

Responses to the **Third Study Commission Questionnaire 2024** (South Africa)

To: The International Association of
Judges (IAJ)



International Association of Judges

FROM: Brazilian Magistrates Association (AMB)

TO: The International Association of Judges (IAJ)

RESPONSES TO THE THIRD STUDY COMMISSION QUESTIONNAIRE 2024 (SOUTH AFRICA)

1) Does your country have legislation, or regulations, and/or court rules of procedure that are relevant to the topic of our focus this year – chemical substances and essential equipment possibly used in illicit drug manufacturing and trafficking, including importing, exporting, for domestic distribution and use and private sector due diligence.

Please explain.

Yes.

In Brazil, there is Law No. 11,343/2006, which, among other provisions, establishes rules for the suppression of unauthorized production and illicit trafficking of drugs. According to Article 31 of this law, prior authorization from the competent authority (which is the Federal Police) is essential for *producing, extracting, manufacturing, transforming, preparing, possessing, keeping in storage, importing, exporting, re-exporting, sending, transporting, exposing, offering, selling, buying, exchanging, giving or acquiring*, for any purpose, raw material intended for the preparation of drugs.

Moreover, the same Law No. 11,343/2006, in its Article 33, § 1, item I, defines as a crime, subject to a penalty of 5 (five) to 15 (fifteen) years of imprisonment and a fine, the act of *importing, exporting, sending, producing, manufacturing, acquiring, selling, exposing for sale, offering, supplying, keeping in storage, transporting, carrying, or keeping*, without authorization or in disagreement with the legal or regulatory determination, raw material, input or chemical product intended for the preparation of drugs.

Also according to Law No. 11,343/2006, Article 34, it is a crime, subject to a penalty of imprisonment from 3 (three) to 10 (ten) years and a fine, to *manufacture, acquire, use, transport, offer, sell, distribute, deliver in any way, possess, keep or supply*, even if free of charge, machinery, apparatus, instrument or any object intended for the manufacture, preparation, production or transformation of drugs, without authorization or in disagreement with legal or regulatory determination.

Therefore, in Brazil, it is a crime, subject to imprisonment, not only the illicit trafficking of the drug itself but also the trafficking of its raw materials and its manufacturing apparatus and instruments, according to Law No. 11,343/2006.

Regarding the private sector's due diligence, any individual or legal entity, to carry out activities involving precursors of narcotic substances, psychotropic substances or those that determine physical or psychic dependence, needs prior authorization from the Federal Police, according to Article 4 of Law No. 10,357/2001.

This authorization from the Federal Police depends on the registration of the interested party, as well as the fulfillment of certain requirements, and is only granted to: a) legal entities in the chemical-pharmaceutical, health, food and scientific research fields; b) legal entities that carry out activities different from those mentioned in the previous item, that prove the need for the drug; and c) individuals who develop activities in the field of scientific research.

Ordinance No. 204/2022 of the Ministry of Justice and Public Security, in turn, defines the chemical substances that are considered precursors of illicit drugs and are therefore subject to control and supervision by the Federal Police.

Handling these substances, in non-compliance with regulatory norms, constitutes an administrative infraction, subjecting the infringer to penalties: a) formal warning; b) seizure of the chemical product found in an irregular situation; c) suspension or cancellation of the operating license; d) revocation of authorization; and e) fines ranging from R\$ 2,128.20 (two thousand, one hundred and twenty-eight reais and twenty cents) to R\$ 1,064,100.00 (one million, sixty-four thousand and one hundred reais), under the terms of Article 14 of Law No. 10,357/2001.

2. Does your country have specific legislation on precursors control?

Yes No....

Title of current legislation and date of adoption:

Yes.

