office, employment or function. 3. Appeal denied.
'Superior Court of Justice. ORDINARY APPEAL IN HABEAS CORPUS PROCEEDING- 17321. Minister Felix Fischer. CRIMINAL AND CRIMINAL PROCEDURAL. ORDINARY APPEAL IN HABEAS CORPUS PROCEEDING. ARTICLE 317, FIRST SENTENCE, OF THE CRIMINAL CODE. LAWYER RETAINED UNDER A CONTRACT SIGNED BY THE OFFICE OF THE STATE ATTORNEY GENERAL AND THE BRAZILIAN BAR ASSOCIATION TO ACT IN DEFENSE OF BENEFICIARIES OF LEGAL AID. CONCLUSION OF CRIMINAL PROCEEDING. NON-OCCURRENCE. A lawyer who is paid under a contract to the government to defend persons who have been granted the benefit of a public defender comes under the definition of a public official for criminal law purposes. (Precedent) Appeal denied.'

Article 317 of the Brazilian Penal Code (Passive bribery): *"Requesting or receiving, for himself or for another person, directly or indirectly, even outside his official functions or before assuming those functions, but by reason of them, an undue* advantage*, or accepting a promise of such advantage. Penalty: imprisonment for two to 12 years, and a fine."*

§1. The penalty is increased by one-third if, as a consequence of the advantage or promise, the official delays or omits any official act or performs it in violation of his public duties.

§2. If the official performs, omits or delays an official act, in violation of his public duties, at the request or influence of another person. Penalty: detention of three months to one year or a fine."

- With regard to paragraph (b) of Article VI(1):

Article 333 of the Brazilian Penal Code (Active bribery): *"Offering or promising an undue* advantage *to a public official to induce him to perform, omit or delay an official act. Penalty: imprisonment of two to 12 years, and a fine.*[67]

Sole paragraph. The penalty is increased by one-third if, as a consequence of the advantage or promise, the official delays or omits any official act or performs it in violation of his public duties."

- With regard to paragraph (c) of Article VI(1):

Article 312 of the Brazilian Penal Code (*Peculato*, "Embezzlement"): *"A public official who appropriates for himself, money, valuables or any other movable good, public or private, of which he holds possession by reason of his office, or who diverts it for his own benefit or that of another person. Penalty: imprisonment of two to 12 years, and a fine."*

§1. The same penalty applies if the public official, even if he does not hold possession of the money, valuable or good, removes it or assists in its removal for his own benefit or that of another person, taking advantage of the facility afforded him by his official status."

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[67] Brazil presented the following case law in connection with Article 333 of the Brazilian Criminal Code:
- With respect to conduct classified as 'granting':
'Court of Justice of São Paulo. Habeas Corpus nº 452.663-3/8-00. (...). *In fact, the offer or promise of an advantage must be spontaneous. The crime consists, moreover, in delivering money, even if the initiative comes from a public official (...). To deliver the illicit advantage at the request of the public official, however, is also covered: as the court has ruled, 'active corruption consists of offering or promising an illicit advantage to a public official to induce him to perform, omit or delay an official act. The law does not distinguish as to whether the offer or promise was made at the suggestion or request of the official* (in RT 641/316, Acórdão written by Des. Weiss de Andrade). The same interpretation can be found in the Acórdão written by Des. Dante Busana, published in RT 684/316'
- As regards the element "directly or indirectly":
'Superior Court of Justice. HC 33535/SC. Minister Hamilton Carvalhido. HABEAS CORPUS. CRIMINAL LAW. CRIME OF ACTIVE CORRUPTION. NON-OCCURRENCE. 1. *The crime of active corruption may be committed by an intermediary, in which case the person through whom the agent offers or promises an illicit advantage to a public official does not necessarily have to share the criminal intention in order to be deemed a co-perpetrator. 2. An agent who, taking advantage of his position as adviser to the official, promises or offers an illicit advantage to induce him to perform, omit or delay an official act commits the crime of active corruption, specified in Article 333 of the Criminal Code (...).*'
'Court of Justice of São Paulo. *It does not matter whether the offer or promise is made to the official directly or through an intermediary*" (RT 542/323)'
'TRF 3rd Region. HC 11011. Reporting Judge Erik Gramstrup. *It is clear that the crime of Article 333 of the Criminal Code is committed with the simple offer or promise of an undue advantage and this may be done through an intermediary, who undertakes to deal with the official at the request of the agent*.'

Article 313 of the Brazilian Penal Code (Embezzlement through the error of another person): *"Appropriating for himself, money or any profit which, in the exercise of his position, he received by error from another person. Penalty: imprisonment of one to four years and a fine."*

Article 313-A of the Brazilian Penal Code (Entering false data in information systems): *"An authorized official inserting or facilitating the insertion of false data, altering or unlawfully deleting correct data in the information systems or databases of the public administration for the purpose of obtaining an undue advantage for himself or for another person, or to cause damage. Penalty: imprisonment of two to 12 years, and a fine."*

Article 315 of the Brazilian Penal Code (Misuse of public funds): *"Using public funds in ways other than established by law. Penalty: detention of one to three months, or a fine."*

Article 316.2 of the Brazilian Penal Code (Excessive exaction): *"If an unofficial diverts, for his own use or that of another person, [money] unduly received for deposit to the public purse. Penalty – imprisonment of two to 12 years, and a fine."*

Article 318 of the Brazilian Penal Code (Facilitation of smuggling or embezzlement): *"Facilitating, in violation of his official duty, the practice of smuggling or embezzlement. Penalty: imprisonment of three to eight years, and a fine."*

Article 319 of the Brazilian Penal Code (*Prevaricação*, Maladministration) *"Improperly delaying or omitting an official act, or performing it against the express provision of law, to satisfy a personal interest or desire. Penalty: detention of three months to one year, and a fine."*

Article 1 (I, II and III) of Decree Law 201 of February 27, 1967 (Criminal liability of municipal prefects): *"Municipal prefects incur criminal liability and are subject to judgment by the judiciary, regardless of the ruling of the Municipal Council, if they:*

I. Appropriate public property or funds or divert them for their own use or that of another person;

II: Make illicit use of public property, funds or services for their own benefit or that of another person;

III: Divert or improperly use public revenues or funds;

(...)

§1. The crimes defined in this Article are publicly actionable and items I and II are punishable by imprisonment of two to 12 years, and the others by detention of three months to three years.

§2. Conviction of any of the crimes defined in this Article entails dismissal from office and disqualification for five years from the exercise of public, elected or appointed office or function, without prejudice to civil reparations for the damage caused to public or private property."

- With regard to paragraph (d) of Article VI(1):

Article 180.6 of the Brazilian Penal Code (Receiving): *"Acquiring, receiving, transporting, conveying or concealing, for his own benefit or that of another person, something he knows to be the proceeds of a crime, or influencing a third party to acquire, receive or conceal that thing in good faith. Penalty: imprisonment of one to four years, and a fine.*

(...)

§6. In the case of property and facilities belonging to the federal government, a state, a municipality, a public utility or a mixed economy corporation, the penalty stipulated above is doubled."

Article 1 of Law 9613 of March 3, 1998, on the crimes of money laundering or concealment of assets, rights and valuables: *"Concealing or dissimulating the nature, origin, location, disposal, movement or ownership of goods, rights or valuables that are the direct or indirect proceeds of crime:*

(...)

V: against the public administration, including demanding, for himself or another party, directly or indirectly, any advantage as the condition or price for performing or omitting administrative acts;

VII: practiced by a criminal organization.

Penalty: imprisonment of three to 10 years, and a fine.

§1. The same penalty applies to any person who, in order to conceal or dissimulate the use of assets, rights or valuables that are the proceeds of any of the above-mentioned crimes:

I. Converts them into legal assets;

II. Acquires, receives, exchanges, trades, gives or receives them in guarantee, custody or deposit, moves or transfers them;

III. Imports or exports goods at values not consistent with their true value.

§2. The same penalty also applies to any person who:

I. Uses for an economic or financial activity goods, rights or valuables that he knows to be the proceeds of any of the crimes referred to above in this Article;

II. Participates in a group, association or business knowing that its main or secondary activity involves it in the crimes stipulated in this law."

