IBA Anti-Corruption Committee
Submission to OECD Working Group on Bribery
Phase 4 country monitoring of the OECD Anti-Bribery Convention Brazil

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Introduction

In 2023, the OECD Working Group on Bribery launched its fourth phase of monitoring of Brazil's implementation of the OECD Anti-Bribery Convention. Following the Working Group's on-site visit to Brazil in May 2023, the International Bar Association's (IBA) Anti Corruption Committee – in accordance with the relevant rules of procedure and established practice – welcomes the opportunity to contribute to this preparatory process and consultations, and to continue providing its support to advance the global fight against corruption. To that effect, this submission focusses on the suggestions made on the "Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Brazil", dated October 2014.

The Role of the International Bar Association and its Anti-Corruption Committee in the Fight against Corruption

The International Bar Association, *the global voice of the legal profession*, is the foremost organisation for international legal practitioners, bar associations and law societies. Established in 1947, shortly after the creation of the United Nations, it was born out of the conviction that an organisation made up of the world's bar associations could contribute to global stability and peace through the administration of justice. Its present membership is comprised of more than 80,000 individual international lawyers from most of the world's leading law firms and some 190 bar associations and law societies spanning more than 170 countries.

When international bribery was elevated as a major concern in the international arena, the IBA adopted the **Resolution on Deterring Bribery in International Business Transactions,** in 1996. The **Anti-Corruption Resolution**, adopted on 7 October 2010 by the IBA, expressed a clear message of its strong commitment to support the global fight against corruption.[1]

A driving force behind the IBA's commitment to combatting corruption has been the Anti-Corruption Committee (ACC), which includes members who are anti-corruption and compliance lawyers (in private practice and in the public sector), academics, prosecutors, investigators, judges, and forensic accountants from around the world.

Over the years, the IBA and the ACC have, in addition to the documents mentioned before, provided multiple contributions toward the fight against corruption, including the examples cited below:

i. In 2010, the IBA, in cooperation with the OECD and UNODC, commenced the Anti-Corruption Strategy for the Legal Profession, a project focusing on the role that lawyers play in fighting corruption in international business transactions and the impact on the legal practice of international anti-corruption instruments and associated implementing national legislation with extraterritorial

[1] Both documents are available on the ACC's website.

application. Over a five-year period, the IBA (with the support of the OECD and UNODC) hosted workshops in over 30 countries, calling out the corruption risks facing lawyers and their clients, and advancing the anti-corruption message to hundreds of lawyers.

II. Since 2015, the IBA has been promoting its **Judicial Integrity Initiative,** focussing on seeking structural changes in the administration of judicial systems and the support of judges across the world to address bribery and corruption risks in national judicial systems.

III. On August 24, 2015, the ACC filed a **Submission to the Australian Senate Economics Reference Committee on Australia's Foreign Bribery Laws** supporting substantial proposed reforms to tackle foreign bribery under Australian law.

IV. Between 2015 and 2017, the ACC worked with the **German Government International Development Authority** and the **Afghanistan Independent Bar Association** to formulate a series of anti-corruption guidelines for the Afghan legal profession. Subsequently, a series of education and training workshops were held in Dubai with the participation of senior representatives from the Afghan Government and legal system.

V. On April 26, 2017, the ACC presented a **Submission to the Australian Attorney General's Department on Considerations of a Deferred Prosecution Agreement (DPA) Scheme** in Australia, and, on 17 November 2017, filed a **Submission to the Canadian Government's Deferred Prosecution Agreements consultation**. In March 2020, the Australian Parliament Legislation and Constitutional Committee published its report, which recommended all the reforms supported by the ACC for reforming Australia's foreign bribery and other laws and introducing a DPA scheme.

VI. In May 2017, the ACC issued a report **Anti-Corruption Law and Practice Report 2017: Innovation in Enforcement and Compliance**, which examined the developments in law and practice in the international anti-corruption field. Seven key areas were identified: negotiated/structured settlements; corporate criminal liability; corruption and human rights; reporting persons; internal investigations; collective action; and corporate compliance and behavioural regulation.

VII. In 2016, the ACC's Structured Criminal Settlements Subcommittee (SCSS) commenced a two-year project entitled **Towards Global Standards in Structured Settlements for Corruption Offences** and, in December 2018, released a **report** mapping the evolving settlement practices for corruption cases of countries across the globe. The project contributed to the growing discussion on whether, and to what extent, there is a need for global anti-corruption standards.

VIII. Following the previous initiatives, the ACC launched Project Roll Out with the objective of (i) contributing to the guidelines that the Working Group on Bribery of the OECD had been developing for non-trial resolutions of foreign bribery cases, and (ii) participating in the national implementation of those guidelines.

IX. On December 9, 2019, the ACC's Asset Recovery Subcommittee (ARSC), together with the UNODC-World Bank Stolen Asset Recovery Initiative (StAR), published the jointly authored book **Going for Broke**, outlining often underutilised means to pursue the restitution of corrupt funds.

X. In September 2021, the ACC presented its Submission to the OECD Risk Assessment Toolkit for SMEs, which focusses on the regulatory requirements and best practices adapted in key jurisdictions, namely the United Kingdom, United States, Australia, Brazil, Mexico, Panama, Colombia, and Italy, to enable SMEs to detect, monitor, counter, and manage the challenges of bribery and corruption.

XI. In August and October 2021, the ACC presented two submissions to the preparatory process for the Special session of the General Assembly against corruption 2021. In the first submission, the ACC focussed on the prevention of bribery and corruption as well as its criminalisation. In the second submission, the ACC focussed on asset recovery.

The Fight against Corruption in Brazil

Compared to 2014, today's anti-corruption landscape in Brazil has evolved significantly in all aspects. Since the issuance of the "Phase 3 Report on Implementing the OECD Anti-bribery Convention", in October 2014, a series of large anti-corruption investigations raised the bar of anti-corruption and compliance in Brazil. Car Wash Operation was undeniably one of the driving forces that boosted international cooperation, policy streamlining, institutional coordination, and compliance programs.

Despite economic and political challenges faced by Brazil since 2014, Brazilian institutions have endured and moved forward to implement most of the suggestions of the Phase 3 report. The learning curve to enforce our anti-corruption legislation was not smooth and took place amidst political turmoil, which adds merits to the achievements discussed below.

After these introductory remarks, the ACC turns to the three main themes of this submission, namely:

(i) The role of the Executive, Legislative, and Judiciary branches in the fight against corruption;

(ii) Cooperation among agencies; and

(iii) Comments on the Recommendations made in the Phase 3 Report on Implementing the OECD Anti-Bribery Convention.

In the first section, this submission addresses the overall role of the three branches of the government under the Anti-Bribery Convention, which is binding to the Brazilian State and not only to the Executive branch.

In the second section, the submission summarises the recent developments in the cooperation efforts among domestic institutions with a role in anti-corruption policy and enforcement.

In the last section, this submission comments on each specific recommendation made in the "Phase 3 Report on Implementing the Anti-Bribery Convention" for Brazil and presents key related developments. The goal of this section is to map how much Brazil has evolved and implemented each of the recommendations since 2014.

I. The role of the Executive, Legislative and Judiciary branches in the fight against corruption in Brazil

I.1. Executive branch

The Office of the Comptroller General (*Controladoria-Geral da União* – "CGU") is a federal agency with a diverse set of responsibilities that falls into two main categories: defending public funds and fostering government transparency through measures targeting both the public and private sectors, including auditing, internal affairs, prevention and enforcement against corruption.

Headed by a Minister appointed by the President, the CGU has recently undergone an internal restructuring after the change in administration following the 2022 national elections. Under the new structure, all initiatives involving prevention and enforcement against corruption were consolidated under a newly created Private Integrity Office (*Secretaria de Integridade Privada*). The three main workstreams of this Office, which targets the private sector, are: *(i)* negotiation of leniency agreements, *(ii)* conduction of enforcement actions and *(iii)* fostering and evaluating integrity programs.

The agency has also been promoting a series of initiatives to provide easily accessible information on the actions under its purview. This level of transparency allows a significant monitoring by civil society in terms of preventive and enforcement actions taken by the CGU over the years since its creation, in 2003.

In this regard, the CGU has made publicly available in its official website a series of dashboards with data on actions involving leniency agreements, administrative proceedings against legal entities and government officials, conflict of interest, and international recommendations, such as those made by the OECD.

In addition, there is information on audits, investigations in collaboration with other agencies and authorities, case precedents and data on government spending. The available information, in most cases and whenever applicable, also relate to actions adopted by other agencies and secretaries of the Federal Government.

On enforcement against private entities, the CGU alone has launched 327 administrative proceedings from 2014 to April 2023, with a significant increase from 2020 onwards. These administrative proceedings have resulted in the imposition of debarment penalties in 71 cases and in fines in the total amount of BRL 545,193,842.15. If one looks at the entire Federal Government, 1,541 administrative proceedings have been launched in the same period, with the imposition of debarment penalties in 2,415 cases.

In these past three years alone, during the COVID-19 pandemic, the CGU launched 236 administrative proceedings. Referring to the pandemic specifically, the CGU was fast to adopt monitoring and enforcement measures to counter the easing of rules and procedures related to

governmental procurement of products and services to fight the pandemic. Among these measures, the CGU developed a specific website to publicly disclose information about federal government spending, contracts, and tenders, including information on the use of federal funds by states and municipalities specifically in relation to measures to fight the pandemic.