- a) Law No. 10,357, of December 27, 2001, which establishes control and supervision norms over chemical products that directly or indirectly can be used for the illicit preparation of narcotic substances, psychotropic substances, or substances that determine physical or psychic dependence.
- b) Decree No. 4,262, of June 10, 2002¹, which regulates Law No. 10,357, of December 27, 2001, establishing control and supervision norms over chemical products that directly or

¹ In Brazil, decrees are administrative acts whose issuance is the responsibility of the Head of the Executive Branch and aim to regulate laws for their faithful compliance. Decrees fill the gaps left in the law by the legislator, mainly due to the greater expertise of public administration bodies to deal with certain technical matters, such as the supervision and control of chemical products considered precursors of illicit drugs.

indirectly can be used for the illicit preparation of narcotic substances, psychotropic substances, or substances that determine physical or psychic dependence.

- c) Ordinance No. 204, of October 21, 2022², from the Ministry of Justice and Public Security, which establishes procedures for the control and supervision of chemical products and defines the chemical products subject to control by the Federal Police.
- d) Ordinance No. 344, of May 12, 1998, from the Health Surveillance Secretariat of the Ministry of Health, which approves the Technical Regulation on substances and medicines subject to special control.

3. In your country, is an approval by a judge a pre-condition to launch investigations into a case of diversion and trafficking of precursors? Similarly, is a court order or approval by a judge required for effecting controlled or monitored deliveries?

Please explain:

No.

It is important to clarify that, in Brazil, criminal prosecution involves two main phases: the *investigation phase* and the *judicial process phase*.

Thus, the initiation of investigative procedures does not depend on judicial authorization, being a competence that falls on the Public Prosecutor's Office (Article 129, item I, of the Federal Constitution)³ and primarily on the Federal Police and State Civil Police (Articles 4 and 5 of Decree-Law No. 3,689/1941, which institutes the Code of Criminal Procedure). Although the initiation of a criminal investigation does not depend on judicial authorization, it is necessary to inform the competent judge about this initiation.

On the other hand, according to the jurisprudential understanding of the Federal Supreme Court⁴, there is a need for prior judicial authorization to initiate investigative procedures against authorities with special forum by function prerogative. For example, the President of

² Ordinances are also administrative acts whose competence, at the federal level, falls to the Head of each Ministry and aim to regulate laws and decrees within their areas of material competence. In other words, ordinances fulfill the function of detailing, to a greater degree, the discipline brought by regulatory laws and decrees.

³ The investigative powers of the Public Prosecutor's Office were recognized by the Federal Supreme Court in the judgment of Direct Actions for the Declaration of Unconstitutionality Nos. 2,943, 3,309, and 3,318. On that occasion, the Supreme Court understood that if the Constitution grants the Public Prosecutor's Office the power to propose criminal action, in the form of Article 129, item I, it implicitly also granted the power of investigation necessary for the conviction formation of the prosecutor for filing the criminal action.

⁴ An example of this understanding can be found in the judgment of Direct Action for the Declaration of Unconstitutionality No. 7,083.

the Republic can only be prosecuted and judged for common crimes before the Federal Supreme Court. In this case, any criminal investigation procedure against the President of the Republic depends on prior authorization from the Supreme Court, according to Article 21, item XV, of the Internal Regulations of the Federal Supreme Court.

Therefore, the opening of an investigation into the illicit trafficking of raw materials, inputs, or chemical products intended for the preparation of drugs does not depend on judicial authorization, except when the investigation is conducted against a public authority with special forum by function prerogative — in which case authorization from the competent judicial body will be required.

Additionally, judicial authorization will be indispensable when, in the investigation, it is necessary to adopt some measures that imply restrictions on fundamental rights, such as house search and seizure or telephone wiretapping (Article 5, items XI and XII, of the Federal Constitution).

In any case, despite the general lack of need for judicial authorization for the initiation of criminal investigations, the initiation of the actual judicial process, in which the responsibility and possible penalty of the investigated/accused will be determined, depends on the acceptance of the complaint by the competent judge (Article 395 of the Code of Criminal Procedure).

Finally, there is also no need in Brazil for prior authorization from the Judiciary regarding controlled actions (*controlled or monitored deliveries*). According to Article 8 of Law No. 12,850, of August 2, 2013, a controlled action consists of delaying police or administrative intervention related to an action carried out by or linked to a criminal organization, provided that it is kept under observation and monitoring so that the legal measure is implemented at the most effective moment for the formation of evidence and obtaining information.