Article 7 of Law 9.613/98: *"Conviction produces the following effects, in addition to those stipulated in the Penal Code:*

I. Forfeit to the Union of goods, rights and valuables that are proceeds of the crimes stipulated in this law, subject to the rights of the injured party or a third party acting in good faith;

II. Prohibition from the exercise of public office or function of any kind and that of executive or member of a board of directors or of management of the legal persons referred to in Article 9, for double the length of the applicable prison penalty."

- With regard to paragraph (e) of Article VI(1):

Article 14 .II and sole paragraph of the Brazilian Penal Code (Attempted crime): *"A crime is deemed:*

(...)

II. attempted when, once begun, it is not consummated because of circumstances beyond the control of the agent.

Sole paragraph: Except where provided to the contrary, an attempted crime is punished with the same penalty as if it had been consummated, reduced by one to two-thirds."

Article 29 of the Brazilian Penal Code (Concurso de pessoas, "Aiding and abetting"): "A person who is in any manner an accomplice to a crime incurs the penalties applicable to that crime, to the extent of his guilt.

1. If his participation was minor, the penalty may be reduced by one-sixth to one-third.

2. If any of the accomplices had wished to participate in a less serious crime, the penalty for that crime shall be applicable to him; that penalty shall be increased by half if the outcome was more serious and this could have been foreseen."

- Article 286 of the Brazilian Penal Code (Incitement to crime): *"To publicly incite the commission of crime: Penalty – detention for three to six months, or a fine".*

Article 288 of the Brazilian Penal Code (Criminal Associations):[68] *"Association of more than three persons for the purposes of committing crimes. Penalty: imprisonment of one to three years."*

Article 1.4 of Law 9.613/98 (Crimes of money laundering or concealment of goods, rights and valuables): *"The penalty shall be increased by one to two-thirds in the cases stipulated in sections I to VI of this Article, if the crime was committed habitually or through a criminal organization."*

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

With respect to the provisions criminalizing the acts of corruption provided for in Article VI(1) of the Convention that have been examined by the Committee, based on the information made available to it, they constitute, as a whole, a set of provisions relevant for promoting the purposes of the Convention.

However, the Committee considers it appropriate for Brazil to 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 Recommendation 3 in Section 1 of Chapter III of this Report).

[68] Brazil informs that Law 9.034, of May 3, 1995, defines and governs evidence and investigative procedures in connection with wrongdoings resulting from acts committed by criminal organizations or associations of any type.

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

In its response to the questionnaire[69], Brazil presents the following information on the results in this area:

"[T]he articulation and coordination of the work of these bodies [Federal Police, Public Prosecutor's Office, Federal Comptroller General's Office, Financial Activities Control Board and Federal Court of Accounts] were reinforced by the creation, in 2003, of the National Strategy to Combat Corruption and Money Laundering (ENCCLA), the purpose of which is to coordinate the various organs responsible for policies and actions to combat corruption and money laundering. The ENCCLA today comprises 57 organs, including the judiciary and the authorities responsible for criminal prosecution. In the context of the ENCCLA, annual objectives are set for combating corruption and money-laundering, and the organs responsible for implementing the established targets are selected. The ENCCLA is an important forum for strengthening instruments to coordinate efforts to combat corruption in all its forms."

"The Federal Police carried out forty special operations to combat corruption in 2007 alone, discovering and attacking places throughout the country where public funds were being diverted. The investigations fingered members of the legislature, the executive and the judiciary, resulting in the arrest of 316 public servants and 13 federal police officers."

ACTIVITIES OF THE FEDERAL POLICE, 2003 TO 2007

YEAR	***NUMBER OF OPERATIONS***	***PUBLIC SERVANTS ARRESTED***	***POLICE OFFICERS ARRESTED***	***TOTAL ARRESTS***
2003-2004	*58*	*265*	*48*	*926*
2005	*67*	*219*	*9*	*1407*
2006	*178*	*385*	*11*	*2673*
2007	*188*	*316*	*13*	*2876*

"Operations to combat money laundering and fraud in public tendering were also noteworthy in 2007: 29 special actions were undertaken, with the arrest of 592 persons. In five of these alone, the FP identified more than R$3 billion in fraud."

The response also contains information on the activities of the Federal Comptroller General's Office (CGU), which supported several special operations of the Federal Police in combating corruption,[70] as well as on the work of the Financial Activities Control Board (COAF), Brazil's Financial Intelligence Unit, in combating corruption,[71] and of the Federal Court of Accounts, which in 2007 referred 950 cases to the public prosecution office for civil and criminal action.[72]

With respect to criminal prosecution for acts of corruption, Brazil presents the following information in its response:

[69] Response of Brazil to the Questionnaire, pages 66-76.
[70] See pages 69-70 of the Response of Brazil to the Questionnaire for a list of special operations by the federal police that involved the CGU.
[71] Response of Brazil to the Questionnaire, pages 70-73.
[72] Response of Brazil to the Questionnaire, pages 73-74.

"Actions by the Public Prosecutor's Office and the Judiciary also demonstrate the government's determination to combat corruption. The following statistics show the number of actions by the federal, state, Federal District and territorial prosecution offices and the judiciary:

Number of Persons Charged by the Federal Public Prosecution and Subsequently Convicted— 2006 and 2007

	2006	*2007*	*Total*
Persons charged	*5,555*	*11,262*	*16,817*
Persons convicted	*888*	*1,171*	*2,059*
Percentage of convictions	*15.98*	*10.39*	*12.24*

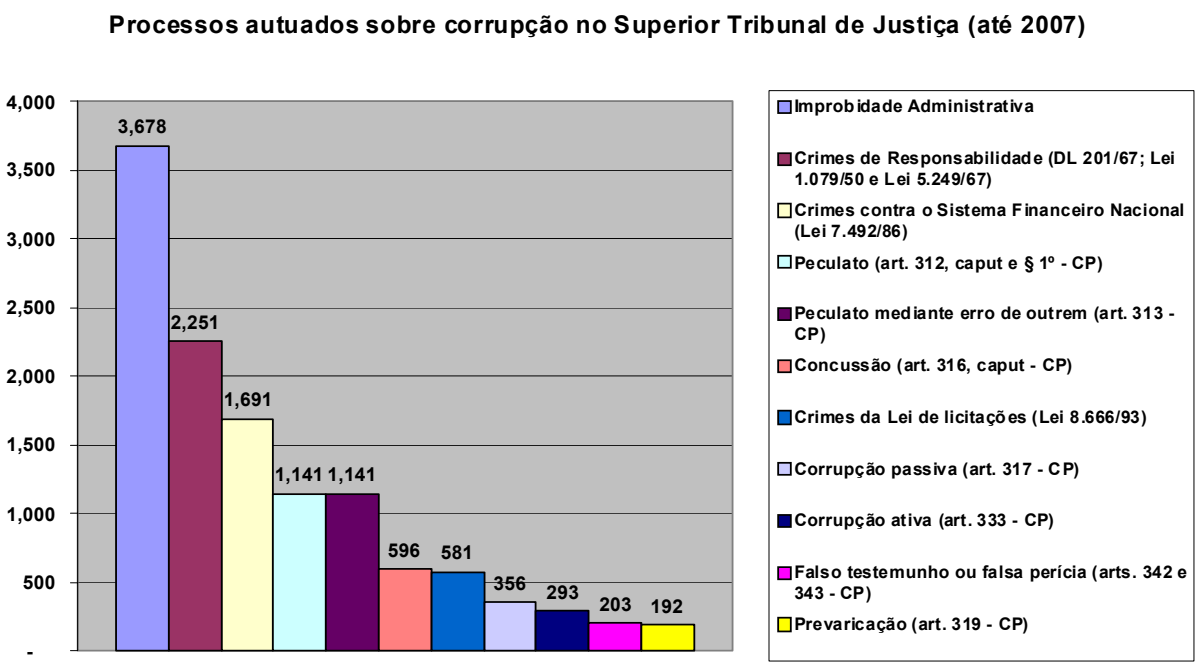
Number of Persons Charged by the State Public Prosecution and Subsequently Convicted— 2006 and 2007

	2006	*2007*
Persons charged	*308,255*	*378,890*
Persons convicted	*84,698*	*97,974*