Since April 2020, the CGU has conducted 80 special operations in collaboration with the Federal Police (*Polícia Federal*), the Federal Prosecution Office (*Ministério Público Federal* – "MPF") and other authorities to fight embezzlement of federal funds related to the pandemic. In monetary amounts, these special operations totalled BRL 5.87 billion.

In relation to leniency agreements, the CGU has signed 25 agreements since the instrument was introduced by the by the so-called "Clean Companies Act" or the "Corporate Liability Law" or CLL (Law No. 12,846/2013) in 2014 – with 14 leniency agreements signed between 2020 to 2022. The total amount involved in these agreements amounts to BRL 18,303,789,248.17.

The number of companies requesting to start negotiations has also increased in the past 3 years after a slight decrease in 2019. In 2020, 2021 and 2022, a total of 23 requests to start negotiations were submitted to the CGU. In terms of leniency agreements successfully reached, 2022 was the leading year, with 8 leniency agreements signed.

By using the dashboard of leniency agreements made available by the CGU, it is also possible to check how much has been paid out of the total amount settled with each company, as well the development of compliance obligations imposed as a result of these agreements.

On enforcement against government officials, the CGU launched 605 administrative proceedings from 2014 to 2023. In total, 344 government officials were removed from office as a direct result of these proceedings – 193 of those because of corruption. With a peak of 129 administrative proceedings in 2021 and a slight decrease in 2022, enforcement actions against government officials have been increasing in the past years. If we look at the entire Federal Government, 70,211 administrative proceedings have been launched in the same period, with 8,499 government officials removed from office – 3,333 of those because of corruption.

I.2. Legislative branch

August 2023 will mark a decade since the CLL was enacted. During this decade, several laws and regulations have been approved by Congress to strengthen the fight against corruption in Brazil (see next session for detail). From the legislative perspective, there are also several draft bills currently under discussion in Congress related to corruption, crimes against the public administration and the illicit enrichment of government officials. A non-exhaustive list of some of them is included below, according to the importance and status of each proposal.

Bill 236/2012 **Status:** Proposed on July 9, 2012, by Senator José Sarney, and pending appointment of a rapporteur since March 23, 2023.	The bill proposes to reform the Brazilian Criminal Code to impose criminal liability on legal entities for acts of corruption.
Draft Bill No. 1,202/2007[2] **Status:** Proposed on May 30, 2002, by Representative Carlos Zarattini, the bill was approved in the House of Representatives on November 29, 2022, and it is currently in the Senate.	The bill proposes to regulate lobbying in Brazil and establish rules of conduct for individuals or legal entities when defending their interests before government officials.
Draft Bill No. 1,588/2020[3] **Status:** Proposed on April 6, 2020, by Senator Antonio Anastasia, the bill was forwarded by the Senate to the House of Representatives, where it awaits the approval of the House Committee on Industry, Commerce and Services.	The bill proposes to add the professional certification of a company's compliance office to the requirements for reducing the fines established in the CLL.
Draft Bill No. 4,636/2020[4] **Status:** Proposed on September 17, 2020, by Senator Alessandro Vieira and others, the bill has been assigned to the Senate Public Security Committee in December 2021 and awaits the appointment of a rapporteur.	The bill proposes that political parties should be subject to obligations established by the Brazilian Anti-Money Laundering Law (Law No. 9,613/1998)[5] making them liable in case of violations.

[2] Draft Bill No. 1,202/2007.
[3] Draft Bill No. 1,588/2020.
[4] Draft Bill No. 4,636/2020.
[5] Law No. 9,613/1998.

Draft Bill No. 3,394/2015[6] **Status:** Proposed on October 22, 2015, by Representative Kaio Maniçoba. Since March 23, 2023, the bill has been sent to the House's Committee on Administration and Public Service.	The bill proposes that funds derived from the payments of fines for violations of the CLL should be used to fund educational measures to fight corruption.

[6] Draft Bill No. 3,394/2015.

I.3. Judiciary

Corruption cases in Brazil may involve multiple authorities at local, state and federal levels, which may lead to independent and simultaneous investigations and sanctions based on the same facts. Therefore, the risk of double jeopardy due to multiple proceedings and respective penalties may be a disincentive for companies or legal representatives to consider self-disclosure.

The Judicial Branch has adopted an important role in defining the roles of the several authorities with anti-corruption mandates. On March 30, 2021, for example, the Brazilian Federal Supreme Court (*Supremo Tribunal Federal* – "STF") ruled that the Federal Court of Accounts (*Tribunal de Contas da União* – "TCU") could not issue disbarment decisions against companies that entered into leniency agreements with other federal authorities.[7] Following this path, the Legislative Branch amended the Administrative Improbity Law (through Law No. 14,230/21) to curb the risk of double jeopardy, by expressly providing that companies subject to enforcement proceedings under the CLL could not be prosecuted for the same facts under the Administrative Improbity Law.

However, because most of the cases in the Operation Car Wash involved the negotiation of collaboration agreements with the authorities, a myriad of significant legal discussions remains unsettled. For instance, we are not aware of cases – at least not publicly disclosed – in which the authority sought to lift the corporate veil to reach shareholders. Also, because there was no clear guidance on the requirements to settle with the authorities (such as the level of cooperation required or the calculation of damage compensation), some of these collaboration agreements have been submitted to courts, either to review the amounts of the fines and disgorgement, or to question the legality of these agreements.[8]

[7] Claim No. 41,5577/SP, decided by the Brazilian Supreme Court of Justice (Second Panel).
[8] Such as the initiatives led by certain political parties – PSOL, PCdoB and Solidariedade, as indicated in the next topic.

II. Cooperation among agencies

As mentioned above, one of the greatest challenges under Brazilian legal system to prevent and fight corruption remains the fact that several different laws provide for multiple investigation and accountability spheres, in which different authorities at local, state and federal levels can simultaneously investigate and punish companies and individuals for the same facts.[9] Coordination between these authorities has been a challenge since the introduction of the CLL.

The consequences of a lack of coordination are particularly complex for legal. In Brazil, only individuals may be held criminally liable for wrongdoings, with very few exceptions expressly provided by law.[10] Notwithstanding, the legal entity may face a broad variety of repercussions in the civil and administrative spheres, especially because of the strict liability standard provided by the CLL. Additionally, other laws may apply, such as the Administrative Improbity Law, the Law No. 14,133/2021 (Public Procurement Law), the Law No. 9,613/1998 (Anti-Money Laundering Law – "AML"), depending on the illegal conduct and on the activities developed by the involved entities.[11]

These laws also provide for different accountability systems: unlike the CLL, other laws with anti-corruption aspects (such as the Administrative Improbity Law) do not provide for strict liability of legal entities for wrongdoing; instead, all other laws require a subjective element – *i.e.*, intent for individuals and, for legal entities, that they actively engaged in or benefited from the wrongful conduct.

As such, violations of these laws may involve several authorities, at local, state, and federal levels, with jurisdiction over the same case. In other words, these authorities could independently and simultaneously investigate and punish a legal entity based on the same facts. This means that an improper conduct punishable under federal law may result, simultaneously, in prosecutions in state and federal levels, and in criminal and civil/administrative liability. Additionally, improper conducts may result in tax implications (for example, the failure to accurately account for, declare and pay taxes due), which may result in fines applicable by the Brazilian tax authorities (*e.g.*, Federal Income Revenue Services).

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[9] WINTERS, Michelle A. Too Many Cooks in the Kitchen: Battling Corporate Corruption in Brazil and the Problems with a Decentralized Enforcement Model, 13 Rich. J. Global L. & Bus. 681 (2015): "*As previously mentioned, one of the most problematic elements of the highly touted Brazilian Anti-Corruption Act is its delegation to essentially any entity of Brazil's public administration (at the federal, state, and municipal levels) of the power to investigate possible illegal acts.*"

[10] Unlike common law jurisdictions, the so-called civil law systems, with a few exceptions, generally do not apply criminal liability to legal entities (as opposed to individuals). As such, even if a company is the ultimate beneficiary of a corrupt act, such as a bribery, it cannot be held criminally liable in Brazil. Only its directors, managers, employees, or agents involved in such act can be held criminally liable for their actions on behalf of the company.

[11] For example, issuers will also be subject to rules and regulation issued by the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários* – "CVM") and financial institutions will be subject to rules issued by the Brazilian Central Bank (*Banco Central do Brasil* – "Bacen").

Therefore – and because the division between different jurisdictions is sometimes not entirely clear when it comes to improper conduct related to corruption in Brazil – there is a risk of multiple prosecutions under different levels of authority, which may result in piling on proceedings and double jeopardy.

For example, in addition to plea-bargain agreements, as mentioned above, other legal tools are also available for authorities to settle cases, such as the "*Acordo de Não-Persecução Cível*", provided by the Administrative Improbity Law (Art. 17-B).[12] Depending on the nature of the offenses, other entities such as the Brazilian Administrative Council for Economic Defense (*Conselho Administrativo de Defesa Econômica* – "CADE"), the Bacen[13] and the CVM may also have jurisdiction and may negotiate separate resolutions.

