

The Brazilian flag is shown on the left side of the slide, featuring its characteristic green and gold colors with a blue globe in the center containing white stars and the motto 'EM E PROGRESSO' on a white banner.

PROCUREMENT AND ANTI-CORRUPTION EFFORTS: AN UPDATE FROM BRAZIL

**NOVEMBER 21, 2023
9:00 ET/ 11:00 BRASILIA
FREE WEBINAR**



Welcome

Professor Christopher Yukins
GW Law School

- Recording and materials at **www.publicprocurementinternational.com** and recording at **GW Law Government Procurement Law YouTube** page
- Questions & Answers (Q&A)
- Speakers' statements are in their personal capacities



Introduction

- Public procurement in Brazil was buffeted by the “Operation Car Wash” corruption scandal, [reshaped](#) by reform, and now is being redirected under re-elected President Luiz Inácio Lula da Silva. [Controversially](#), Lula was himself tarred by the “Car Wash” scandal and spent 580 days imprisoned before Brazil’s Supreme Court ruled his [imprisonment unlawful](#). Lula won the presidency again, and then his new administration withdrew Brazil’s coverage offer for entry into the WTO Government Procurement Agreement — an abrupt U-turn from the market-opening [initiative](#) of the prior Bolsonaro administration. This one-hour webinar, led by academics and attorneys from Brazil, will discuss the most recent developments under President Lula — anti-corruption, contracting and the future direction of public procurement in Brazil.

Panelists



Panelists



- [Mauricio Moreira Menezes](#) is a Full Professor of Business Law at the University of the State of Rio de Janeiro and partner of Moreira Menezes, Martins, Advogados. He is specialized in business law, including corporate, mergers and acquisitions, capital market, banking, business contracts, bankruptcy, anti-corruption and arbitration.
- [Renata Costa Rainho](#) is a visiting scholar at GWU Law School and a doctoral student in administrative law at [Universidade Federal de Minas Gerais](#) (UFMG) (Brazil). She is a lawyer specialized in administrative law, including infrastructure, PPPs (CP³P-F), government contracts, bidding procedures, compliance and anti-corruption.
- [Cesar Pereira C.Arb FCiarb](#) is a partner at Justen, Pereira, Oliveira & Talamini, based in São Paulo, Brazil. He is co-head of his firm's practices in infrastructure and in dispute resolution (arbitration and mediation). He has a doctorate in administrative law from PUCSP (Brazil) and has been a visiting scholar at GWU, Columbia University and the University of Nottingham. He is a Fellow of the Public Procurement Research Group at the University of Nottingham.

Topics

- Anti-corruption in the wake of Operation “Car Wash” (R. Costa Rainho)
- How Brazil’s companies have enhanced anti-corruption efforts (M. Menezes)
- Brazil turns away from the WTO Government Procurement Agreement (C. Pereira)
- Future of public procurement in Brazil — panel discussion



ANTI-CORRUPTION EFFORTS
Renata Costa Rainho



ONGOING PROCESS: “Car Wash”

LEGAL FRAMEWORK

Legal certainty and proper instruments.

ENFORCEMENT

Enforcement of the law for all.

DUE PROCESS OF LAW

Proceedings, general rules and principles as stated by law.

TRANSPARENCY

Accountability

LEGAL FRAMEWORK: updates

CLEAN COMPANIES ACT

Companies liable for corruption and other wrongdoings against national or foreign public administration. Federal Decree 11.129/22.

PUBLIC PROCUREMENT

Law n. 14.133/2021 updating bidding procedures, concentrating the regulation in a major bill and giving anti-corruption compliance an increasing relevance. PNCP.

IMPROBITY ACT

Administrative Improbity Law(L. 8.429/93) with several reforms in 2021 regarding sanctioning the conduct of public officials against the public administration

ENFORCEMENT AND TRANSPARENCY

National Registry of Punished Companies – CNEP, National Register of Debarred and Suspended Companies – CEIS, Leniency Agreements

TOTAL DE SANÇÕES VIGENTES 24.422	QUANTIDADE DE SANCIONADOS (PESSOAS FÍSICAS OU JURÍDICAS) 19.015
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Dados referentes aos cadastros de sanções aplicadas a pessoas físicas, jurídicas e servidores públicos federais e de acordos de leniência celebrados

Consulte a origem dos dados para saber a última atualização das informações específicas.