Number of criminal prosecutions pursued by the state prosecutors before courts of first instance— 2006 and 2007

2006	***2007***
4,404,165	***3,023,064***

"Following are data on cases involving the principal acts of corruption heard by the Superior Court of Justice from 1992 to 2007"



Corruption cases heard before the Superior Court of Justice (to 2007)

[Legend of graph:]

- *Administrative Impropriety.*
- *Crimes of Responsibility (DL 201/67; Law 1.079/50 and Law 5.249/7).*
- *Crimes against the National Financial System (Law 7.492/86).*
- *Embezzlement (art. 312, caput and §1, PC).*
- *Embezzlement through the error of another party (art. 313, PC).*
- *Graft (art 316, PC).*
- *Crimes under the Procurement Law 8.666/93).*
- *Passive bribery (art. 317, PC).*
- *Active bribery (art. 333, PC)*
- *False testimony or false witness (arts. 342 and 343, PC).*
- *Maladministration (art. 319, PC)"*

The Committee considers that the above information shows that the bodies responsible for policies and actions to combat corruption and money-laundering in Brazil have increased their cooperation, and this seems to have led to a significant increase in the number of investigations and arrests by the federal police related to the acts of corruption provided for in Article VI(1) of the Convention. The Committee believes that Brazil deserves recognition for this aspect.

However, the data on persons charged by the Public Prosecutor's Office and subsequently convicted are not sufficiently detailed to allow a thorough analysis of the results: the data are not broken down by crime nor do they indicate the grounds for acquittal (for example, because of the statute of limitations). The previous comment applies also, in part, to the information on corruption cases heard before the Superior Court of Justice between 1992 and 2007, where, as the Committee notes, the information does not indicate the results of those proceedings. No data were supplied on corruption cases heard before the Federal Supreme Court.

Bearing in mind the above discussion and considering that there is no additional information for a comprehensive evaluation of the results obtained with respect to the acts of corruption provided for in Article VI .1 of the Convention, the Committee will formulate a recommendation (see General Recommendation 4.2 of Chapter III of this Report).

III. CONCLUSIONS AND RECOMMENDATIONS IN RELATION TO THE IMPLEMENTATION OF THE PROVISIONS SELECTED IN THE FRAMEWORK OF THE SECOND ROUND

Based on the review conducted in Chapter II of this Report, the Committee offers the following conclusions and recommendations regarding implementation by Brazil of the provisions contained in Article III(5) (systems of government hiring and for the procurement of goods and services); Article III(8) (systems for protecting public servants and private citizens who, in good faith, report acts of corruption); and Article VI (acts of corruption) of the Convention, which were selected for review within the framework of the second round.

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

As explained in section 8 of Chapter II of this report, the Committee urges Brazil to continue to work jointly with the federative entities in order to obtain information on implementation of the Convention, and to continue to strengthen cooperation and coordination between the federal government and the state and municipal governments, and to provide them with the technical assistance required to ensure effective implementation of the Convention.

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

Brazil has considered and adopted measures intended to establish, maintain and strengthen the systems of government hiring, as discussed in Section 1.1 of Chapter II of this Report.

In light of the comments made in the above-noted section, the Committee suggests that Brazil consider the following recommendation:

- Strengthen government hiring systems. To fulfill this recommendation, Brazil could consider the following measures:

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).

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). [73]

1.2. Government Systems for the Procurement of Goods and Services

Brazil has considered and adopted measures intended to establish, maintain or strengthen systems for the procurement of goods and services by government, as discussed in section 1.2 of chapter II of this report.

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

1.2.1. Strengthen government procurement systems. To fulfill this recommendation, Brazil may wish to consider the following measures:

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[73] 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) 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).

1.2.2. Strengthen the control mechanisms for the government procurement system. To fulfill this recommendation, Brazil could undertake the following measures:

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). [74]

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).

1.2.3. Continue to strengthen the electronic channels and information systems for public procurement. To fulfill this recommendation, Brazil could undertake the following measures:

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 pages, which must have the required digital signatures (see section 1.2.2 of chapter II of this report).[75]

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). [76]

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).

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[74] 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.

[75] 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).

[76] 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.

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).

1.2.4. Strengthen the public works contracting systems. To fulfill this recommendation, Brazil could undertake the following measures:

- 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).

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

Brazil has considered and adopted certain measures that are intended to establish, maintain and strengthen systems for protecting public servants and private citizens who in good faith report acts of corruption, as discussed in section 3 of chapter II of this report.

In light of the comments formulated in the above-noted section, the Committee suggests that Brazil consider the following recommendation:

- Strengthen systems to protect public officials and private citizens who in good faith report acts of corruption. To fulfill this recommendation, Brazil could undertake the following measures:

- 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.

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

Brazil has adopted measures that criminalize the acts of corruption provided for by Article VI(1) of the Convention, as discussed in Section 3 of Chapter II of this Report.

In light of the comments offered in the above-noted section, the Committee formulates the following recommendation to Brazil:

- 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).

4. GENERAL RECOMMENDATIONS

Based on the review and comments made throughout this report, the Committee suggests that Brazil consider the following recommendations:

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.

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).

5. FOLLOW-UP

The Committee will consider the periodic updated Reports submitted by Brazil on its progress in implementing previous recommendations, within the framework of the plenary meetings of the Committee and in accordance with the provisions of Article 31 of the Rules of Procedure.

Similarly, the Committee will review the progress of Brazil in implementing the recommendations made in this Report, in accordance with the provisions of Article 29 of the Rules of Procedure.

IV. OBSERVATIONS REGARDING THE PROGRESS MADE WITH IMPLEMENTING THE RECOMMENDATIONS ISSUED IN THE FIRST ROUND

The Committee observes, in relation with the implementation of the recommendations formulated for

Brazil in the Report in the First Round of review, based on the information at its disposal, the following:

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

▪ 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".

In its response, Brazil presents information with respect to the above recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementing the recommendation, the measures taken with respect to:

- Creation of a webpage on the Inter-American Convention against Corruption at the website of the Federal Comptroller General's Office (CGU): www.cgu.gov.br/oea, where the text of the Convention and other publications are made available, highlighting the obligations that states and municipalities must fulfill in order to give effective implementation to the Convention.[77]

- Production and publication by the CGU of brochures and pamphlets on the Convention, targeted at public authorities and other state and municipal agents.[78]

- The Brazil-Europe Seminar on the Prevention of Corruption, hosted by the CGU in Brasilia in June 2007, in partnership with the Euro-Brazil Project of the Ministry of Planning, Budget and Management. The purpose of this event was to make state and municipal managers aware of the international conventions against corruption ratified by Brazil, and to disseminate best practices in preventing corruption.[79]

- The negotiation of technical cooperation agreements between the CGU and the internal control bodies of several states, with a view to enhancing control and improving the supervision of federal funds that are passed on to the states of the Federation, through training, the exchange of information and experiences, technical advisory services, and other means.[80]

- The assistance that the CGU has provided to states and municipalities in implementing public transparency WebPages along the models of the federal government's Transparency Portal.[81]

- Implementation of the Public Management Enhancement Program of the CGU, intended to improve the management of public funds by Brazilian states and municipalities by providing training to agents and offering technical guidance and information, as well as supporting the initiation and operations of state and municipal internal control units.[82]

- The offer, by the CGU, of distance training courses for municipal public servants, dealing with tendering, contracts and agreements, service to the public, and legislation relating to supply logistics.[83]

The Committee takes note of Brazil's satisfactory consideration of the foregoing recommendation, which by its nature will require continuity in its implementation.