Therefore, several regulators can concurrently propose such agreements. Further, recent leniency agreements signed with CGU[14] have highlighted that entering into such agreement does not exclude the jurisdiction of other authorities and agencies to prosecute facts and conducts that constitute offenses over which they have jurisdiction. Seeing the "*glass half full*", the coexistence of leniency regimes under Brazilian law can achieve an optimal level of incentive for collaborating, ultimately improving the fight against corruption. Nevertheless, it creates legal uncertainty and can only work in practice if entities work together to effectively cooperate and exchange information while preserving the rights of collaborators.[15]

Aware of the issues at stake, and in addition to recent efforts by the authorities to provide written guidelines – such as MPF's guidelines issued by the 5th "*Câmara de Coordenação e Revisão*", or the "*Acordo de Cooperação Técnica*"[16] signed between STF, CGU, AGU, TCU, and the Ministry of Justice and Public Security" (*Ministério da Justiça e Segurança Pública* – "MJSP") on August 6, 2020 – authorities nowadays are more inclined to accept the compensation of fines to be paid by wrongdoers to other authorities with jurisdiction over the same facts, as an attempt to reduce the piling on, increase cooperation and encourage companies to self-report.

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[12] For more exemples, see "Acordos Homologados pela 5ª CCR" available at: https://apps.mpf.mp.br/apps/f?p=131:8.

[13] Marcelo Ribeiro de Oliveira "*Capitulo 4. Ainda sobre os acordos de leniência*" in COMPLIANCE.lab "Compliance aplicado ao Direito" Claudia Carneiro e Ana Ayres Delloso, pp. 78-115.

[14] Leniency agreements: Hypera S.A, Article 18.8.3; Stericycle LTDA, Article 17.6.3; Rolls Royce, Article 17.7.3 available at Acordos celebrados CGU: https://www.gov.br/cgu/pt-br/assuntos/integridade-privada/acordo-leniencia/acordos-celebrados

[15] Marcelo Ribeiro de Oliveira "*Capitulo 4. Ainda sobre os acordos de leniência*" in *COMPLIANCE.lab,"Compliance aplicado ao Direito*" Claudia Carneiro e Ana Ayres Delloso, p. 114 citing : "*Our hypothesis is that this may help the Act overcome some of the obstacles often encountered in efforts to effectively punish corrupt practices in Brazil. There are, however, no guarantees that institutional multiplicity will generate the benefits identified in this article. Indeed, it may actually generate inefficiencies with institutional duplication, destructive competition, and obstacles to cooperation and coordination.*"

[16] For more details, *see*:
https://portal.tcu.gov.br/imprensa/noticias/cooperacao-tecnica-define-protocolo-para-compartilhamento-de-informacoes-nos-acordos-de-leniencia.htm

For example, 9 out of the 25 leniency agreements signed by the CGU since 2017 have cross-border aspects (*i.e.*, have been negotiated not only with local but also with international authorities), demonstrating that authorities are learning how to cooperate. On the other hand, the lack of specific written guidelines gives room for excessive discretion of authorities and reduces legal certainty for cooperating companies and individuals. Thus, although some progress over the last years in Brazil is recognizable, cooperation is far from being entirely effective in Brazil.[17]

Other possible setbacks with respect to cooperation (both among domestic and international entities) include recent discussions for the conversion of financial obligations undertaken under leniency agreements into new public-private partnerships and government contracts, with an uncertain level of effectiveness and, more recently, a constitutional challenge filed by certain political parties (namely PSOL, PCdoB and Solidariedade) before STF to suspend the effectiveness of leniency agreement and force their renegotiation.

Therefore, despite the improvements and positive initiatives over the past decade, there are still high risks related the lack of effective cooperation. Brazil does not seem to be addressing the problem successfully, and such recent initiative remain largely insufficient.[18]

[17] Luz, Reinaldo; Spagnolo, Giancarlo (2016): Leniency, Collusion, Corruption, and Whistleblowing, SITE Working Paper, No. 36, Stockholm School of Economics, Stockholm Institute of Transition Economics (SITE), Stockholm: "*In the absence of coordinated forms of leniency (or rewards) for unveiling corruption, a policy offering immunity from antitrust sanctions may not be sufficient to encourage wrongdoers to blow the whistle, as the leniency recipient will then be exposed to the risk of conviction for corruption*".

[18] According to Transparency International Exporting Corruption Report, "Assessing enforcement of the OECD Anti-Bribery Convention", October 2022, there is still limited enforcement of the OECD Convention in Brazil. See more details at: https://images.transparencycdn.org/images/2022_Report-Full_Exporting-Corruption_EN.pdf.

III. Comments on the Recommendations made in the Phase 3 Report on Implementing the OECD Anti-Bribery Convention

	OECD Recommendations	IBA Comments
Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery		
1	Regarding the foreign bribery offence, the Working Group recommends that Brazil take all appropriate steps to clarify that the foreign bribery offence applies to bribes promised, offered or paid, in return for acts outside of the official's authorised competence. [Convention, Article 1]	The CLL is already applicable to all cases of payment of bribes to government officials, even if the recipient official has no authorized competence to grant an undue benefit to the entity making the payment. Therefore, the change is not necessary.
2	Regarding the liability of legal persons, the Working Group recommends that Brazil:	
2.a	Issue, as a matter of priority, the announced Decree aiming at regulating several aspects of the Corporate Liability Law (CLL); [Convention Article 2; 2009 Recommendation III ii), V, Annex 1B]	Brazil issued the Decree regulating the CLL in 2015. More recently, on July 11, 2022, Decree 11,129/2022 , followed by the CGU Ruling 19/2022, improved the regulation of the CLL and introduced significant changes such as (i) the authority's obligation to conduct a preliminary investigation to gather initial evidence before starting an administrative proceeding against the legal entities; (ii) the introduction of a novel sanction tool - the early or anticipated trial, allowing companies to settle with the authority; (iii) the review of the criteria to calculate penalties for purposes of the CLL, and the inclusion of a clearer methodology for the calculation of the illegally obtained benefits; (iv) the explicit reference to the AGU as an entity with power to negotiate and execute leniency agreements; and (v) the review and improvement of criteria for the evaluation of a compliance program, such as the destination of resources, communication initiatives, risk management, treatment of hotline reports and third-party due diligence procedures. These Rulings organized provisions and practices that had been sparsely gathered in other rulings and understandings of government entities, which helps to enhance legal certainty and improve predictability not only for companies, but also for authorities.
2.b	Take appropriate steps to clarify: (i) whether, in practice, the CLL covers bribery of foreign public officials in international business transactions, as defined under Article 1 of the Anti-Bribery Convention; (ii) the application of the law to all legal persons, including SOEs, as well as companies receiving financing from BNDES; (iii) the coverage under "undue advantage" of any incentive or advantage, pecuniary or not, received by the public agent from private agents, either to perform activities that go beyond his/her legal attributes, or to perform activities within his/her duties; and (iv) the interpretation of the "interest" and "benefit" criteria to ensure that it covers situations where, for instance, a legal	Even though there were no changes in the text of the CLL to such effect, Brazilian authorities (particularly the CGU and the MPF) have issued decisions and guidelines clarifying the items in this recommendation. With respect to covering situations in which bribes are paid by related legal entities, the CLL is clear in establishing the joint liability of controlling shareholders, subsidiaries, and affiliates.

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Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery		
	person bribes on behalf of a related legal person (including a subsidiary, holding company, or member of the same industrial structure); [Convention Article 2; 2009 Recommendation III ii), V, Annex 1B]	
2.c	Ensure that if the draft Bill to establish the criminal liability of legal persons passes into law, it follows one of the two approaches recommended under Annex I B) of the 2009 Recommendation and either supersedes or operates in a manner that is consistent with the administrative CLL. [Convention Article 2; 2009 Recommendation III ii), V, Annex 1B]	Draft bill 236/2012 (see above) proposes to reform the Brazilian Criminal Code to include criminal liability for legal entities in corruption cases and is currently pending the designation of a rapporteur.
3	With respect to sanctions, the Working Group recommends that Brazil:	
3.a	Review the CLL to clarify which sanctions are available to SOEs while ensuring that these are effective, proportionate and dissuasive, including for the largest SOEs; [Convention Article 3; 2009 Recommendation III (ii) and V]	Regarding sanctions applicable against state-controlled enterprises (SOEs), please see the information provided above in item 2(b).
3.b	Re-consider including debarment as a possible administrative or civil sanction; [Convention Article 3; 2009 Recommendation III (ii) and V]	The possibility of debarment as an administrative or civil sanction is addressed in the CLL, the Administrative Improbity Law and in the Public Procurement Law (Federal Law No. 14,133/2021). Enacted on April 1, 2021, this law provides for all requirements for public bids and administrative procurement contracts between private entities and Brazil's public administration. Additionally, Article 155 of the Public Procurement Law also determines the reasons companies contracted by the public administration may be liable for administrative violations, which are subject to the following sanctions: (i) official warnings; (ii) fines; (iii) suspension from participating in bids and settling public procurement contracts; and (iv) being declared ineligible to participate in bidding and contracting processes. Although the Public Procurement Law is already in effect, Law No. 8,666/1993 and other public procurement laws remain applicable until December 2023, as per Provisional Presidential Decree No. 1,167/2023. Both legal frameworks will coexist during this period, and the public administration can opt between them when conducting a bidding process. The only exception concerns a section regarding crimes involving public bidding processes – the old provisions were immediately revoked. As for compliance requirements, the Public Procurement Law contains provisions that encourage companies and other organizations engaged in business with Brazil's public administration to implement and develop integrity programs. In Brazil, compliance programs are not obligatory under the Corporate Liability Law, which considers them merely a governance incentive for mitigating the risk of potential