Visão geral de sanções e acordos de leniência vigentes

CADASTRO DE SANÇÕES E ACORDOS DE LENIÊNCIA	QUANTIDADE DE SANÇÕES E ACORDOS DE LENIÊNCIA VIGENTES	QUANTIDADE DE SANCIONADOS E CELEBRANTES DE ACORDOS (PESSOAS FÍSICAS OU JURÍDICAS)
CEIS - Cadastro de Empresas Inidôneas e Suspensas i	14.854	12.509
CNEP - Cadastro Nacional de Empresas Punidas i	850	527
CEPIM - Cadastro de Entidades Privadas sem Fins Lucrativos Impedidas i	4.009	2.209
CEAF - Cadastro de Expulsões da Administração Federal i	4.674	3.658
Acordos de Leniência i	35	112
TOTAL	24.422	19.015

The background of the slide is a grayscale image of the Brazilian national flag, showing the stars and the motto '15 de Novembro' and '15 de Novembro' on a banner. The text 'CHALLENGES FOR THE FUTURE' is overlaid in large white letters on the left side of the image.

CHALLENGES FOR THE FUTURE

WHISTLEBLOWING

Improving Brazil's legal framework with the best practices regarding anti-corruption efforts. OECDs 4th monitoring report.

LEGAL CERTAINTY

To encourage investments in our public procurement market (PPPs, infrastructure) it is essential to provide legal certainty.

COMPLIANCE

Anti-corruption in public procurement and the increasing relevance of corporate compliance programs. Additional incentives.



OBRIGADA

RENATA COSTA RAINHO

Visiting scholar at GWU Law School and a doctoral student in administrative law at Universidade Federal de Minas Gerais (UFMG) (Brazil). Attorney specialized in administrative law, including infrastructure, PPPs (CP³P-F), government contracts, bidding procedures, compliance and anti-corruption.

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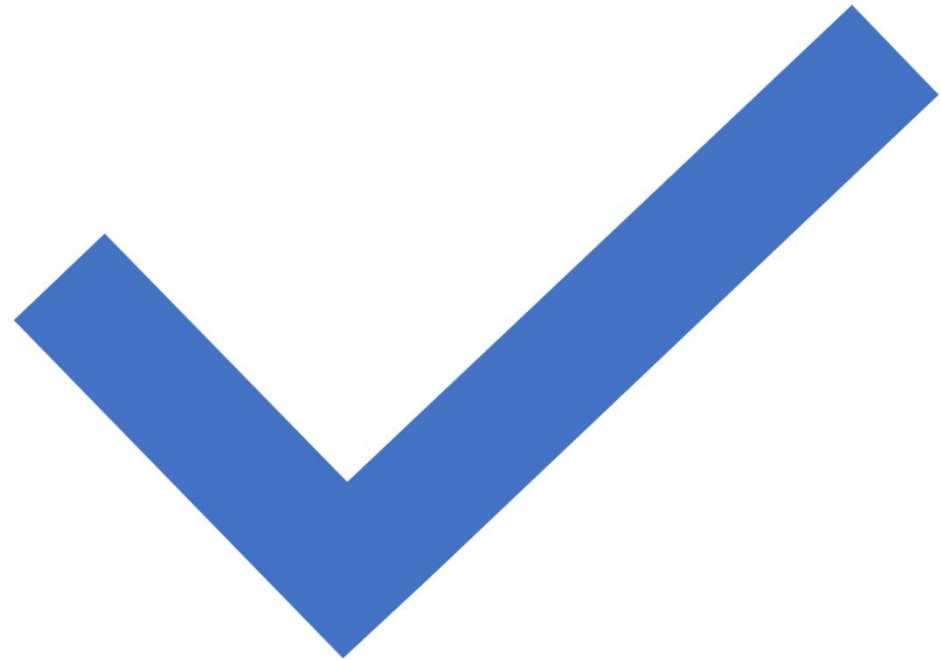
@rcostarainho

[linkedin.com/in/renata-costa-rainho-cpc-a-cp³p-f-6a802119b](https://www.linkedin.com/in/renata-costa-rainho-cpc-a-cp3p-f-6a802119b)