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[77] Response of Brazil to the Questionnaire, page 77
[78] *Ibid.*, page 77
[79] *Ibid.*, page 77
[80] *Ibid.*, page 78
[81] *Ibid.*, page 78
[82] *Ibid.*, pages 78-79
[83] *Ibid.*, page 79

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:

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 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.*

In its response, Brazil presents information with respect to the above recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementing the recommendation, the measures taken with respect to:

- Bill 7.528/2006 has been prepared and sent to Congress, dealing with conflicts of interest in the exercise of position or employment in the federal executive branch, as well as subsequent impediments to the exercise of public functions. The bill was drafted by the CGU, debated in the Council on Public Transparency and Combating Corruption, and submitted for public consultation.[84] (Measures a), b) and c))

[84] *Ibid.*, pages 80-81

- Official Order (*Portaria*) 43.050 of February 7, 2008, of the Central Bank of Brazil (BACEN), which prohibits the granting of leave to public servants, even if unpaid, to pursue activities in the private sector in areas regulated by the BACEN.[85] (Measure a)

- Establishment of the Ethics Management System of the Federal Executive Branch, by means of Decree 6.029 of February 1, 2007. That system has among others, the following functions: to integrate the organs, programs and activities relating to public ethics, to contribute to the establishment of public policies to promote transparency and access to information as essential instruments for the exercise of public ethics management, and to coordinate activities with a view to establishing and giving effect to incentives and measures to enhance institutional performance in the management of public ethics in the Brazilian government.[86] (Measure b)

The Committee takes note of the steps taken by Brazil to proceed with the implementation of measures a), b) and c) of the foregoing recommendation, and of the need to continue giving attention thereto, as well as the need for Brazil to give additional attention to implementing measure d) of the recommendation.

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.

▪ Measure suggested by the Committee:

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

In its response, Brazil presents information with respect to the above recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementing the recommendation, the measures taken with respect to:

- Competitive examinations were held to hire public servants for the main control bodies, namely the CGU and the Federal Court of Accounts (TCU). In 2006 and 2007, the TCU recruited 289 employees and the CGU 446. In addition, in March 2008, the CGU held a new competition to fill 400 vacancies.[87]

- The CGU has created investigation offices (*Corregedorias Setoriais*) in each of the Ministries. In 2007, there were 110 Finance and Control Analysts (*Analistas de Finanças e Controle*) working in those investigation offices, compared to 19 in 2005. In addition, in 2008, the CGU held a competition to fill 45 vacancies in the *Corregedoria*.[88]

[85] *Ibid.*, page 81
[86] *Ibid.*, page 81
[87] *Ibid.*, page 82
[88] *Ibid.*, pages 82-83

- In 2006 and 2007, the CGU initiated 135 administrative proceedings and inquiries to investigate irregularities committed by public officials. In 2007, 6,201 disciplinary proceedings and inquiries were undertaken in other organs and entities of the corrections system, of which 437 resulted in the dismissal of public agents.[89]

The Committee takes note of the steps that Brazil has taken to implement the above recommendation, and the need for it to give additional attention to its implementation.

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:

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.

In its response,[90] Brazil presents information with respect to the above recommendation. In this regard, the Committee takes note of the need for Brazil to give additional attention to its implementation.

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:

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.

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[89] *Ibid.*, pages 85-86

[90] *Ibid.*, page 83. The specific measures adopted by Brazil to implement this recommendation are described in Section 2.3 of Chapter II of this Report.

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.

In its response, Brazil presents information with respect to the above recommendation. In this regard, the Committee notes, as a step which contributes to progress in implementing the recommendation, the following measure:

- The issuance of Inter-ministerial Order 298 of September 6, 2007, which requires all public agents in the federal executive branch to authorize electronic access to copies of their annual personal income tax declarations submitted to the Federal Revenue Service of Brazil (SRS), or to present annually, in hard copy, a declaration of assets that comprise their personal wealth, for filing with the personnel office of the organ or entity to which they are connected.[91] (Measures c) and d))

The Committee takes note of the steps taken by Brazil to proceed with the implementation of measures c) and d) of the foregoing recommendation, and of the need to continue giving attention thereto, as well as the need for Brazil to give additional attention to implementing measures a) and b) of the recommendation.

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

▪ 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.

In its response, Brazil presents information with respect to the above recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementing the recommendation, the measures taken with respect to:

- Budgetary allocations for the main oversight bodies, namely the CGU and the TCU, have been increased. The CGU budget rose from R$172,310,588 in 2004 to R$394,643,981 in 2008. The budget for the TCU was increased from R$643,138,879 in 2004 to R$1,060,474,728 in 2007.[92]

- Competitive examinations were held for recruiting employees for the main oversight bodies, namely the CGU and the TCU. In 2006 and 2007, the TCU recruited 289 employees and the CGU 446. In addition, in March 2008, the CGU held a new competition to fill 400 vacancies.[93]

[91] *Ibid.*, page 85
[92] *Ibid.*, page 87

- Since 2007, the National Strategy to Combat Money-Laundering has included the aspect of combating corruption, and is now known as the National Strategy to Combat Corruption and Money Laundering (ENCCLA).[94]

- The internal audit bodies have been strengthened in a number of states of the Federation.[95]

- The Ethics Management System of the Federal Executive Branch was instituted by Decree 6.029 of February 1, 2007.[96]

- The CGU's oversight checklist now includes verification of the existence and activity of ethics commissions in the bodies and entities of the Federal Public administration.[97]

The Committee takes note of the steps that Brazil has taken to implement the above recommendation, and the need for it to continue giving attention thereto.

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.

▪ Measure suggested by the Committee:

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

In its response, Brazil presents information with respect to the above recommendation. In this regard, the Committee notes, as a step which contributes to progress in implementing the recommendation, the following measure:

- Preparation by the CGU of draft legislation on access to information, in the context of the Council on Public Transparency and Combating Corruption, which was sent to the President's office for final examination in the executive branch and submission to the National Congress.[98]

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[93] *Ibid.*, page 87
[94] *Ibid.*, pages 87-88
[95] *Ibid.*, page 88
[96] *Ibid.*, page 89. Brazil reports that on September 29, 2008, the Public Ethics Commission issued Resolution 10, which establishes the rules of operation and procedure for the Ethic Commissions created by Decree 1.171 of June 22 1994 and regulated by Decree 6.029 of February 1, 2007.
[97] *Ibid.*, page 89
[98] *Ibid.*, page 92

The Committee takes note of the step that Brazil has taken to implement the above recommendation, and the need for it to give additional attention to its implementation.

4.3. Mechanisms for consultation

▪ Recommendation:

Continue strengthening the mechanisms for consultation.

▪ Measure suggested by the Committee:

> *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.*

In its response, Brazil presents information with respect to the above recommendation. In this regard, the Committee notes, as a step which contributes to progress in implementing the recommendation, the following measure:

- The holding of public consultations to receive suggestions and comments on the draft bill proposed by the CGU, dealing with conflict of interest in the exercise of office or employment in the federal executive branch, as well as subsequent impediments to the exercise of public functions.[99]

The Committee takes note of the step that Brazil has taken to implement the above recommendation, and the need for it 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

▪ Measure suggested by the Committee:

> *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.*

Brazil's response to the questionnaire did not refer to this recommendation. The Committee therefore takes note of the need for Brazil to give additional attention to its implementation.

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.

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[99] *Ibid.*, pages 80-81

▪ Measures suggested by the Committee:

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.*

In its response, Brazil presents information with respect to the above recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementing the recommendation, the following measures:

- Reformulation by the CGU of the Transparency Portal which, with a view to facilitating public access to the information contained therein, now includes new possibilities of consultation, financial execution of government programs, as well as new sections entitled "Learn More" (where the user can learn about the principal concepts relating to the portal), "FAQ" (which compiles answers to the most common questions raised by users) and "Participation in Social Control" (which explains the workings of the municipal councils, participatory budget, oversight bodies, and provides guidance to encourage discussion on the use of public funds and control over that use).[100] (Measures a) and b))

- Inter-ministerial Order 140 of March 16, 2006, governing the disclosure via Internet of data and information by organs and entities of the Federal Public administration.[101] (Measure c))

- Publication of Public Transparency Pages on the websites of all ministries and in 318 organs and entities of the Federal Public administration, for the disclosure of data and information on their budgetary and financial management, including among other things matters relating to tenders, contracts and agreements.[102]

- Continuation of the *Olho Vivo no Dinheiro Público* (roughly, "Keeping a close eye on the public purse"), which provides training for municipal councilors under federal programs, civil society leaders, and the general public with respect to the proper use of federal funds transferred to the municipalities.[103] (Measures a) and b))

- In 2007, the CGU launched the first drawing and writing competition, entitled *Criança Cidadã* ("Child and Citizen"), to encourage school students to think about and debate citizenship, ethics and social participation.[104] (Measure b))

The Committee takes note of the steps that Brazil has taken to implement measures a), b) and c) of the above recommendation, and the need for it to continue giving attention thereto.