Although judicial authorization is not necessary, the controlled action must be previously communicated to the competent judge — this communication will be confidential so that, until the completion of the diligence, access to the information will be restricted to the judge, the Public Prosecutor's Office, and the police chief, to ensure the success of the investigations.

4. When a drug/precursor-related crime is being investigated in your country, does the judiciary have any role (a) in the request for information from a foreign state and/or (b) in the provision of information to a foreign state?

Yes No....

If your answer to either (a) or (b) is yes, what legislation, regulations or rules of procedure apply to the decision of a judge involved at the investigation stage?

Yes.

As a rule, the simple exchange of information on investigations related to drug trafficking or its precursor substances can occur through direct assistance between the Brazilian central authority (Ministry of Justice and Public Security) and the corresponding foreign authorities, according to Articles 28 to 34 of Law No. 13,105 of March 16, 2015 (Code of Civil Procedure), thus dispensing with the participation of judicial authorities.

However, requests for direct assistance, when requiring the performance of judicial activity, will depend on the assessment by the Federal Court.

In addition, the participation of the Brazilian Judiciary will also be indispensable in cases of foreign judicial decisions, the enforcement of which will only occur after homologation by the Superior Court of Justice, by Article 105, item I, letter *i*, of the Constitution and Articles 960 to 965 of the Code of Civil Procedure.

Therefore, the eventual exchange of information related to investigations of drug trafficking or its precursors does not necessarily depend on the participation of Brazilian judicial authorities, except in cases where the measure to be carried out in Brazil requires the performance of judicial activity or stems from a foreign judicial decision, the enforcement of which requires prior homologation by the Superior Court of Justice.

5. Does your country have legislation or court rules that relate to monitoring manufacture and distribution of precursors which are applicable over the entire national territory?

Please explain:

In Brazil, legislating on criminal law and criminal procedure is an exclusive competence of the Federal Legislative body (central power), according to Article 22, item I, of the Constitution. For this reason, the States of the Brazilian Federation do not have the autonomy to establish their own rules on the manufacture and distribution of drug precursors. Thus, all legislation on this subject is issued by the Federal Legislative body and applies throughout the national territory.

Therefore, the laws and regulations mentioned in the second question of this questionnaire (Law No. 11,343/2006, Law No. 10,357/2001, Decree No. 4,262/2002, and MJSP Ordinance No. 204/2022) apply throughout the national territory.

6. Does your country have legislation or court rules that establish as a criminal offence the manufacture, transport and distribution of essential equipment intended to be used for illicit drug manufacturing.

Please explain:

Yes.

As highlighted in the response to the first question of this questionnaire, according to Article 34 of Law No. 11,343/2006, it is a crime, punishable by imprisonment from 3 (three) to 10 (ten) years and a fine, to *manufacture, acquire, use, transport, offer, sell, distribute, deliver* under any title, *possess, store, or supply*, even for free, machinery, equipment, instrument, or any object intended for the manufacture, preparation, production, or transformation of drugs, without authorization or in disagreement with legal or regulatory determination.

7. In respect of non-scheduled chemicals/ equipment, is the fact that they have been misdeclared before the Customs, sufficient to impute 'knowledge' on the part of the supplier of their being used for illicit drug manufacture?

Please explain:

In Brazil, according to precedents of the Supreme Federal Court and the Superior Court of Justice, cited in response to question 8 of this questionnaire, it is possible to convict people caught with substances not listed in the controlled substances list, provided it is proven that this substance would be used in the production of illicit drugs. Therefore, any misdeclaration to the competent authorities cannot, by themselves, imply a presumption that the substances will be used for the manufacture of narcotics or psychotropic substances.

Thus, to penalize the supplier for the crime of trafficking chemicals for drug production, it is essential to prove that they knew, or at least should have known, that these products would indeed be used in the manufacture of drugs, and a presumption based on any improper declarations to the competent authorities is not sufficient.