	OECD Recommendations	IBA Comments
Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery		
		sanctions. However, other statutes may consider compliance programs to be a *sine qua non* condition in specific circumstances, such as in public bids and procurement contracts worth over BRL 200 million (approximately USD 40 million). In this case, the bid notice must include an obligation for the winning bidder to implement an integrity program within six (6) months from the date the contract is signed. Acts the Public Procurement Law or other public procurement laws define as administrative violations that are also deemed violations under the CLL must be investigated and judged jointly in the same proceeding. Proper procedures and the authority of the competent jurisdiction must also be respected, as determined in Article 159 of the CLL.
3.c	Clarify by any appropriate means that: (i) mitigating factors, although inserted in the Chapter of the CLL that regulates administrative liability, will be taken into consideration in determining the judicial/civil liability; and (ii) that "the offender's economic situation" (under article 7. VII) cannot encompass considerations forbidden under Article 5 of the Convention, in particular with regard to SOEs but also companies receiving financing from the State, notably through development banks; [Convention Article 3 and Article 5; 2009 Recommendation III (ii) and V]	Regarding the item (i), the Decree 11,129/2022 included additional guidelines on the calculation methodology of fines, mitigating and aggravating factors, as indicated in the comment to item 2.a above. Mitigation or aggravating factors are applicable only to administrative fines, but can be considered by the courts, which can also impose penalties in case of inertia on the part of the public administration. As to item (ii), this Decree and additional guidelines issued did not exempt the considerations forbidden under Article 5. As mentioned in item 2.(b).ii. the CLL is including SOEs according to the State-Owned Companies Law.
3.d	Take the necessary steps to ensure that the Decree implementing the CLL, to be issued by the Federal Executive Branch (i) clarifies that internal controls and compliance programs provided under article 7.VIII can only be taken into account as mitigating factors and cannot be used as a complete defence from liability by companies; (ii) provides a sufficient level of detail on "the parameters of evaluation of the mechanisms and procedures provided" to allow both the companies to anticipate what they may be able to expect from good internal controls and compliance and the CGU and the judiciary to make a consistent use of this mitigating factor; and (iii) clarifies that the impact of the ethics and compliance programs will not be limited to mitigating administrative sanctions and will also be taken into	In addition to the measures that ensure that the Decree implements the CLL, the CGU also has published legal and infra-legal regulations to clarify compliance aspects of the Corporate Liability Law, the following of which are among them: • Decree No. 11,129/2022 – Provides that "for purposes of the provisions of this Decree, an integrity program consists, within the scope of a legal entity, of a set of internal mechanisms and procedures for integrity, auditing and encouraging the reporting of irregularities and the effective application of codes of ethics and conduct, policies and guidelines, with the objective of I - prevent, detect and remedy deviations, frauds, irregularities and illicit acts practiced against the public administration, domestic or foreign; and II - fostering and maintaining a culture of integrity in the organizational environment. Sole Paragraph. The integrity program shall be structured, applied and updated according to the characteristics and current risks of the activities of each legal entity, which, in turn, shall ensure constant improvement and adaptation of the program with a view to guaranteeing its effectiveness".

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	account when determining civil sanctions; [Convention Article 3; 2009 Recommendation III (ii) and V]	• Ordinance No. 6/2022 – Published on September 9, 2022, this ordinance establishes an addendum to the CGU's Practical Guide for Evaluating Integrity Programs in PARs, establishing a methodology to evaluate integrity programs and providing guidance on how to calculate applicable fines based on the mitigating factors provided for in Decree No. 11,129/2022. The ordinance established new minimum and maximum limits for reducing fines in the event an integrity program is effectively implemented, changing from '1% to 4%' to 'up to 5%'. • Integrity Program Guide for Private Companies - Published by CGU in September 2015, the guide addresses (i) pillars of integrity programs; (ii) standards of ethics and conduct; (iii) rules, policies, and procedures to mitigate risks; (iv) communication and training; (v) reporting channels; (vi) disciplinary measures; (vii) remedial actions; (viii) strategy for continuous monitoring of the integrity program.
3.e	(i) Review the range of sanctions available for successor companies and in case of joint liability under article 4 paragraphs 1 and 2 of the CLL with a view to providing more flexibility and, in particular, to allow for the confiscation of the profit of foreign bribery and the imposition of sanctions that will be better adapted to each company's situation; and (ii) remove the limitation of the liability of the successor companies to the "transferred assets". [Convention Article 3; 2009 Recommendation III (ii) and V]	The CGU has provided a specific chapter on interpreting and applying the penalties in the Corporate Liability Law in its Manual on the Accountability of Private Entities, published in April 2022. Although the manual has no legally binding powers, it was published to establish a uniform understanding and function as a best practice guide for government officials who work in PARs.
4	Regarding confiscation, the Working Group recommends that Brazil:	
4.a	Adopt necessary measures, including reviewing its legislation as necessary: (i) to allow for the confiscation of a bribe or its monetary equivalent in cases of foreign bribery; (ii) to ensure that confiscation of the proceeds of foreign bribery is always available, including in the case of successor companies, companies held jointly liable, and when concluding leniency agreements with cooperative offenders; [Convention Article 3; 2009 Recommendation III (ii) and V]	According to article 19 of the CLL, Public Attorneys' Offices or judicial representation bodies, or equivalents, and the Federal Prosecution Office, can file lawsuits with a view to the application of the following sanctions to infringing legal entities: forfeiture of assets, rights or values that represent a direct or indirect advantage or profit obtained from the infringement, safeguarding the right of the injured party or a third party in good faith. Criminal proceedings against the public official who participates in the bribery offense also allow for forfeiture and restitution.
4.b	Make full use of the expertise available in the CGU by conferring on a specialised unit the responsibility for calculating the proceeds of bribery; and ensure this unit is promptly issued with the guidelines that have been prepared to determine how the proceeds of bribery	As for the clarifications and best practices guides regarding PARs and imposing penalties, the CGU regulations are:

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	should be calculated and that the unit receives training to this effect; [Convention Article 3; 2009 Recommendation III (ii) and V]	• Normative Instruction No. 2/2018 – Published on May 16, 2018, this normative instruction approves the methodology for calculating administrative fines applied in the context of leniency agreements, as provided for in Article 6 of the Corporate Liability Law. • Ordinance CGU/AGU No. 4/2019 – Published on August 4, 2019, this ordinance defines the procedures for negotiating, concluding, and monitoring leniency agreements established by the Corporate Liability Law. • Decree No. 11,129/2022, which integrated CGU's previous rules and guidelines on the calculation of fines and bribery proceeds. CGU has also recently launched, in its website, a calculator to help legal practitioners to calculate the amount of fines in the context of the PARs.
4.c	Take the necessary steps to ensure that data and statistics are maintained at the federal level regarding the confiscation of the proceeds of foreign bribery and other corruption and serious economic crimes. [Convention Article 3; 2009 Recommendation III (ii) and V]	CGU and AGU maintain a website where the main information on the leniency agreements signed is published. The terms of the agreements are made available to the public, as well as the general status of the proposals being analysed and how well the companies are complying with the agreement. • The CGU has a page on its website with guidelines and clarifications on the procedures for applying to open leniency negotiations and negotiation procedures, among others. • The MPF also maintains a website that provides information on the procedures for (i) proposing and negotiating leniency agreements, (ii) minimum requirements, (iii) models and guidelines, and (iv) frequently asked questions.
5	Regarding the investigation and prosecution of foreign bribery, the Working Group recommends that Brazil:	
5.a	Ensure cooperation between the prosecutors and the police as necessary for foreign bribery investigations and conclude an MOU between the CGU and the Federal Prosecution Service (FPS) providing a detailed framework for the enhanced cooperation between the two agencies in the context of the administrative proceedings, the judicial/civil proceedings and the criminal proceedings, including information on the initiation of proceedings against natural and legal persons; [Convention Article 5; 2009 Recommendation XIII and Annex I D]	Regarding the investigation and prosecution of foreign bribery, it is worth mentioning that Brazilian authorities have enacted legal and infra-legal norms that relate, to a greater or lesser extent, and some examples are listed below. • Technical Note No. 01/2017: Published by the MPF 5th Coordination and Review Chamber, defends the intervention of MPF in the signing of leniency agreements. • Joint Ordinance No. 04/2019: Published by the CGU and the AGU, ensures the joint action of CGU and AGU in the negotiation and execution of leniency agreements. • Normative Ruling No. 83/2018/TCU: Published by the TCU, regulates the inspection that the TCU exercises over the leniency agreements entered by the Federal Public Administration.