Compliance

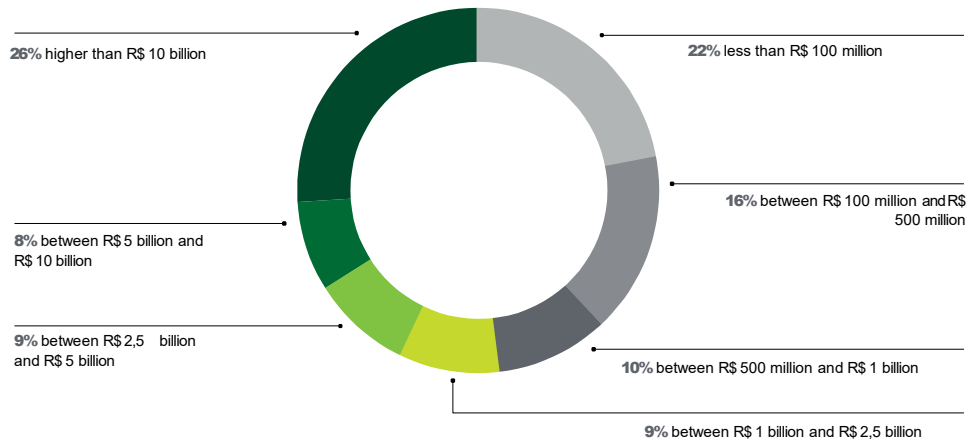
Mauricio Moreira Menezes



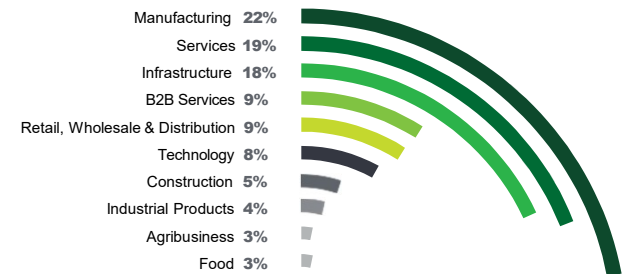
How Brazil's companies have enhanced anti-corruption efforts (2012-2023)

International Chamber of Commerce (ICC Brazil) and Deloitte research (2018)
211 selected companies

Net Revenue



Economic sector

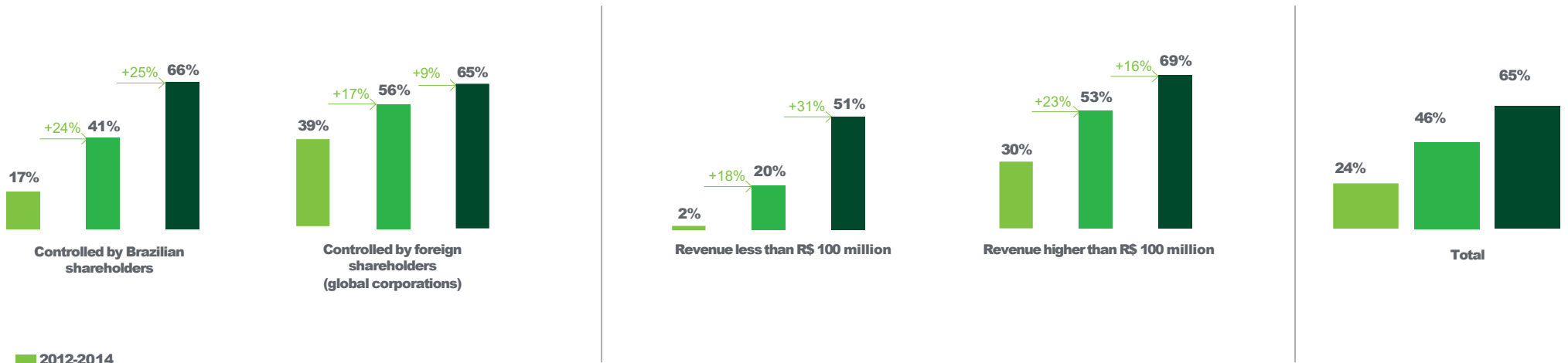


How Brazil's companies have enhanced anti-corruption efforts (2012-2023)

International Chamber of Commerce (ICC Brazil) and Deloitte research (2018)

Development of anti-corruption compliance: Brazilian private companies

Adoption of at least 15 among 30 anti-corruption practices:



■ 2012-2014
■ 2015-2017
■ 2018-2020*

* Expected at that time

How Brazil's companies have enhanced anti-corruption efforts (2012-2023)

International Chamber of Commerce (ICC Brazil) and Deloitte research (2018)

Development of anti-corruption compliance: Brazilian private companies

Adoption of anti-corruption practices to mitigate legal or regulatory risks:

	2012-2014	2015-2017	2018-2020*	
	19%	49%	63%	Education and training programmes on corporate integrity and anti-corruption practices
	25%	49%	62%	Remedies and internal sanctioning for violations
	19%	47%	61%	Compliance with Brazilian Clean Company Law
	25%	45%	59%	Fraud prevention procedures in public procurement
	19%	32%	49%	Compliance with Foreign Corrupt Practices Act (FCPA) rules
	16%	27%	41%	Compliance with UK Bribery Act rules

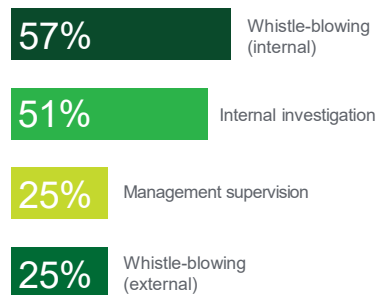
How Brazil's companies have enhanced anti-corruption efforts (2012-2023)

International Chamber of Commerce (ICC Brazil) and Deloitte research (2018)