[100] *Ibid.*, pages 90-91
[101] *Ibid.*, page 91
[102] *Ibid.*, page 91
[103] *Ibid.*, page 91
[104] *Ibid.*, page 92

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

▪ 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.

In its response, Brazil presents information with respect to the above recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementing the recommendation, the following measures:

- Promulgation of the Inter-American Convention on Mutual Assistance in Criminal Matters, by means of Decree 6.340, published on January 3, 2008.[105]

- Bilateral treaties on mutual assistance in criminal matters have been negotiated with Canada, El Salvador, Honduras, Mexico, Panama, and between MERCOUR, Bolivia and Chile, and have been sent to Congress for ratification.[106]

The Committee takes note of the steps that Brazil has taken to implement the above recommendation, and the need for it to continue giving attention thereto.

▪ 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.

Brazil's response to the questionnaire did not refer to this recommendation. The Committee therefore takes note of the need for Brazil to give additional attention to its implementation.

▪ 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.

Brazil's response to the questionnaire did not refer to this recommendation. The Committee therefore takes note of the need for Brazil to give additional attention to its implementation.

6. CENTRAL AUTHORITIES (ARTICLE XVIII OF THE CONVENTION)

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.

[105] *Ibid.*, page 93
[106] *Ibid.*, page 93

7. GENERAL RECOMMENDATIONS

▪ 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.

In its response, Brazil presents information with respect to the above recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementing the recommendation, the following measures:

- An increase in the number of public agents trained through the National Training Program for Combating Corruption and Money Laundering (PNCLD), which rose from 253 in 2004 to 1,122 in 2007.[107]

- The CGU offers a course on wealth analysis and a qualifying program in disciplinary administrative procedures, which trained 162 and 2,360 public servants in 2006 and 2007, respectively.[108]

- The National School of Public Administration (ENAP) offers a distance training course on "Ethics and Public Service", which trained a total of 4,399 public servants in 2006 and 2007.[109]

- The Public Ethics Commission (CEP) conducted various training activities: in 2006 and 2007, 291 public servants took part in the Ethics Management Course, and 451 in the Ethics Management Seminars. In addition, 269 public servants were trained in the Assessors' Course conducted by the CEP.[110]

The Committee takes note of Brazil's satisfactory consideration of the foregoing recommendation, which by its nature will require continuity in its implementation.

▪ 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.

Brazil's response to the questionnaire did not refer to this recommendation. The Committee therefore takes note of the need for Brazil to give additional attention to its implementation.

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[107] *Ibid.*, page 94
[108] *Ibid.*, page 94
[109] *Ibid.*, page 95
[110] *Ibid.*, pages 95-96

▪ 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.

Brazil's response to the questionnaire did not refer to this recommendation. The Committee therefore takes note of the need for Brazil to give additional attention to its implementation.

ENDNOTES

[i] The Federal Supreme Court has issued various summary judgments (*súmulas*) on the constitutional requirement of public competitions for hiring throughout the public administration (with the exceptions stipulated in the Constitution itself), among which the following should be noted: *"The appointment of a public servant without competition may be nullified before assumption of office"* (Súm. 17); *"It is unconstitutional to veto a candidate's participation in a public competition without justification"* (Súm. 684*); "Any form of appointment whereby a public servant assumes an office that was not part of the career in which he was previously employed, without passing a competitive examination, is unconstitutional"* (Súm. 685).

[ii] With respect to challenges through the administrative route, Brazil reports (page 5 of its response to the questionnaire) that *"one of the controls over public competitions is that exercised by the candidates participating in the competition. All public competition announcements allow candidates to file administrative appeals. The announcements also stipulate the time limits and the requirements for presenting appeals. By means of administrative appeals, candidates may contest any act or decision, and they may challenge the form and scope of the response. When an appeal is filed, the responsible authorities must respond within the time limit established in the announcement."*

[iii] Article 5 (LXIX) of the Federal Constitution provides that *"a writ of mandamus shall be issued to protect a clear and perfect right, not covered by habeas corpus or habeas data, whenever the party responsible for the illegal action or abuse of power is a public official or an agent of a corporate legal entity exercising duties of the government"*. Federal Law 1533 of December 31, 1951, governing the writ of mandamus, establishes as well that this instrument may be used by any person *"who suffers or has reason to fear violation by the authorities, regardless of the category and the functions exercised"*.

[iv] Article 5 (LXXIII) of the Federal Constitution provides that *"any citizen is a legitimate party to file suit ("popular action") with a view to nullifying an act injurious to the public property or to the property of an entity in which the State participates, to administrative morality, to the environment and to the historic and cultural heritage, and the author shall, except in the case of demonstrated bad faith, be exempt from judicial costs and from the burden of defeat."* "Popular action" is governed by Federal Law 4717 of June 29, 1965.

[v] "Public civil suit" is governed by Federal Law 7347 of July 24, 1985, and is an instrument designed to protect disparate or collective interests. It may be brought by the Federal Prosecutor's Office or other public organs or associations for the purpose of protecting the interests of society. In addition, any person may ask the Federal Prosecutors Office to take action, supplying information on the facts that constitute the object of the action and indicating the elements of proof.

[vi] According to Article 5, the basic requirements for investiture in public office are: I: Brazilian nationality; II: enjoyment of political rights; III: fulfillment of military and electoral obligations; IV: the level of education required for the position; V: minimum age of 18 years; VI: physical and mental aptitude. In addition, paragraph 1 of Article 5 provides that other requisites may be established pursuant to law in light of the responsibilities of the position.

[vii] Four months before the end of the probationary period, the candidate's performance will be assessed by a committee constituted for this purpose, which will report to the competent authority, pursuant to the law or regulation governing the career or possession, without prejudice to continued observance of the factors of diligence, discipline, capacity for initiative, productivity and responsibility (Article 20 (1), Law 8112/90).

[viii] Following are the grounds for declaring a "temporary need of exceptional public interest" and the respective time periods, maximum and total, established by Law 8745/93, as amended by Provisional Measure 431 of May 14, 2008:

Grounds	Maximum duration	Total duration
Assistance in situations of public calamity.	6 months	Not to exceed 2 years
Combating an epidemic outbreak.	6 months	The law does not allow extension of the contract
Conduct of censuses and other statistical research by the Fundação Instituto Brasileiro de Geografia e Estatística – IBGE (Brazilian Institute of Geography and Statistics).	1 year	Not to exceed 2 years
Admission of substitute and visiting professors.	1 year	Not to exceed 2 years

Admission of foreign visiting professors and researchers.	4 years	Not to exceed 4 years
Special activities in organizations of the armed forces in the industrial area, or temporary duties involving engineering works and services.	4 years	Not to exceed 4 years
Territorial identification and demarcation activities.	2 years	Not to exceed 2 years
Activities related to the Armed Forces Hospital.	1 year	Not to exceed 2 years
Research and development work on information systems security projects under the responsibility of the Centro de Pesquisa e Desenvolvimento para a Segurança das Comunicações – CEPESC (Communications Security Research and Development Center).	2 years	Not to exceed 3 years
Inspection and supervision work relating to agricultural protection under the Ministry of Agriculture and Supply for addressing emergency situations relating to international trade in products of animal or plant origin or of imminent risk to animal, plant or human health.	1 year	Not to exceed 2 years
Activities related to projects of the Amazon Surveillance System - SIVAM and the Amazon Protection System - SIPAM.	4 years	Not to exceed 5 years
Specialized technical activities relating to fixed-term cooperation projects pursuant to international agreements, where the person contracted is working under a public organ or entity.	3 years	Not to exceed 4 years
Specialized technical activities needed to establish organs or entities or to carry out new attributes defined for existing organizations or flowing from a temporary increase in work volume that cannot be met by application of article 74 of Law 8112 of December 11, 1990.	4 years	Not to exceed 5 years
Specialized activities relating to information and communications technology and the review of work processes that do not constitute permanent activities of the organ or entity.	4 years	Not to exceed 5 years
Teaching in government schools.	3 years	Not to exceed 4 years
Provision of health assistance to indigenous communities.	1 year	Not to exceed 2 years
Admission of substitute teachers, researchers and technologists to replace permanent teachers, researchers or technologists on leave for innovation-related business activities.	3 years	Not to exceed 6 years
Admission of national or foreign researchers for fixed-term research projects and research institutions.	3 years	Not to exceed 4 years
Combating environmental emergencies in a specific region, declared by the Minister of State for the Environment.	6 months	The law does not allow extension of the contract