8. In your country, does domestic legislation include measures and/or civil, criminal and/or administrative sanctions to address non-scheduled chemicals and emerging precursors, namely those that are used as starting materials and/or intermediaries in the legitimate manufacture of substances in Table I and Table II of the 1988 Convention? If yes, which type of sanctions?

Please explain:

As already highlighted in the responses to questions 1 and 2 of this questionnaire, in Brazil, there are legal and regulatory norms that establish the requirements and rules to be observed by individuals and legal entities intending to deal with chemical substances considered precursors to illicit drugs, duly listed in national regulations.

Non-compliance with these requirements and rules implies the possibility of administrative sanctions, which may be a formal warning, seizure of the chemical found in an irregular situation, suspension or cancellation of the operating license, revocation of special authorization, and a fine.

This applies to the administrative level. However, if it is proven that the diversion of the chemicals was intended to produce illicit drugs, in addition to the administrative sanction, the crime described in Article 33, § 1, item I, of Law No. 11,343/2006, punishable by imprisonment from 5 (five) to 15 (fifteen) years and a fine, is characterized.

This regulation, however, concerns controlled substances, i.e., those listed in the relevant regulations. Regarding non-scheduled chemicals, there is no provision for administrative, civil, or criminal sanctions, at least not explicitly.

Despite the absence of explicit legal norms regarding non-scheduled chemicals, there are precedents from the Higher Courts (STF and STJ), indicating that the fact of not being listed in the norms defining the list of controlled substances does not negate the criminal nature of the trafficking of drug precursors (Article 33, § 1, I, of Law No. 11,343/2006), provided it is proven that the chemical product would be used in the production of narcotics and psychotropic substances.⁵⁻⁶

⁵ "Habeas Corpus". Condenação pela prática dos crimes previstos nos artigos 12, parágrafo 1., I, e 14, ambos da Lei n. 6.368/76. Matéria-prima destinada a preparação de substância entorpecente ou que determine dependência física ou psíquica (éter e acetona destiladas de cocaína). - Inocuidade da indagação de estarem, ou não, o éter e a acetona incluídos na lista de substâncias entorpecentes, pois a condenação se fez por terem os ora pacientes fornecido tais substâncias para a refinação da cocaína, e não por serem elas substâncias entorpecentes. - Não é o "habeas corpus" meio idôneo para a reapreciação aprofundada de matéria de fato. "Habeas corpus" indeferido. (HC 69308, Relator(a): MOREIRA ALVES, Primeira Turma, julgado em 28-04-1992, DJ 22-05-1992 PP-07215 EMENT VOL-01662-02 PP-00306 RTJ VOL-00142-01 PP-00259)

⁶ PROCESSUAL PENAL. HABEAS CORPUS SUBSTITUTIVO DE RECURSO PRÓPRIO. INADEQUAÇÃO. POSSE DE INSUMO (CAFEÍNA) DESTINADO À PREPARAÇÃO DE DROGAS. CONDUTA MATERIALMENTE TÍPICA. ABSOLVIÇÃO POR INSUFICIÊNCIA DE PROVA. REEXAME DE FATOS. VIA INADEQUADA. AUSÊNCIA DE MANIFESTA ILEGALIDADE. WRIT NÃO CONHECIDO. 1. Esta Corte e o Supremo Tribunal Federal pacificaram orientação no sentido de que não cabe habeas corpus substitutivo do recurso legalmente previsto para a hipótese, impondo-se o não conhecimento da impetração, salvo quando constatada a existência de flagrante ilegalidade no ato judicial impugnado a justificar a concessão da ordem, de ofício. 2. É firme o entendimento do Superior Tribunal de Justiça de que a cafeína constitui insumo comumente utilizado para aumentar a quantidade e o volume de entorpecentes. Sendo assim, sua posse para tal finalidade configura o delito do art. 33, § 1º, I, da Lei n. 11.343/2006. 3. Conforme pontuou julgado da Sexta Turma, "[...] a expressão 'matéria-prima' abrange não só as substâncias destinadas exclusivamente à preparação de drogas, mas também aquelas que, eventualmente, se prestam a esse objetivo" (HC 45.003/SP, Rel. Ministro OG FERNANDES, DJe 26/10/2009). 4. A pretensão de

Therefore, despite the lack of legal or regulatory norms in Brazilian law regarding the application of sanctions for non-scheduled chemicals, the courts have admitted criminal conviction for those caught with these products, provided their use to produce narcotics and psychotropic substances is proven.