Development of anti-corruption compliance: Brazilian private companies

Preventive measures and punishment: 32% of Brazilian companies experienced fraud or misconduct

How were fraud or misconduct detected? (multiple responses)



Effective preventive measures (multiple responses)



How Brazil's companies have enhanced anti-corruption efforts (2012-2023)

International Chamber of Commerce (ICC Brazil) and Deloitte research (2018)

Development of anti-corruption compliance: Brazilian private companies

Main challenges:



* Expected at that time

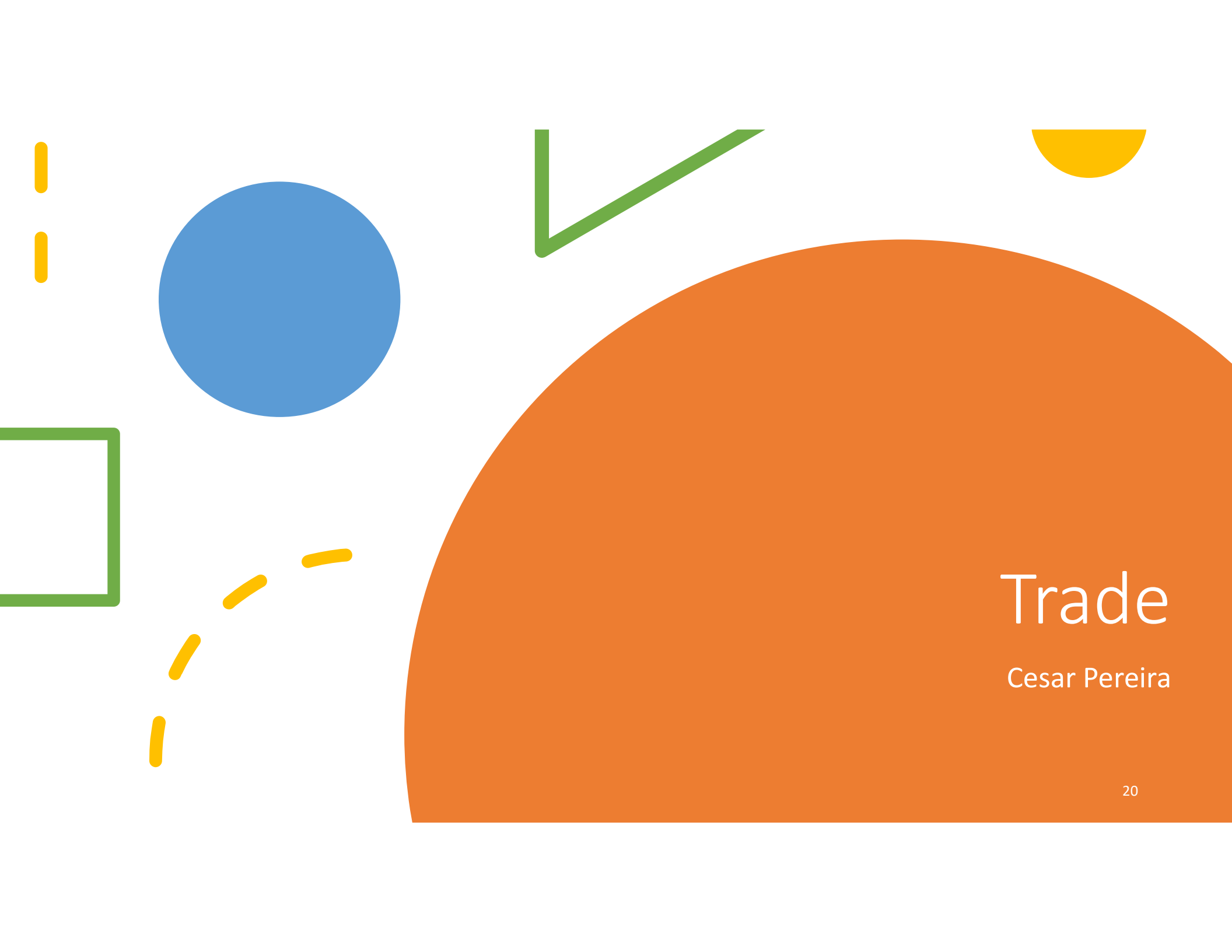
How Brazil's companies have enhanced anti-corruption efforts (2012-2023)

Current issues regarding Brazilian private companies

- The “multi-leniency” issue (companies must negotiate several settlements)
- The Clean Company Law: urgent improvements
- The OECD Report Phase 4: comments on Brazilian companies' practices

Final remarks and conclusion

- The impacts of Car-Wash Operation over Brazilian business organizations
- Do we need another Car-Wash Operation?
- Do we need “super-judges” or “super-prosecutors”?
- Reasonable expectations



Trade

Cesar Pereira

Brazil and the WTO/GPA: Fast-Track Engagement

Brazil became an observer in 2017
Application for accession came in 2020



GOVERNMENT PROCUREMENT

Agreement on Government Procurement

To ensure open, fair and transparent conditions of competition in the government procurement markets, a number of WTO members have negotiated the Agreement on Government Procurement (GPA).