[ix] For purposes of Decree 5497/2005, Article 2 provides: *"Career public servants are deemed to be employees, active or inactive, of an organ or entity of any branch of the federal government, the states, the Federal District and the municipalities, their public enterprises and mixed economy corporations, who hold a permanent office or position which they entered through public competition or, if they entered prior to October 5, 1988, through an appointment procedure allowed by the legal framework at the time of appointment".*

[x] The National Council of Justice (CNJ) exercises external control over the administrative and financial activity of the judiciary, and over judges in the performance of their duties. Its functions include *"seeing to observance of article 37 and validating, ex officio or upon request, the legality of administrative acts performed by*

members or organs of the judiciary; it may quash or review such acts, or set a time limit for taking the necessary steps to comply with the law, without prejudice to the powers of the Federal Court of Accounts" (Article 103-B (4 .II) of the Federal Constitution)

[xi] The National Council of the Federal Prosecutor's Office (CNMP) exercises external control over the administrative and financial activity of the Federal Public Prosecutor's Office and over its members in the performance of their duties. Its functions include *"seeing to observance of article 37 and validating, ex officio or upon request, the legality of administrative acts performed by members or organs of the Federal Public Prosecutor's Office; it may quash or review such acts, or set a time limit for taking the necessary steps to comply with the law, without prejudice to the powers of the Federal Court of Accounts"* (Article 130-A (2 .II) of the Federal Constitution)

[xii] Response of Brazil to the questionnaire, pages 10-12. According to that response, competitions were held to fill vacancies in the following careers of the Federal Public Service: Management; Audit; Diplomacy; Legal; Federal Police; Federal Penitentiary Agent; Federal Highways Police; Administrative Career of the Federal Police; Special Plan of the National Department of Mineral Production; Research in Science and Technology; Agrarian Reform; Supervision; Social Insurance, Health and Labor; Teachers; Securities Commission; Superintendency of Private Insurance; General Plan of Positions in the Executive Branch; Administrative Career of the Federal Institutions of Higher Education; Air Defense and Air Traffic Control Group; Ministry of the Environment; Ministry of Culture; Social Security; Brazilian Institute of Geography and Statistics; Oswaldo Cruz Foundation; National Institute of Industrial Property; National Water Institute; Regulatory Agencies; National Department of Transportation Infrastructure.

[xiii] See inter alia the sections on public competitions at the website of the National Press (http://portal.in.gov.br/in/mais_concurso) and the website of the Public Servant (http://www.servidor.gov.br/concursos/index.htm). The various organs and entities of the Federal public administration also publish their competition notices at their Internet pages.

[xiv] The Personnel Statistics Bulletin is prepared and published monthly by the General Coordination Office for Management Studies and Information of the Department of Labor Relations of the Human Resources Secretariat of the Ministry of Planning, Budget and Management. The bulletin contains data on public servants of the Union, as well as on personnel expenditure of the Union, distribution by organ and entity of the Federal administration, number of public servants, distribution by pay range, entry through public competition, and offices and functions of trust, and their remuneration. The bulletin may be accessed at the following address: http://www.servidor.gov.br/publicacao/boletim_estatistico/bol_estatistico_08/Bol144_abr2008.pdf

[xv] In addition, article 7.5 prohibits "tenders that include goods and services without facsimile, or with exclusive brands, characteristics and specifications, except in cases where this is technically justified, or when the supply of such materials and services is being procured under the contracted administration regime, as stipulated in the call for tenders."

[xvi] Competition (Concorrência) is "the form of bidding between any interested parties who, in the initial prequalification phase, can demonstrate that they meet the minimum qualification requirements stipulated in the notification of tender for executing its object."(article 22.1).

[xvii] Price comparison (Tomada de preços) is "the form of bidding between interested parties who are duly registered or who meet all the conditions required for registration by the third day before the date for receipt of proposals, with the necessary qualifications." (article 22.2).

[xviii] Invitation (Convite) is "the form of bidding between at least three interested parties of the relevant industry, registered or not, who have been selected and invited by the administrative unit, which must post, in an appropriate place, a copy of the call for tenders and extend it to other registered suppliers in the corresponding specialty who have declared their interest at least 24 hours prior to submission of proposals."(article 22.3).

[xix] Contest (Concurso) is "the form of bidding between any interested parties for the selection of technical, scientific or artistic works, through the award of prizes or remuneration for the winners, in accordance with criteria stipulated in the notice, published in the official press at least 45 days in advance" (article 22.4).

[xx] Auction (Leilão) is "the form of bidding between any interested parties for the sale of movable goods not needed by the administration or of products legally seized or distrained, or for disposing of the immovable properties stipulated in article 19, awarded to the best bid that is equal to or greater than the appraised value."(article 22.5).

[xxi] The following table shows the value ranges established by article 23 of Law nº 8.666/93:

Method	**Value Ranges**	
	For engineering works and services	*For other purchases and services*
Invitation (Convite)	Up to R$ 150,000,00	Up to R$ 80,000,00
Price Comparison (Tomada de Preços)	Up to R$ 1,500,000,00	Up to R$ 650,000,00
Competition (Concorrência)	Above R$ 1,500,000,00	Above R$ 650,000,00

[xxii] Lowest-priced tendering is the process where the rule of selecting the bid most advantageous to the administration determines that the winning bid will be the one that meets the specifications in the notification or invitation and offers the lowest price (article 45.1-I).

[xxiii] The "best technical offer" or "technical offer and price" bidding methods will be used only for services of a predominantly intellectual nature, in particular for the preparation of projects, calculations, oversight, supervision and management, and consulting engineering services in general and, in particular, for the preparation of preliminary technical studies and of basic and executive projects (article 46, first sentence).

[xxiv] Such criteria must not violate the rules and principles established in Law 8,666/93, which prohibits "the use of any element, criterion or factor that is patented, secret, subjective or reserved, if it could even indirectly circumvent the principle of equality among bidders." (article 44.1).

[xxv] Article 24 of law 8666/93 indicates the following cases in which bidding may be waived and contracting may be done directly: *for engineering works and services of a value up to 10% of the limit stipulated in line (a) of article 23-I, provided these do not represent parcels of the same work or service, or works and services of the same nature and in the same place that could be done jointly and concomitantly;*

I. for other services and purchases of a value up to 10% of the limit stipulated in line (a) of article 23-II and for disposals, in the cases stipulated in this law, provided they do not represent parcels of a service, purchase or disposal of greater value that could be done at once;

II. in cases of war or serious disruption of public order;

III. in cases of emergency or public calamity, when it is urgent to address a situation that could cause damage or compromise the safety of persons, works, services, equipment and other goods, private or public, and only for the goods necessary to address the emergency situation and for the parcels of works and services that can be concluded within 180 consecutive and uninterrupted days, counting from the occurrence of the emergency or calamity: extension of the respective contracts is prohibited;

IV. when no bids have been submitted previously and the tendering cannot be repeated without prejudice to the administration: in this case all the pre-established conditions must be maintained;

V. when the federal government must intervene in the economy to regulate prices or supply;

VI. when the bids that have been submitted carry prices manifestly higher than those prevailing on the national market, or are incompatible with those fixed by the competent official organs, in which cases, with due regard to article 48 of this law, and if the situation persists, the goods or services may be awarded directly, for a value not exceeding that in the price or services registry;

VII. for procurement, by legal persons under domestic public law, of goods produced or services provided by an organ or entity that is part of the public administration and that has been created for the specific purpose prior to the validity of this law, provided the contracted price is compatible with the market price;

VIII. when there is a risk that national security could be compromised, in the cases established by decree of the President of the Republic, with the advice of the National Defense Council;

IX. for the purchase or lease of buildings or property to meet essential needs of the administration, where the choice is conditioned by installation and location requirements, provided the price is compatible with market value, as previously appraised;