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		• Technical Cooperation Agreement 1/2020, signed among the CGU, AGU, TCU, MJSP, and STF, establishing mechanisms for sharing information among the public institutions involved in the negotiation and supervision of leniency agreements. Although the MPF participated in the negotiations, it did not join the technical cooperation agreement according to Technical Note No. 2/2020, the main argument being that "it is unconstitutional to rule out the legitimacy of the MPF in entering into Leniency Agreements, with legal entities, under the regime of Law No. 12,846/2013". • Brazilian Anti-Corruption Plan: Anti-Corruption Plan for the period between 2020 and 2025, with the objective of structuring and executing actions to improve, within the federal Executive Branch, the mechanisms of prevention, detection, and accountability for acts of corruption, advancing in the compliance and improvement of anti-corruption legislation and the international recommendations. Particularly regarding the mutual legal assistance treaty in criminal affairs (MLAT), it would be recommended to expand the number of states with which Brazil has bilateral agreements. As of today, there are only more than 20 bilateral agreements, and some countries that Brazil has strong cultural and economic ties do not have agreements with Brazil, such as Germany and Japan.
5.b	Intensify efforts to provide guidance and regular training to the Federal Police Department (DPF), the FPS, and the CGU on the foreign bribery offence, the CLL, the basis and method of calculation of the proceeds of the bribe, and, as necessary, the new investigative techniques available under the Organised Crime Law; [Convention Article 5; 2009 Recommendation XIII and Annex I D]	Brazil's law enforcement agencies – including the Federal Police, the MPF, and the CGU – have undertaken trainings on fighting transnational and foreign corruption as part of the *Fighting Transnational Corruption* Week held in Brasilia. Such trainings counted with the participation of individual from foreign and international law enforcement and policy-making organizations, such as the DOJ and the OECD.
5.c	Ensure that sufficient resources and skills are available within the DPF, the FPS, and the CGU in order to fight foreign bribery; and consider creating a national corruption-fighting unit within the Federal Prosecution Service and specialised police units within the Federal Police Department; [Convention Article 5; 2009 Recommendation XIII and Annex I D]	
5.d	Encourage law enforcement authorities to make full use of the broad range of investigative measures available in foreign bribery investigations, including special investigative techniques and access to financial information; and ensure by any appropriate means that the use of the general and special investigative	Brazilian authorities have been making use of a wide range of international cooperation measures to seek financial information and recover assets in bribery cases. During Operation Car Wash, the number of international cooperation requests reached the highest rates the country has ever seen with 2,329 new requests in 2017. This investigation alone resulted in 597 requests to 58 countries, especially in relation to financial or tax information and the freezing of over BRL 2,1 billion in assets (information provided by the MPF and updated until January 2021). The number of requests resulted in restructuring of authorities

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	techniques contained in the Code of Criminal Procedure is available in practice in the context of the administrative and civil proceedings under the CLL; [Convention Article 5; 2009 Recommendation XIII and Annex I D]	in certain jurisdiction to ease the flow of communication, like Switzerland that created its own task force to handle cases arising from Operation Car Wash. In 2021, the number of new judicial cooperation requests decreased to 1,558, which is still a significant rate.
5.e	Take necessary measures to: (i) ensure that all credible foreign bribery allegations are proactively investigated; and (ii) gather information from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations; [Convention Article 5; 2009 Recommendation XIII and Annex I D]	No comment.
5.f	Clarify in the implementing Decree to the CLL that factors forbidden under Article 5 of the Convention cannot be taken into account in the decision to initiate, conduct or close the proceedings against a legal person. [Convention Article 5]	To the best of the group's knowledge, such a recommendation has not been added in Decree No. 11,129/2022.
6	Regarding cooperation agreements and leniency agreements, the Working Group recommends that Brazil: (i) make public, where appropriate, certain elements of leniency and cooperation agreements concluded in foreign bribery cases, such as the reasons why an agreement was deemed appropriate in a specific case and the terms of the arrangement; and (ii) take all necessary measures to ensure diversion (under Law 9.099), cooperation agreement (under the Organised Crime Law) and leniency agreements (under the CLL) are applied consistently, including by providing training to prosecutors and issuing guidance on the elements that may be taken into consideration in deciding whether to enter into such agreements. [Convention Articles 3 and 5; Commentary 27; 2009 Recommendation Annex I.D]	CGU and AGU release periodic publications concerning leniency agreements on its website mentioned in item 4.(c). Additionally, in July 2020, the CGU published its Manual for Evaluating Integrity Programs in Leniency Agreements. The Technical Cooperation Agreement ACT No. 1/2020 was signed between CGU, AGU, TCU, MJSP, and STF to define a protocol for sharing information in leniency agreements. As mentioned before, the Joint Ordinance No. 04/2019, published by CGU and AGU, ensures the joint action of CGU and AGU in the negotiation and execution of leniency agreements, as well as the procedures before, during and after closing of the agreement, especially in respect to the publication. The Joint Ordinance also tackles the issue of consistency in the leniency agreement, setting out a Leniency Agreement Directorship to review all proposals, to supervise and coordinate the leniency agreement commissions and follow up in leniency agreement obligations.
7	Regarding jurisdiction, the Working Group recommends that Brazil clarify by any appropriate means that the jurisdiction over legal persons under article 28 of the CLL should be broadly interpreted and cover, in particular (i) companies not incorporated in Brazil if their main seat is in Brazil; and (ii) companies that have their	In this regard, please see our response to item 3(e).

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	main management and control situated in Brazil even if some part of this function is located outside of Brazil. [Convention Article 4]	
8	Regarding the statute of limitations, the Working Group recommends that Brazil (i) urgently take steps to ensure that the statute of limitations for natural and legal persons for foreign bribery allows adequate time for investigation, prosecution, sanctioning, and the completion of the full judicial process, including in cases where the final sentence is at the lower end of the scale; and (ii) clarify its ability to extend the timeframe for administrative proceedings against legal persons. [Convention Article 6]	Brazil has already undergone discussions regarding the statute of limitations after the Car Wash operation; however, they are still pending and have increased the public debate on this matter. In addition, in 2010, the Criminal Code was amended to increase the time for reaching statute limitations for criminal offenses. More recently, the amendments to the Administrative Improbity Law have also modified the timing limits for applying such legislation. Federal Law No. 14,130/2021 changed the statute of limitation to file administrative improbity lawsuit to apply the sanctions set forth in said legislation. Currently, the statute of limitation is eight (8) years counting from the fact that constitutes administrative misconduct. The CLL establishes that "the violations provided in this Law are subject to a five-year (5) statute of limitations, commencing from the date of awareness of the infraction or, in the case of an ongoing or repeated infraction, from the day it ceases". In addition, in the administrative or civil spheres, the statute of limitation is interrupted in the event investigative proceedings are opened or, in the case of an ongoing or repeated infraction, the day it ceases. However, cases that involve financial harm to the Brazilian treasury must consider a specific ruling on the statute of limitation from STF, handed down during Extraordinary Appeal No. 852475, Theme 897. This decision established that lawsuits regarding compensation for financial harm to the Brazilian treasury resulting from a willful act of administrative improbity are not subject to the CLL's statute of limitations. The STF also determined that changes to the statute of limitations provided for in Law No. 14,230/2021 cannot be applied retroactively, even to cases that have yet to receive a final, unappealable ruling that could benefit the defendant. This law had extended the statute of limitations for acts of improbity from five to eight years after the infraction – or, in the case of repeated violations, eight years from when the illicit act ceased. Therefore, the new statute of limitations only applies to administrative improbity lawsuits filed from October 26, 2021, when Law No. 14,230/2021 took effect.
9	With respect to mutual legal assistance, the Working Group recommends that Brazil take steps to ensure bank secrecy does not cause unnecessary delays in providing MLA in foreign bribery cases. [Convention Article 9; 2009 Recommendation XIII.i]	Decree 11,129/2022 puts the International Affairs Special Advisory in charge of managing, following up, and evaluating international cooperation agreements and MoUs with bodies, entities, and international organizations, as well as the international conventions and obligations that the Federal Government has undertaken and regards the CGU. In a vote in the STF on September 29, 2022, judge Gilmar Mendes recognized that the Mutual Legal Assistance Treaty (MLAT) between Brazil and the United States was constitutional. However, he also stated that this should not be the only way for the Brazilian courts to obtain information on private

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		communications in the event of a judicial investigation. In addition to the MLAT, Brazil is also a signatory to international treaties for legal cooperation between countries, such as the United Nations Convention against Corruption and the United Nations Convention Against Transnational Organized Crime. In August 2018, Brazil enacted its General Data Protection Law (Federal Law No. 13,709/2018), commonly known as the LGPD. The law allows for international data transfers when required for international legal cooperation between state intelligence, investigation, and prosecution entities (in line with instruments of international law), or when they result from a commitment established via an international cooperation agreement. In April 2022, the Prosecutor General's Office (PGR) and the AGU signed a mutual agreement – Ordinance PGR/AGU 1/2022. The agreement provides that in the event legal cooperation with other countries becomes difficult (due to the lack of a mutual treaty or conditions for reciprocity between states), the Brazilian State may hire a private law firm in the relevant jurisdiction(s) to act on its behalf and facilitate legal cooperation.