[English](#) [French](#) [Spanish](#) All files>>

GPA/ACC/BRA/3/Rev.2/Suppl.1

Committee on Government Procurement - Accession of Brazil to the Agreement on Government Procurement - Final market access offer - Supplement

[Access: Restricted](#) | 21/06/2022 | 74 KB | Pages: 2 | Doc #: 22-4825

[English](#) [French](#) [Spanish](#) All files>>

GPA/ACC/BRA/3/Rev.2

Committee on Government Procurement - Accession of Brazil to the Agreement on Government Procurement - Final market access offer - Revision

[Access: Restricted](#) | 14/06/2022 | 265 KB | Pages: 23 | Doc #: 22-4637

[English](#) [French](#) [Spanish](#) All files>>

GPA/ACC/BRA/3/Rev.1/Suppl.1

Committee on Government Procurement - Accession of Brazil to the Agreement on Government Procurement - Revised market access offer - Supplement

[Access: Restricted](#) | 06/12/2021 | 68 KB | Pages: 1 | Doc #: 21-9145

[English](#) [French](#) [Spanish](#) All files>>

GPA/ACC/BRA/3/Rev.1

Committee on Government Procurement - Accession of Brazil to the Agreement on Government Procurement - Revised market access offer - Revision

[Access: Restricted](#) | 25/11/2021 | 230 KB | Pages: 19 | Doc #: 21-8900

[English](#) [French](#) [Spanish](#) All files>>

GPA/ACC/BRA/3/Add.1

Committee on Government Procurement - Accession of Brazil to the Agreement on Government Procurement - Initial market access offer - English translation of entities - Addendum

[Access: Restricted](#) | 28/05/2021 | 150 KB | Pages: 10 | Doc #: 21-4425

[English](#) [French](#) [Spanish](#) All files>>

GPA/ACC/BRA/3

Committee on Government Procurement - Accession of Brazil to the Agreement on Government Procurement - Initial market access offer

[Access: Restricted](#) | 03/02/2021 | 196 KB | Pages: 17 | Doc #: 21-0906



The largest domestic market in Latin America

Until 2023, the only Latin American country to negotiate its accession (Costa Rica is now applying to accede to the GPA)

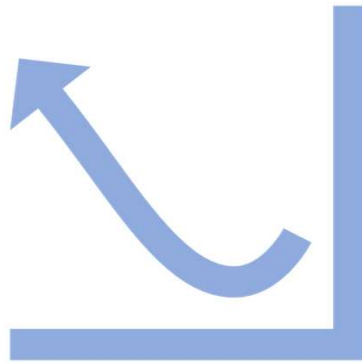
2021 Government Contracts Act

Unrelated to the GPA

More compatible with the GPA than previous legislation

No need to change most standards for GPA's harmonization.

GPA Accession



Objectives of the Federal Government:

- reduce costs
- increase competitiveness
- **private sector resistance**

Democratic process for GPA accession



Public consultation

- private sector
- Subnational government entities (states and municipalities)

Democratic process for GPA accession

Transparency

Agility

in the accession process

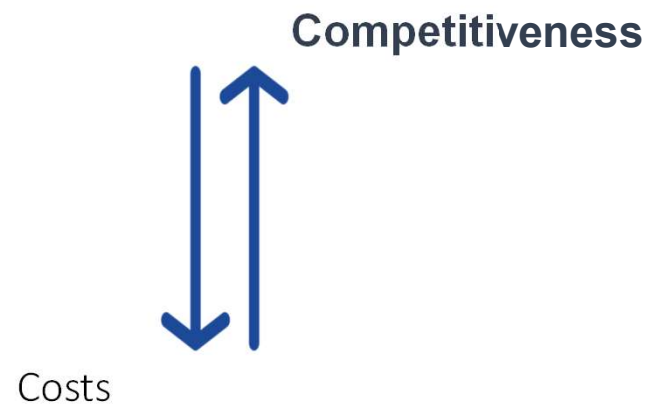
Dialogue



- National Industry Confederation (CNI)
- Handbook on Government Procurement Agreements (2018)
- Private Sector Voices Concerns and Recommendations

Benefits of GPA accession





Only 6.83% of public purchases carried out by the Brazilian federal government between 2011 and 2018 were awarded to foreign companies.