X. in the contracting of remaining works, services or supply as a result of contractual cancellation, observing the order of ranking from the previous bidding and accepting the same conditions offered by the winning bidder, including price, duly corrected;

XI. in the purchase of fruits and vegetables, bread and other perishable commodities, in the time necessary to conduct the corresponding bidding processes, purchased directly at the base price for the day;

XII. in contracting a Brazilian research, education or institutional development institution recognized by regulation or statute, or an institution devoted to the social rehabilitation of prisoners, providing the institution has a solid ethical and professional reputation and is not for profit;

XIII. for the procurement of goods or services pursuant to a specific international agreement approved by the National Congress, when the conditions offered are manifestly advantageous to the government;

XIV. for the acquisition or restoration of works of art and historic objects of certified authenticity, provided they are compatible with or inherent in the purposes of the organ or entity;

XV. for the printing of the official Gazettes, standard administrative forms, and official technical publications, and for the provision of informatics services to a legal person under public law, by organs or entities of the public administration created for this specific purpose;

XVI. for the purchase of components or parts of national or foreign origin needed for maintenance of equipment during the technical warranty period, from the original supplier of the equipment, when such exclusivity is essential for maintaining the warranty;

XVII. in the purchase or contracting of services for the supply of ships, vessels, aircraft or troops and their means of displacement, on short layover in ports, airports or locations other than their headquarters, for reasons of operational movement or training, and when observance of the legal time limits could compromise the functioning and purposes of the operations, and provided their value does not exceed the limit stipulated in line (a) of article 23-II of this law;

XVIII. for the purchase of materials for use by the armed forces, with the exception of materials for personal and administrative use, when there is a need to maintain the standardization required by the logistical support structure of naval, air and land facilities, consistent with the opinion of a commission instituted by decree;

XIX. in contracting with a nonprofit and demonstrably suitable association of disabled persons by organs or entities of the public administration to provide services or to supply manpower, provided the contracted price is compatible with the market price;

XX. for the procurement of goods intended exclusively for scientific and technological research with funding from CAPES, FINEP or CNPq, or other research promotion institutions accredited by CNPq for this specific purpose;

XXI. in contracting for the supply or delivery of electric energy and natural gas with a concessionaire, permit holder or other licensed entity, in accordance with specific legislation;

XXII. in procurement contracted by a public enterprise or a mixed economy corporation with their controlled subsidiaries, for the purchase or disposal of goods, the provision or receipt of services, provided the contracted price is compatible with the market price;

XXIII. for signing contracts for the provision of services with social organizations qualified in the respective spheres of government for activities covered by the management contract;

XXIV. in contracting by the Institute of Science and Technology (ICT) or by a development agency for the transfer of technology and for the licensing of rights to use or to exploit protected intellectual property;

XXV. in the negotiation of program contracts with an entity of the Federation or with an entity of its in direct administration for the joint provision of public services under terms authorized in a public consortium contract or cooperation agreement;

XXVI. in contracting for the collection, processing and marketing of recyclable or reusable urban solid wastes, in areas with a selective garbage collection system, performed by associations or cooperatives formed exclusively by low-income individuals recognized by government as

salvagers of recyclable materials, with the use of equipment compatible with technical, environmental and public health standards;

XXVII. *for the supply of goods and services produced or rendered in the country that involve, cumulatively, high technological complexity and national defense aspects, pursuant to an opinion of a commission specially designated by the highest authority of the organ*."

[xxvi] The tender exemption relating to service contracts signed with social organizations (article 24-XXIV of Law 8666/93) is regulated by decree 6170 of July 25, 2007. Article 2-II prohibits the negotiation of pass-through contracts with private nonprofit entities of which the directors are: *"members of the executive, legislative or judicial branches, the Attorney General's Office and the Federal Court of Accounts, as well as their respective spouses, partners and relatives in direct or collateral line or by affinity to the second degree; a public servant connected with the granting organ or entity, as well as their respective spouses, partners and relatives in direct or collateral line or by affinity to the second degree."*

[xxvii] According to article 25, *"bidding is not required when there is no possibility of competition, in particular:*

I. for the procurement of materials, equipment or goods that can be supplied only by an exclusive producer, firm or commercial representative: any brand preference is prohibited, and exclusivity must be proven by an attestation by the local business registry in the place where the tendering or the work or service is to be performed, by the local business association or federation, or by equivalent entities;

II. for the procurement of the technical services listed in article 13 of this law, of a particular nature, with professionals or firms of recognized specialization: this exemption does not apply to advertising and publicity services;

III. for contracting professionals in any artistic endeavor, directly or through an exclusive agent, provided they are recognized by a specialized critic or by public opinion.

§1. A professional or firm is deemed to have "recognized specialization" if its reputation in the field of its specialty, flowing from previous performance, studies, experience, publications, organization, outfitting, technical equipment, or other requisites relating to its activities allows the inference that its work is essentially and indisputably the best suited to fully satisfying the object of the contract."

[xxviii] According to article 109-I of Law 8666/93, the appeal must be filed within five working days after notification of the act or decision regarding: (a) qualification or disqualification of participants; (b) evaluation of proposals; (c) cancellation or revocation of the bidding; (d) refusal to register or alteration or cancellation of registration; (e) contract cancellation, as referred to in article 79-I of this law; (f) the application of penalties in the form of a warning, temporary suspension, or fine. For tendering under the "letter of invitation" method, the time limit shall be two working days (article 109.6).

[xxix] In cases that do not allow for appeal, the interested party may make representation within five working days after notification of the decision relating to the object of the tender or the contract (article 109-II). For tendering under the "letter of invitation" method, the time limit shall be two working days (article 109.6).

[xxx] A request for reconsideration of a decision by a Minister of State or a State or Municipal Secretary to blacklist a supplier from tendering or contracting with the administration must be submitted within 10 working days after notification of the decision. For tendering under the "letter of invitation" method, the time limit shall be two working days (article 109.6).

[xxxi] Article 113 of Law 8666/93 establishes that the competent Court of Accounts shall control the expenses flowing from contracts and other instruments governed by this law, and it is the responsibility of the interested organs of the administration to demonstrate the legality and regularity of expenditure and execution, under the terms of the Constitution and without prejudice to the internal control system provided therein.

[xxxii] Publication is to be done through the Official Gazette of the Union in the case of tendering by an organ or entity of the Federal public administration, and in the case of works financed wholly or in part with federal funds or funding guaranteed by federal institutions (article 21-I).

[xxxiii] The minimum time limits established by article 23.2 are as follows:

Method	Minimum time to receipt of proposals or opening of bids
Concurso	45 days
Concorrência (when the contract to be signed is a turnkey contract or when the bidding criterion is "best technical offer" or "technical offer and price")	
Concorrência (in the cases not specified above)	30 days
Tomada de preços (when the bidding criterion is "best technical offer" or "technical offer and price")	
Tomada de preços (in the cases not specified above)	15 days
Leilão	
Convite	5 days

[xxxiv] According to article 39 of Law 8666/93, "when the estimated value of a tender or a series of simultaneous or successive tenders exceeds 100 times the limit stipulated in article 23-I (c) of this law (R$1,500,000), the bidding process must begin with a public hearing granted by the responsible authority at least 15 working days before the planned date of publication of the call for tenders, and notified at least 10 working days before it is to be held, through the same channels as those for publishing the tender, to which all interested parties shall have access and the right to all pertinent information and to declare their views."