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10	Regarding money laundering, the Working Group recommends that Brazil:	
10.a	Take the necessary measures to ensure that offenders cannot escape liability when laundering the proceeds of foreign bribery through legal persons; [Convention, Article 7; 2009 Recommendation V]	The Brazilian AML framework, mainly regulated by Law No. 9,613/98 and its regulations, sets forth legal obligations to private entities that operate in business sectors deemed as more susceptible to money laundering practices ("high-risk sectors"), including the obligations (i) to register and analyse information regarding clients and commercial partners, with the implementation of know your customer ("KYC") and know your partner procedures, (ii) to implement an anti-money laundering internal policy, (iii) to record financial activities, and (iv) to report suspicious financial activities or financial operations that exceeds a pre-fixed in-cash threshold to the Brazilian Financial Activities Control (*Conselho de Controle de Atividades Financeiras* - "COAF"). The purpose of these AML procedures is to mitigate the risks that companies' activities are used for concealing and disguising proceeds of crimes, as well as to ensure that suspicious activities are being tracked by the relevant investigative authorities, enabling the prosecution of money laundering, and correlated criminal offenses. Regarding KYC procedures, the law provides that they should cover not only the verification of the customer's identity, but also of the customer's qualification, including an assessment on whether he/she is a "politically exposed person" ("PEP"). The definition of PEP provided by Brazilian law covers

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		individuals who are or have been entrusted with a prominent function within the country or abroad. If the customer is a legal person, the company's administrators and beneficial owners will also be subject to KYC procedures. As for the suspicious transactions, the law provides that they must be reported to COAF, but the elements that characterize a suspicious transaction may vary from one regulated business sector to another. Some examples of red flags that are usually labelled as suspicious are the following: (i) frequent transfer of funds to or from a PEP; (ii) client related to a jurisdiction considered of high risk or inadequate in its AML policies and legislation by the Financial Action Task Force ("FATF"); (iii) client that resists to provide information needed for KYC records or transactions records, or if she/he provides unreliable information; (v) transactions that are not compatible with the client's financial situation or business activity. Entities that are subject to special control mechanisms and report duties under the AML includes financial institutions, companies that sell high value or luxury goods, as well as jewellery or precious stones and metals, insurance companies, investment and securities companies and cash-in-transit companies. In the last two years, this list has been amended to also cover betting companies and cryptocurrency companies. This is an indication of awareness of regulators about the relevance of expanding AML requirements to business sectors that are not entirely regulated in Brazil, but that undoubtedly pose a risk for money laundering. These general AML requirements provided by the Anti-Money Laundering Act are complemented by ordinances and resolutions issued by the agencies that oversee some of the high-risk business sectors, and that establish more specific obligations aligned with the risks posed by each one of these sectors. The non-compliance with AML procedures set forth by law may lead to administrative sanctions to the companies and its administrators, namely: (i) warning; (ii) fines capped by a) two times the value of the transaction; b) two times the real profit or the presumable profit that would arise from the transaction; or c) BRL 20,000,000.00 (twenty million reais, approximately US 4,000,000.00); and (iii) partial or total suspension of company's activities or operation. **Criminal Prosecution:** Pursuant to the Brazilian Anti-Money Laundering Act, money laundering is a crime punishable by imprisonment from 3 to 10 years and a fine. Penalties may be increased from one to two thirds if the crime is committed repeatedly, through a criminal organization or using cryptocurrency. Besides the penalty of imprisonment, a fine may also be imposed at the end of the prosecution. This fine range from approximately BRL 404.00 (US 80) to BRL 6,544,800 (US 1,308,960.00), depending on the defendants'

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		financial standing and the severity of the criminal offense. Also, the proceeds of crime may be seized during prosecution. As most crimes, Brazilian Law does not provide for corporate criminal liability. This means that liability arising from the crime of money laundering targets individuals, not companies. However, companies may be impacted by precautionary measures, including the freezing of financial assets, which may be granted at any stage of a criminal investigation or lawsuit launched against individuals. The standard for a precautionary measure to target the company requires indication that the company was used for the practice of crimes and/or has benefited from its financial results. In this sense, the Brazilian Anti-Money Laundering Act establishes that a precautionary measure of freezing of assets may be granted at any stage of the criminal proceeding if there is minimum evidence of the occurrence of the crime and of who has committed it. This measure may also impact companies that were used as instrument of the criminal offense. There is no strict liability in relation to criminal matters under Brazilian law. To be held criminally liable for money laundering, an individual must act with knowledge and intent (*mens rea*), which means that at least in theory, actions committed with negligence or omissions, cases in which there was no actual intent to commit the crime, are not enough to establish criminal liability. However, the *meas rea* element as set forth in Brazilian law is characterized not only when the individual wants the criminal result, but also when he/she takes the risk of producing it. In this case, the perpetrator is aware that his/her conduct may lead to an illicit result, accepting its occurrence, even though it is not desired in a direct manner. When it comes to money laundering, a judicially made doctrine known as wilful blindness expands the definition of the *mens rea*, element required for criminal liability, to encompass cases in which the individual intentionally fails to make reasonable inquiry when faced with the high suspicion of the illegal source of the money. In other words, if an individual had a reason to suspect that the money was "dirty"/illegal but did not take any action to confirm or disprove his belief, and even so agreed to receive the money, he/she may be convicted for accepting the risk to took part in in a money laundering activity. Considering the above-mentioned doctrine, employees or representatives from companies which activities are subject to AML procedures, but that do not properly comply with them, may be held criminally liable for aiding and abetting money laundering practices committed by clients, depending on the circumstances of the case.

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10.b	Maintain statistics on investigations, prosecutions and sanctions for money laundering, including data on whether foreign bribery is the predicate offence; [Convention, Article 7 and 2009 Recommendation, III (i)];	Launched in March 2014, the Car Wash Operation uncovered an alleged corruption scheme in which construction firms were accused of paying millions in bribes and non-declared campaign donations to politicians and public officials in Brazil and abroad, in exchange for getting contracts from government and state-controlled companies. The purported scheme also involved the concealment and disguising of the illicit gains that were laundered through a network of shell companies, off-shore bank accounts, and off-book transactions throughout the world. The MPF's official website keeps updated data of the main results of the Car Wash Operation,[19] including numbers of pretrial detentions, search and seizures, plea deals, criminal charges, and international cooperation requests, with the indication of the number and matter of the judicial requests received by or sent to more than 60 countries, as well as and the amounts of money that have been recovered during the Operation.[20] According to the MPF's website, 2,1 billion reais (US 420,000,000) in values and goods are frozen abroad due to Car Wash Operation.[21] It is worth noting that the National Strategy to Combat Corruption and Money Laundering ("ENCCLA"), an organization that is linked to the MJSP, has already set as one of the Strategy's main goals for 2023 to map and to debate the flow of investigation and prosecution of crimes of money laundering and asset recovery (ENCCLA's Action 5/2023). ENCCLA works as the main net of institutional articulation in Brazil for the discussion and implementation of public policies aimed at preventing and fighting crimes of money laundering and corruption. Created in 2003, it currently has approximately 80 members (government entities from the Executive, Judiciary and Legislative branches). In light of the Brazilian Government's commitment with the improvement of the procedures for the prevention and punishment of money laundering, ENCCLA's goal is to prioritize the creation of an unified database, considering that the gathering of data and statistics is essential to support the definition of public policies on the matter. Finally, the State and Federal Courts of Appeals, as well as the Superior Court of Justice (Superior Tribunal de Justiça – "STJ") and the STF, provide free and online access to case law that allow the research of money laundering and corruption related cases by anyone.
10.c	Ensure that institutions and professions required to report suspicious transactions, their supervisory authorities, as well as the Council of Control of Financial Activities receive appropriate directives, including typologies on	Brazilian authorities have successfully developed and implemented a handful of legal and infra-legal norms that address aspects related to the prevention and combating of money laundering, the financing of terrorism and proliferation of weapons of mass destruction (AML), among which are:

[19] Available on: https://www.mpf.mp.br/grandes-casos/lava-jato/resultados (access on April 3rd, 2023).
[20] Available on: https://www.mpf.mp.br/grandes-casos/lava-jato/efeitos-no-exterior (access on April 3rd, 2023).
[21] Available on: https://www.mpf.mp.br/grandes-casos/lava-jato/efeitos-no-exterior (access on April 3rd, 2023).