Access to the public procurement markets of GPA Member States
(within negotiated GPA Coverage)

Possible improvement in public sector governance

Brazil's 2021 Government Contracts Act, the latest public procurement reform, has already sought to improve governance in this area



Possible change in the historical traits of public procurement in Brazil

- Extremely formal
- Strict rules
- Many statutory definitions



- Accession to GPA can change this environment by bringing new views
- Brazilian government has already taken measures to reduce hidden barriers to the participation of foreign bidders



Regional leadership of Brazil in Latin America

Inclusion of developing countries in the GPA

Synergy with other agreements to internationalize public procurement





By joining the GPA, Brazil could influence the
future of the agreement and the
internationalization of public procurement

More: Brazil could be a representative of
developing countries in the GPA

Costs and Difficulties of GPA accession



“Brazil Cost”

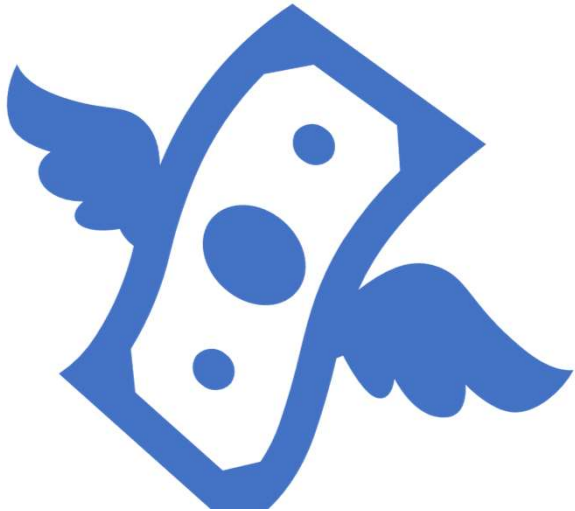
Inefficiencies

Tax complexity

Bureaucratic requirements

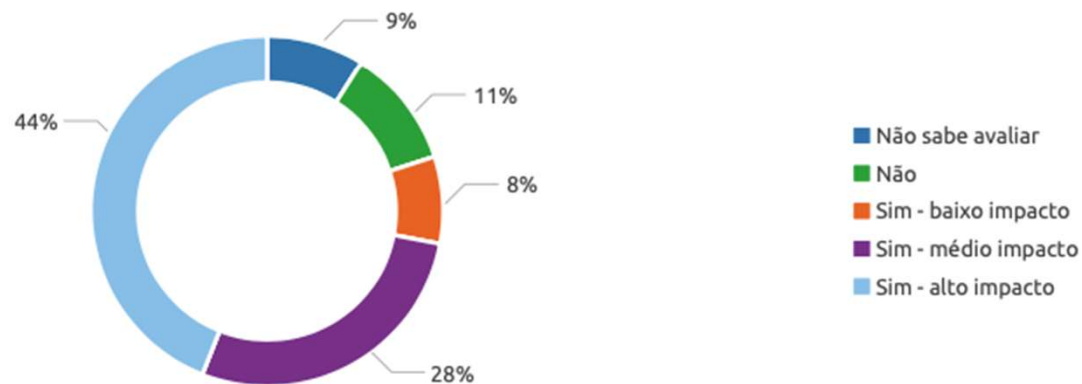


Brazilian companies find it
difficult to compete in foreign
bids



“Brazil Cost”

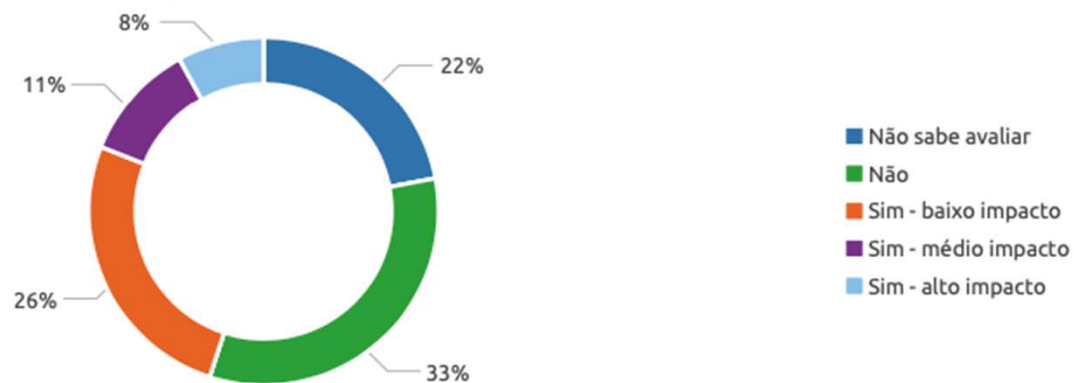
GRÁFICO 7 – Na avaliação das empresas, a eventual facilitação da participação de fornecedores estrangeiros nas compras públicas de que participa no Brasil teria impactos significativos?