[xxxv] According to article 40 of Law 8666/93, *"the call for tenders shall contain, in the preamble, the annual serial number, the name of the interested entity and its sector, the method, the system of execution and the type of tender, mention that it will be governed by this law, the place, date and time for receiving documentation and bids, as well as for the opening of envelopes, and shall indicate the following:*

I. The purpose of the tender, in a succinct and clear description;

II. the time limit and conditions for signing the contract or withdrawing the instruments, pursuant to article 64 of this law, for executing the contract and for delivering the goods or services;

III. sanctions for breach of contract;

IV. the place where the basic project can be examined and acquired;

V. if there is an executive project available at the time of notification, the place where it can be examined and acquired;

VI. conditions for participation in the bidding, pursuant to articles 27 to 31 of this law, and the form of presentation of bids;

VII. criteria for evaluation, with clear provisions and objective parameters;

VIII. locations, hours and access codes for the distance communications media through which data, information and clarifications on the bidding will be supplied and the conditions for fulfilling the obligations necessary for meeting its objective;

IX. equivalent conditions of payment between Brazilian and foreign firms, in the case of international bidding;

X. the rule governing acceptability of unit and global prices, as the case may be, whereby the setting of maximum prices is allowed and the setting a minimum prices is prohibited, statistical criteria or ranges of variation with respect to reference prices, except as provided in article 48 (1 and 2);

XI. the rule governing adjustments, which must reflect the actual change in the cost of production, using if appropriate specific or sectoral indices, from the planned date of presentation of the proposal or of the budget to which it refers until the date of delivery of each parcel;

XII. (vetoed);

XIII. limits for payment of installation and mobilization for execution of works or services, which must be stipulated separately from the other parcels, stages or tariffs;

XIV. conditions of payment, stipulating: a) payment must be made within 30 days from the final date of the delivery period for each parcel; b) a maximum disbursement schedule by period, depending on the availability of financial resources; c) the rule governing the financial updating of values to be paid, from the final date of the delivery of each parcel until the date of actual payment; d) financial compensation and penalties for delays, and discounts for any down payments; e) surety requirements, if any;

XV. instructions and rules for the appeals provided in this law;

XVI. conditions for acceptance of delivery;

XVII. other specific indications related to the bidding."

[xxxvi] Article 1 of Law 9755 of December 16, 1998 stipulates that the monthly reports of all purchases by the direct or indirect administration shall be published in the section called "public accounts" of the home page of the Federal Court of Accounts. Decree 5482 of June 30, 2005 provides that organs and entities of the direct and indirect federal public administration must maintain, at their respective Internet sites, a page called "Public Transparency" for *"the dissemination of data and information on their budgetary and financial execution, including among other things matters relating to bidding, contracts and agreements."*

[xxxvii] Article 6 (IX) of Law 8666/93 defines the term "Basic Project" as "the set of necessary and sufficient elements, with adequate level of detail, for characterizing the work or service, or the complex of works or services covered by the tender, prepared on the basis of indications from preliminary technical studies, which will assure the technical feasibility or adequate treatment of the environmental impact of the undertaking, and will make possible an evaluation of the cost of the work and the definition of execution methods and times." That law also provides that the basic project must contain the following elements: "a) development of the selected solution in such a manner as to provide an overview of the work and to identify all its constituent elements clearly; b) global and localized technical solutions, sufficiently detailed, to minimize the need for reformulation or variation during the phases of preparing the executive project and carrying out the works and assembly; c) identification of the types of services to be performed and the materials and equipment to be included in the works, as well as their specifications, so as to ensure the best results for the undertaking without frustrating the competitive nature for their execution; d) information that will allow the study or the deduction of construction methods, provisional installations and organizational conditions for the works, without frustrating the competitive character for their execution; e) support for assembling the plan for tendering and managing the works, including their programming, the supply strategy, the supervision rules and other data necessary in each case; f) the detailed budget for the total cost of the works, based on properly evaluated quantitative estimates of services and supplies."

[xxxviii] Article 6 (X) of Law 8666/93 contains the following definition of the term "Executive Project": "all those elements necessary and sufficient for complete execution of the works, in accordance with the rules of the Brazilian Technical Standards Association, ABNT."

[xxxix] Indirect participation means any link of a technical, commercial, economic, financial or labor nature between the author of the project, whether a natural or legal person, and the bidder or the person responsible for the services, supply and works, including the supply of goods and services necessary thereto (article 9.3 of Law 8666/93), or between a member of the bidding commission and the bidder (article 9.4 of Law 8666/93).

[xl] The assumptions relating to contractual alteration, according to article 65 of Law 8666/93, are the following:

I. Unilaterally by the administration:

a) when there is a change to the project or the specifications to improve their technical adequacy;

b) when a change is required in the contractual value because of a quantitative increase or decrease in its scope, within the limits defined by this law;

II. By agreement of the parties:

a) when substitution of the execution guarantee is desirable;

b) when a change is necessary in the system for executing the work or service, or in the form of supply, upon technical verification that the original contractual terms are inapplicable;

c) when a change is necessary in the form of payment, because of unforeseen circumstances, in which case the initial updated value must be maintained, advance payments are prohibited,

with respect to the established financial schedule, if not compensated by supply of goods or execution of works or services;

d) to reestablish the relationship that the parties initially agreed between the duties of the contractor and compensation of the administration for the fair remuneration of the work, service or supply, with a view to maintaining the initial economic and financial balance of the contract, in the case of unforeseen events or events that, while foreseeable, have incalculable consequences or might delay or impede execution of the adjusted contract or, in the case of force majeure, fortuitous circumstances or sovereign act, would constitute an extraordinary economic event not covered by the contract."

[xli] Among those general provisions is the one defining a public servant as "any person who exercises, even if temporarily or without remuneration, a public office, function or employment;" equivalent to a public servant is any person who exercises an office, employment or function in a public entity, which is deemed to include the foundations, public enterprises and mixed economy corporations, as well as other entities under the direct or indirect control of government." (article 84, first sentence and paragraph 1).

[xlii] Pursuant to article 1, sole paragraph, of Law 10,520/02 and article 3.2 of Decree 3555/00, ordinary goods and services are "those whose standards of performance and quality may be objectively defined by the call for tenders, using normal market specifications." Annex II of Decree 3555/00 has an illustrative list of such goods and services. Decree 3555/00 also provides, in article 5, that "tendering under the reverse auction (pregão) method is not applicable to contracts for engineering goods and services, for real estate leases, and for disposals in general, which shall be governed by the general legislation of the administration."

[xliii] The following table indicates the limits established by article 11 of Decree 3555/00 for the publication of tender notices under the *pregão* method:

Estimated value of the goods or services	**Means of publication**
Up to R$ 160,000.00	Official Gazette of the Union and electronically via *Internet*.
Above R$ 160,000.00 up to R$ 650,000.00	Official Gazette of the Union; electronically via *Internet*; and a newspaper of wide local circulation
About R$ 650,000.00	Official Gazette of the Union; electronically via *Internet*; and a newspaper of wide regional or national circulation.

[xliv] In the course of the reverse auction session, the author of the lowest bid and the authors of bids with prices up to 10% greater than that lowest bid may make new verbal bids. If there are not at least three bids in this sense, the authors of the three best bids may offer new and successive verbal bids (article 4 (VIII and IX) of Law 10,520/02).

[xlv] If the bidder's qualification documents are already in the Unified Suppliers Registry (SICAF) the bidder is not required to submit them, but other bidders are guaranteed the right of access to the data in those documents (article 4 (XIV) of Law 10,520/02).

[xlvi] Article 21 of Decree 3555/00 provides that *"the essential acts of the reverse auction (pregão), including those conducted electronically, shall be documented or attached to the respective process, as they are produced, and shall include at least the following:*

I. justification for the procurement;

II. terms of reference, including a detailed description of the object, the estimated budget, and the physical and financial timetable for disbursement, if any;

III. cost tables;

IV. guarantee of budgetary availability, with indication of the respective headings;

V. authorization to open bidding

VI. designation of the auctioneer and the support team;

VII. legal opinion;

VIII. notice of tender and the respective annexes, if any;

IX. draft terms of the contract or equivalent instrument, if any;

X. minutes of the auction session, containing at least the list of accredited bidders, the written and verbal bids presented, in the order of ranking, the analysis of documentation required for qualification and any appeals filed; and

XI. evidence of publication of the notice, the results of the tender, the extract of the contract, and other acts relating to publicity for the competition, if any."

[xlvii] The following table indicates the limits established by article 17 of Decree 5450/05 for the publication of notices of electronic *pregão* proceedings:

Estimated value of the goods or services	**Means of publication**
Up to R$ 650,000.00	Official Gazette of the Union and electronically via *Internet*.
Above R$ 650,000.00 up to R$ 1,300,000.00	Official Gazette of the Union; electronically via *Internet*; and a newspaper of wide local circulation.
Above R$ 1,300,000.00	Official Gazette of the Union; electronically via *Internet*; and a newspaper of wide regional or national circulation