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	money laundering related to foreign bribery and training on the identification and reporting of information that could be linked to foreign bribery. [Convention, Article 7; 2009 Recommendation III.i]	• Federal Law No. 13,974/2020: Published on January 8, 2020, provides on the COAF, instituted by Article 14 of the Brazilian AML. • Federal Law No. 13,810/2019: Published on March 8, 2019, provides on the enforcement of sanctions imposed by United Nations Security Council (CSONU) resolutions, including the freezing of assets of natural and legal persons and entities, and the national designation of persons investigated or accused of terrorism, its financing or related acts. • Federal Decree No. 9,828/2019: Published on June 5, 2019, regulates Federal Law No. 13,810/2019, to provide for compliance with obligations imposed by the existing United Nations Security Council (CSONU) and by designations of its legal committees, including the unavailability of assets of natural and legal persons and of entities, and the national designation of persons investigated or accused of terrorism, it financing or related acts. • Federal Law No. 13,260/2016: Published on March 16, 2016, regulates the provisions of subsection XLIII, Article 5 of the Federal Constitution, disciplining terrorism, dealing with investigative and procedural provisions, and reformulating the concept of terrorism organizations. • COAF Resolution No. 41: Published on August 8, 2022, provides on the fulfillment of the duties to prevent money laundering and the financing of terrorism and the proliferation of mass destruction weapons, legally attributed to commercial or mercantile development companies (factoring). • COAF Resolution No. 40: Published on November 22, 2021, provides on the procedures to be observed, in relation to politically exposed persons (PEP), by those who are subject to the supervision of the COAF. • COAF Resolution No. 36: Published on March 10, 2021, disciplines the form of adoption of policies, procedures, and internal controls to prevent money laundering and the financing of terrorism and the proliferation of mass destruction weapons, by those who are subject to the supervision of the COAF. • Bacen Circular No. 3,978: Published on January 23, 2020, provides on the policy, procedures, and internal controls to be adopted by the institutions authorized to operate by the Bacen aimed at the prevention of the use of the financial system for the practice of the crimes of "laundering" or concealment of assets, rights, and values, as disposed on the AML. • SUSEP Circular No. 612: Published on August 18, 2020, provides on the policy, procedures and internal controls destined specifically to prevent and combat the crimes of "laundering" or concealment of

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		assets, rights and values, or the crimes that may be related to them, as well as to prevent and restrain the financing of terrorism. • CVM Resolution No. 50: Published on August 31, 2021, provides on the prevention of money laundering, the financing of proliferation of mass destruction weapons within the securities market. • COFECI Resolution No. 1,336: Published on October 20, 2014, with the aim to prevent the crime of money laundering, the financing of terrorism and the proliferation of mass destruction weapons, as disposed on the AML, provides that its provisions must be observed by all individuals and legal entities that exercise activities of real estate promotion or purchase and sale of real estate, on a permanent or occasional basis, in a primary or accessory manner. • PREVIC Normative Instruction No. 34: Published on October 28, 2020, provides on the policy, procedures, and internal controls to be adopted by the closed complementary welfare entities aimed at the prevention of the use of the regime for the practice of the crimes of money laundering or concealment of assets, rights, and values, and of terrorism financing, as foreseen on the AML. • COAF's Integrated Management Report 2022: Report with the consolidation of COAF's results for 2022 with information related to indications of money laundering crimes and the corresponding measures taken.
11	Regarding accounting and auditing, the Working Group recommends that Brazil:	
11.a	In regards to false accounting (i) ensure that the full range of conduct described in Article 8(1) of the Convention is prohibited; (ii) ensure that both natural and legal persons can be held liable for false accounting; (iii) raise awareness of the false accounting offence among accounting professionals and law enforcement; and (iv) ensure false accounting is vigorously investigated and prosecuted, where appropriate; [Convention Article 8(1); 2009 Recommendation X.A.i]	To the group's best knowledge, there has been no action in this area.
11.b	Raise awareness of foreign bribery among accountants and auditors, including by providing training on foreign bribery indicators and auditors' reporting obligations in respect of foreign bribery; [2009 Recommendation X]	To the group's best knowledge, there has been no action in this area.

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11.c	Require auditors to report all suspicions of foreign bribery to corporate monitoring bodies, where appropriate, and consider requiring them to report to the competent law enforcement authorities. [2009 Recommendation X.B.iii and v]	Even though under international law e regulations, accountants have a responsibility to report any potential international corruption it is important to note that the Brazilian law does not impose such obligation to accountants or any other internal or external consultants. Nonetheless it is crucial to bear in mind that the criminal code criminalizes their participation on domestic or transnational bribery among other illicit activities. It is worth stressing that accountants are compelled to report suspicious activities according to the AML rules as aforementioned in this paper.
12	Regarding corporate compliance, internal controls and ethics, the Working Group recommends that Brazil continue to encourage companies, particularly unlisted companies and SMEs, to (i) develop, and adopt adequate internal controls, ethics and compliance systems to prevent and detect foreign bribery, including by providing guidance in the context of the implementing Decree to the CLL and by promoting the OECD Good Practice Guidance, and (ii) to develop monitoring bodies. [2009 Recommendation X.C.i]	As per the provisions stated in the Decree under analysis, article 56 requires companies to adopt effective compliance programs, which include risk assessment, internal policies and procedures, training and communication, monitoring, and reporting mechanisms. CGU encourages the adoption of integrity programs through a variety of measures, one of which is the Pro-Ética program, an initiative that seeks to foster the voluntary adoption of integrity measures by private companies through public recognition of those that, regardless of their size and line of business, show a commitment to implementing measures to prevent, detect, and remediate acts of corruption and fraud. The Pro-Ética program was established with the following objectives: • To foster, within the private sector, the implementation of measures to promote ethics and integrity and against corruption. • To raise the awareness of companies about their important role in the fight against corruption. • To reduce the risks of fraud and corruption in relations between the public and private sectors. • Recognize good practices in promoting integrity and preventing corruption in enterprises that voluntarily adopt - Desirable and necessary measures to create a more integrity, ethical and transparent environment in the private sector and in its relations with the public sector. According to a note on the CGU website, Pro-Ética has received several international recognitions. The OECD considers it "a positive effort by the Brazilian government". According to UNODC, "it is one of the best examples of incentives for companies to voluntarily invest in anti-corruption programs and other measures to strengthen corporate integrity". According to the recent rule, compliance programs should address not only the risks posed by corruption but also other relevant legal and regulatory requirements.

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		Even though it seems obvious for any seasoned compliance professional unfortunately it is not presumable that the senior management of unlisted companies would spontaneously comply with a basic ethics code. With that been said it is an achievement that the bill at hand establishes that the legal entities must also preconize a culture of integrity and transparency, where employees are encouraged to speak up and report potential wrongdoings. However, there are still a number of improvements regarding whistleblower protections that need to be included in Brazilian laws.
13	In respect of tax measures to combat bribery of foreign public officials, the Working Group recommends that Brazil:	
13.a	Take appropriate measures to ensure that the denial of tax deductibility is not contingent on the opening of an investigation by law enforcement authorities or on court proceedings; [2009 Recommendation III. iii, VIII; 2009 Tax Recommendation I]	The Federal Revenue Service of Brazil has an important role in investigations into corruption illicit activities. Among the activities of financial activities is the investigation of irregularities and that, in some cases, may involve acts of corruption. In the exercise of its activities, the Brazilian Federal Revenue Service regularly inspects companies that make payments to individuals or legal entities that may be under investigation, to seek information on whether such payments were made in exchange for legitimate services or products. In the case of an unjustified payment or payments that may have been made as part of a corruption scheme, the Brazilian Federal Revenue Service can challenge the deductibility of such payments as expenses and seek to collect taxes and fines.
13.b	Provide adequate guidelines and training on the types of expenses that constitute bribes to foreign public officials, including through disseminating the OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors, and extend such dissemination to relevant taxpayers; [2009 Recommendation VIII; 2009 Tax Recommendation I]	No comment.
13.c	Remind tax auditors of their obligation to report to law enforcement authorities any instances of bribery of foreign public officials that come to their knowledge in the performance of their functions; [2009 Recommendation III. iii, VIII; 2009 Tax Recommendation II]	Government officials are under obligation to report violations to law enforcement agencies. During tax assessments, officials of the Brazilian Federal Revenue Service may file tax representations for criminal purposes with the prosecutor's office with jurisdiction over the conduct, so thar prosecutors may initiate a criminal investigation. There are judgments that establish that the Federal Revenue Service must forward to the MPF the tax representation for criminal purposes even if no fine is imposed on the taxpayer.
13.d	Consider ratifying the Convention on Mutual Administrative Assistance in Tax Matters and consider systematically including the language of Article 26 of the OECD Model Tax Convention in all future bilateral tax treaties with countries that are not signatories to the Convention on Mutual Administrative Assistance in Tax	On August 29, 2016, Brazil formally adopted the Multilateral Convention on Mutual Administrative Assistance in Tax Matters ("Multilateral Convention"), which had been signed in 2011.

	OECD Recommendations	IBA Comments
Recommendations for ensuring effective prevention, detection and reporting of foreign bribery		
	Matters. [2009 Recommendation VIII; 2009 Tax Recommendation I].	
14	With respect to awareness-raising and reporting of foreign bribery, the Working Group recommends that Brazil:	
14.a	Increase civil society's awareness of foreign bribery, and continue its foreign bribery awareness-raising efforts within the public and private sectors, across all states, and particularly amongst SMEs; [2009 Recommendation VIII, IX.i and ii; 2009 Tax Recommendation II]	In additional to the primers and good practice guides dealing with transnational bribery already mentioned in items 1 and 3(b), the CGU has also published its Guide to Good Integrity Practices for SMEs[22] and Best Practices Guide for Protecting Your Business against Corruption,[23] which seek to provide enterprises with guidance on the importance of integrity. The documents address topics such as risk analysis, penalties, and ethics for small businesses, among other subjects.
14.b	Continue to systematically provide clear guidance to officials in foreign representations on their reporting obligations in respect of foreign bribery and take steps to increase detection efforts; [2009 Recommendation VIII, IX.i and ii]	
14.c	Regarding whistleblowing, put in place appropriate measures to ensure that private sector employees who report in good faith and on reasonable grounds suspected acts of foreign bribery to competent authorities are protected from discriminatory or disciplinary action [2009 Recommendation IX.iii and Annex I.A]	Provisions for whistleblowing have been addressed by Decree No. 10,153/2019 (amended by Decree No. 10,890/2021), which establishes procedures to protect the identity of whistleblowers who report illicit acts against Brazil's public administration, through an on-line open access platform called Fala.BR.
15	Regarding public advantages, the Working Group recommends that Brazil:	
15.a	Establish formal guidelines for all three export credits agencies addressing (i) the conduct of due diligence of potential exporters and applicants; (ii) the consequences of a client or applicant being the subject of credible allegations or convictions of foreign bribery, either before or after approving support; and (iii) the disclosure of credible evidence of foreign bribery to law enforcement authorities; [2009 Recommendation XII.ii; 2006 Export Credit Recommendation]	Regarding Brazilian export and import activities and relations, it is important to mention the actions developed by the Brazilian Trade and Investment Promotion Agency (ApexBrasil), which acts to promote Brazilian products and services abroad and attract foreign investment to strategic sectors of the Brazilian economy. Among others, the Agency works in coordination with public and private actors to attract foreign direct investment to Brazil, focusing on strategic sectors for the development of the competitiveness of Brazilian companies and the country. Recently, in 2023, ApexBrasil published the "Customer Conduct Guide - Brazilian Companies". The document aims to present the rules of conduct and guidelines to be observed by the Brazilian companies that are clients of the Agency, as well as to contextualize hypotheses of integrity risks, to preserve the image and responsibility of the Agency and of Brazil as a business partner. The Guide was prepared based on the principles of legality, impersonality, morality, transparency, equity, and corporate responsibility, with the purpose of strengthening Governance and Compliance instruments.