Elaboração: CNI

“Brazil Cost”

GRÁFICO 9 – Na avaliação das empresas, a eventual facilitação da sua participação em compras governamentais de países estrangeiros poderia ter impactos significativos?



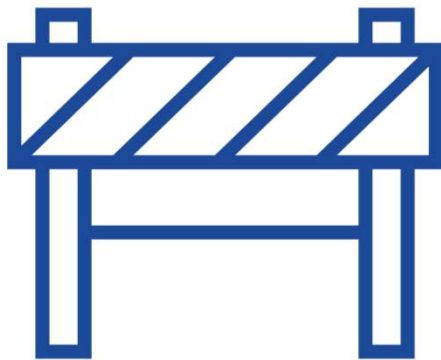
Elaboração: CNI



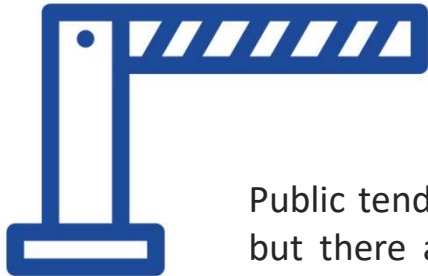
Need for harmonization of some standards.
Although there are few federal rules that conflict with the GPA, some state legislation may not comply with GPA standards and require adjustments

Potential Problems

- Historical tradition of restricting (indirectly) the participation of foreign bidders
- Use of procurement for public policy purposes



Potential Problems



Public tenders are already theoretically open to foreign bidders, but there are regulatory difficulties, informational barriers and other issues that keep foreign bidders away



Potential Problems

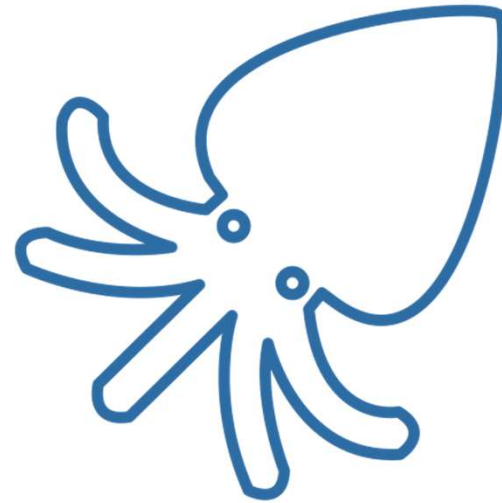
Large proportion of direct awards: government contracts without prior public tenders



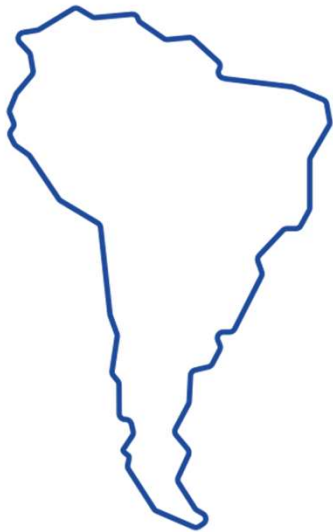
Potential Problems



Brazil has a large state sector:
federal, state and local SOEs



The **change of administration** in Brazil in 2023 altered the trajectory of accession to the GPA. The first signs given by the Lula administration indicated the **continuation of the internationalization of public procurement**. **But Brazil withdrew its offers for accession in May 2023.**



In the past (2011), Brazil expressly decided to prioritize agreements with Mercosur over the WTO

Recently, the Brazilian government seems to have focused again its energy on agreements between Mercosur and the EU

Brazil's first offer

The first offer was submitted in February 2021

Brazil considered its offer had broad coverage:

It included numerous state government (subnational) entities

There were at least 42 SOE's covered

It included purchases related to Information Technology

Public procurement thresholds were similar to the ones adopted by most GPA members

It included 6 states (out of a universe of 27)

Brazil's second offer

The second offer was submitted in November 2021

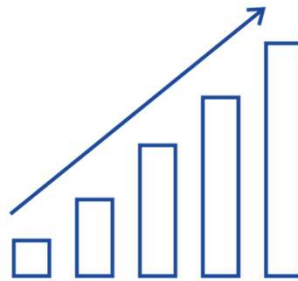
Expected to expand the
number of government entities
covered



11 states

Brazil's third offer

The third offer was submitted in June 2022



**20 states (plus Brasilia, the
Federal District)**



PRESS RELEASES N. 220

Brazil withdraws offer to accede to the WTO Government Procurement Agreement

Published in May 30, 2023 08:23 PM | Updated in Jun 30, 2023 04:19 PM

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Today, May 30, Brazil informed the members of the Government Procurement Agreement (GPA) of the World Trade Organization (WTO) of its decision to withdraw the market access offer made by the country in the process of accession to that agreement.

The GPA establishes common rules on goods and services procurement through bidding procedures and opens them to the participation of companies from foreign countries. As a plurilateral instrument, the obligations under the GPA apply only to WTO members that are parties to the agreement.

Brazil formalized its interest in acceding to the GPA in May 2020. In June 2022, it submitted a final offer for access to its public procurement market. The offer included a detailed list of the contracting entities, goods and services that would be covered by the rules of the agreement, as well as the conditions and caveats for its application.

The Brazilian offer included coverage equivalent, and even superior, to that offered by the current GPA members. Its terms would impose severe limits on the use of the government's purchasing power as an instrument to induce the country's economic and social development, particularly in areas such as public health, technology, and innovation.

The GPA/WTO and Latin America: Lessons from Brazil's Accession Process

Cesar Pereira^{*}

Rafael Wallbach Schwind^{*}

[∗] Accession; Brazil; International trade; Public procurement; World Trade Organization
(2023) 32 P.P.L.R., Issue 5 © 2023 Thomson Reuters and Contributors

- a) The entry of foreign companies in the Brazilian market may cause greater corruption, not less. The argument that the GPA helps the fight against corruption is only a disguise to advance a measure that in fact aims at curbing Brazil's freedom to adopt its own industrial policy through public procurement.
- b) The offers made by Brazil are excessively broad, since at the end (third and final offer) they comprised 21 sub-national governments (20 states and the federal district) and 100 SOEs.
- c) Joining the GPA would make Brazil vulnerable and weaker in the negotiation of bilateral agreements, since it would have granted too much within the GPA plurilateral agreements and reduced its bargaining power in more useful negotiations, such as the Mercosur-EU or other bilateral treaties.
- d) The GPA creates limitations on public policies that Brazil may want to advance through public procurement, such as the protection of SMEs or the establishment of domestic preferences in government purchases ("industrial policy").
- e) Most demands for opening are in the health sector, in which Brazil already has a trade deficit due to the high volume of imports, despite the existing preference for Brazilian suppliers for the health system.
- f) The GPA would make it impossible for Brazil to continue to use its offset policy to acquire technology in areas such as defense, security, and health. It is believed also to curb the country's ability to use government contracts to promote R&D (research and development) and creative contractual conditions to compensate companies for development risks.
- g) The US demands greater opening of the Brazilian market while it continues to rely on its "Buy American" program.
- h) The private sector supports Brazil's withdrawal from the GPA, since the CNI sees risks in the negotiation, such as the lack of reciprocity and the creation of a non-level playing field to favor foreign bidders (which are not subject to the so-called Brazil Cost).
- i) There are concerns due to China's possible accession to the GPA, since China may have unfair commercial practices that would affect the Brazilian domestic market.

Brazil decided to withdraw its offer for accession to the GPA due to a series of reasons, mainly a fear that it would lose (i) strategic leverage in the negotiation of allegedly more relevant bilateral trade agreements, and (ii) the power to use public procurement as a tool to advance public policies. These and other concerns may be overcome through an unbiased understanding of the GPA's limits, effects, and possibilities. Moreover, the withdrawal of Brazil's existing offer does not compromise Brazil's possible accession or the internationalization of its public procurement market.

GPA	Mercosur-EU Agreement
Several competitive countries such as USA and Japan	Many competitive countries, but significant ones (such as USA and Japan) are left out
48 members	27 EU countries + Mercosur
Threshold for federal government purchases: BRL 900,00	Threshold for federal government purchases: around BRL 2 million in the first five years
Threshold for public works: around BRL 26.5 million	Threshold for public works: around BRL 51 million in the first five years
Coverage of subnational entities previously defined and presented in the offers	Coverage of subnational entities must be carried out within 2 years of signing the agreement
Last offer covered 20 states	Brazil must get coverage from subnational entities that represent at least 65% of GDP
There is no news that Brazil has sought margins of preference in the GPA	Possible margins of preferences in favor of Brazilians Small and Micro Enterprises (SMEs).
There is no news that Brazil has sought any kind of limited tendering procedure	Possible limited tendering procedure in the procurement from nonprofit institutions dedicated to social assistance, public services or social services of public interest.
National Industry Confederation stated that the offer should be remodeled	National Industry Confederation stated that the agreement should be concluded under the terms already defined



Discussion/Questions

Please use Q&A

Panel
Discussion –
Future of
Public
Procurement
in Brazil

Clean Company Act (Law No.
12846/13)

New Public Procurement Law (Law
No. 14133/21)

Whistleblower Reforms

Improbity Act (on unlawful acts in
public administration)

Audience Questions



Materials and recordings at:
www.publicprocurementinternational.com

Recordings also at:
YouTube: GW Law Government Procurement Law Program



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