[22] Guide to Good Integrity Practices for SMEs.
[23] Best Practices Guide for Protecting Your Business against Corruption.

	OECD Recommendations	IBA Comments
Recommendations for ensuring effective prevention, detection and reporting of foreign bribery		
15.b	Extend its Registry of Ineligible and Suspended Companies to cover enterprises that are determined under Brazilian law to have committed foreign bribery; [2009 Recommendation III.vii; XII.ii]	Companies violating the CLL due to foreign bribery will be included in relevant registries. However, due to technical and confidentiality issues, the inclusion may not contain a specific reference to the nature of the specific violations.
15.c	Encourage public contracting authorities to consider, as appropriate, internal controls, ethics and compliance programs in their decisions to grant public procurement contracts. [2009 Recommendation X.C]	Under certain conditions, compliance programs are considered in Public Procurement Law.

		IBA Comments
Follow-up by the Working Group		
16	The Working Group will follow up on the issues below as case law and practice develops:	
16.a	Whether the foreign bribery offence in the Penal Code (i) covers all elements of the definition of foreign public official; and (ii) covers all bribes offered, promised or paid in return for acts which provide an advantage in the conduct of international business.	The definition of foreign public official in the Penal Code is quite broad and covers all elements of the definition of foreign public official of the OECD Anti-Bribery Convention. Moreover, the crimes in the Penal Code meet the said standards.
16.b	Brazil's offence of concussão to ensure it cannot be used as a basis to preclude the prosecution of a perpetrator for the offence of bribery of a foreign public official.	To the group's best knowledge, there has been no case law as described.
16.c	Whether the sanctions imposed in practice for foreign bribery are effective, proportionate and dissuasive, including with regard to (i) the use of post-sentencing cooperation agreements; (ii) the sanctions imposed on companies which receive financing from the State, mainly through development banks; (iii) the use of leniency agreements under the CLL; and (ii) the application of civil sanctions and confiscation that may result from a separate civil action.	To the group's best knowledge, although there have been cases, it is not possible to agree or disagree with such statement given the lack of critical mass of caseload.
16.d	The performance of the DPF and the FPS with regard to foreign bribery allegations, including decisions not to open investigations.	To the group's best knowledge, although there have been cases, it is not possible to agree or disagree with such statement given the lack of critical mass of caseload.
16.e	Whether the complexity of the administrative proceedings and the number of actors potentially involved may constitute an obstacle to the establishment of the liability of legal entities.	No comment.

		IBA Comments
Follow-up by the Working Group		
16.f	The application of judicial pardons in cases of foreign bribery, and whether they are used appropriately.	To the group's best knowledge, there have been no cases of judicial pardons in cases of foreign bribery.
16.g	Whether the FPS exercises the control provided under article 20 of the CLL to apply both administrative and civil sanctions in the case of omission of the CGU.	To the group's best knowledge, it is hard to determine whether the FPS exercises the said control. However, the FPS is empowered with both legal and financial resources to carry on its mission.
16.h	How jurisdiction is exercised over natural and legal persons when the offence takes place in part or wholly abroad.	We are aware that the CGU and the MPF have initiated enforcement actions due to violations that took place in part abroad.
16.i	Whether requirements on companies to submit to external audits are adequate; and whether the independence of auditors is sufficiently ensured, particularly for companies which are economically significant but are not listed.	No comment.
16.j	The enforcement of the non-tax deductibility of foreign bribes, particularly whether Brazilian courts promptly inform the tax authorities of convictions related to foreign bribery, and whether tax authorities examine the tax returns of taxpayers convicted of foreign bribery.	To the group's best knowledge, there have not been such reports.
16.k	Whether tax information can effectively be shared in the course of foreign bribery investigations and prosecutions.	Yes, the information can be shared in the course of foreign bribery investigations and prosecutions, provided that the legal requirements of the jurisdictions involved (such as due process) are met. In addition to due process, other provisions may apply, depending on the specificities of the double-taxation agreements signed by the Brazilian government with other jurisdictions.
16.l	Brazil's ability to promptly and effectively respond to foreign bribery-related MLA requests, including those related to legal persons, and those related to Brazil's declaration on Article 9(3).	Brazil has opted for a de-centralized model of MLA requests, in which the federal and the local FPS enjoy a great deal of freedom to liaise with foreign counterparts, which expedited greatly the pace of international cooperation. However, the National Secretariat of Justice of the Executive branch is considering the centralize the MLA requests.
16.m	Brazil's extradition practices to ensure that the consideration of Article 5 factors does not impede Brazil's ability to provide extradition in foreign bribery cases.	No comment.
16.n	Whether Brazil engages the private sector in future development aid projects including through BNDES or a future BRICS's Multilateral Development Bank.	No comment.

Annex I – List of contributors

Name	Position in the Committee	Employment	Experience
Adriana Menezes Dantas	Co-Vice Chair, ACC	Partner at Lefosse Advogados in São Paulo, Brazil	
Ana Elisa Bertolin da Silva	N/A	Associate at FreitasLeite Advogados	Bachelor of Law (State University of Londrina). Lawyer active in anti-corruption and compliance.
Clarissa Oliveira	Publications Officer	Partner at Chinaglia Oliveira Advogados in São Paulo, Brazil	Master in Business Crime Defense (GVLaw -2011). White Collar Crimes, Corporate Investigations and Compliance Practicioner since 2003. Speaker in several international events about the Brazilian Criminal System and Cross Border Investigations.
Isadora Fingermann	N/A	Partner at TozziniFreire Advogados	Master in policy management (Georgetown University) and specialist in White-Collar Crime (FGV/SP). More than 20 years practicing criminal law, with extensive litigation experience in Brazil. Author of numerous articles in criminal matters and member of IDDD's Advisory Board.
Juliana Maia Daniel	Co-Vice Chair, Compliance Subcommittee	Partner at Lefosse Advogados in São Paulo, Brazil	Master in Civil Procedure (USP), Master Proféssionel in Global Governance Studies (M2 – Institut d'Études Politiques de Paris). Practiced in anti-corruption and competition litigation for over 12 years. Reviewer of the Brazilian Journal of Competition Law.
Karla Maeji	Webinar Officer	Partner at TozziniFreire Advogados in São Paulo, Brazil	Master in Laws (Columbia Law School) with extensive experience acting as counsel for foreign listed companies, focusing her practice on internal investigations and leniency agreements, especially in cases involving corruption, fraud and government procurement.
Leopoldo Pagotto	Advisory Board, Member	Partner at Freitas Leite Advogados in São Paulo, Brazil	PhD in Anti-corruption (Universidade de São Paulo). Practised in anti-corruption and compliance for 15 years. Author of numerous texts on Brazil's bribery laws.
Marcelo Ribeiro Oliveira	N/A	Partner at Lefosse Advogados in São Paulo, Brazil	Post-doctorate in Law (University of Salamanca), Ph.D. in Law (University of Lisbon). Former Federal Prosecutor where he was a member of the Federal Public Prosecutor's Office Money Laundering Group, the Permanent Advisory Committee on Leniency and Collaboration and the Working Group on Cryptoactive Securities and member of the Brazilian delegation before the OECD (2017-2022).

Name	Position in the Committee	Employment	Experience
Thiago Jabor Pinheiro	Membership Officer	Partner at Mattos Filho in Brasília, Brazil	Thiago holds an LLM from Harvard Law School and is currently a PhD candidate at FGV Direito in São Paulo, with the Mario Henrique Simonsen Scholarship.
Thiago Luis Santos Sombra	Data Protection Officer	Partner at Mattos Filho in Brasília, Brazil	Thiago holds PhD from University of Brasilia where he is also Law Professor. Former São Paulo State Attorney dealing with Anti-Corruption, and also acting before Supreme Court and Clerk at Superior Court of Justice. He was awarded with GIR 40 under 40 and is author of books and articles.

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