It is also important to note that the country adopts measures to ensure that the lists of controlled substances are always up to date.

9. Please elaborate on specific pieces of information and level of details that would allow you as a judge to act on information/intelligence/evidence received from counterparts in investigations related to new emerging drug precursor chemicals not under control in your country.

Please explain:

As highlighted in the response to question 8 of this questionnaire, there are precedents from the Supreme Federal Court (STF) and the Superior Court of Justice (STJ) that allow for the criminal conviction of individuals caught with non-listed substances, provided it is proven that this substance would be intended for the manufacture of illicit drugs. Thus, a well-conducted investigation by the Police and/or the Public Prosecutor's Office can provide adequate information about the purpose of these chemical products, thus assisting the judge in conducting the criminal process and potentially convicting the accused of the crime described in Article 33, § 1, item I, of Law No. 11,343/2006, which is the trafficking of raw material, inputs, or chemical products intended for the production of narcotics or psychotropic substances, even if this chemical product is not listed in the controlled substances lists.

10. Are there any specific provisions that allow you as judge to act on non-scheduled chemicals with no known legitimate uses? Would information from an international body, or a collection of information from other countries, that a chemical has no known legitimate use facilitate your work in any way?

Please explain:

In Brazil, as already highlighted in responses to previous questions, the legal framework criminalizes the conduct of *importing, exporting, sending, producing, manufacturing, acquiring, selling, offering for sale, storing, transporting, carrying, or keeping*, without authorization or in disagreement with legal or regulatory determination, raw material, inputs,

absolvição por insuficiência de prova demanda, in casu, o revolvimento do conteúdo fático-probatório dos autos, providência inviável em sede de habeas corpus. 5. Habeas corpus não conhecido. (HC n. 441.695/SP, relator Ministro Ribeiro Dantas, Quinta Turma, julgado em 15/10/2019, DJe de 25/10/2019.)

or chemical products intended for the preparation of drugs. For this crime, the legislation establishes a penalty of 5 (five) to 15 (fifteen) years of imprisonment and a fine.

Furthermore, it has been mentioned that the Higher Courts have precedents that allow for criminal conviction even if the substance is not listed in the controlled substances lists, provided it is proven that the purpose of this substance is the manufacture of illicit drugs.

In this context, the essential information the judge needs is the purpose of the chemical product. Thus, knowing that this product has no legitimate purpose does not, by itself, justify a criminal conviction in Brazil.

However, without a doubt, knowing that this product has no known legitimate use can help to form the conviction of the magistrate competent to judge the criminal action.

11. As a judge, if you receive a request for assistance in a drug/precursor-related crime from a foreign country, whether at the investigation stage or in the context of a court proceeding (a hearing or a trial), how is it relevant to your determination to ensure that basic human rights, principles of natural justice, and/or rules of procedural fairness that exist in your country are respected?

Please explain:

In Brazil, international legal cooperation, regulated by Law No. 13,105/2015 (Code of Civil Procedure), must observe, among other precepts, respect for the guarantees of due process in the requesting State and equal treatment between nationals and foreigners, as provided in Article 26. Furthermore, in international legal cooperation, acts that contradict or produce results incompatible with the fundamental norms governing the Brazilian State will not be admitted (Article 26, § 3, of Law No. 13,105/2015).

The same law allows for direct assistance between the Brazilian central authority (the Ministry of Justice) and the foreign authority, which may involve the exchange of relevant information on investigations and judicial proceedings related to drug trafficking (Articles 28 to 34). When the request from the foreign state requires a judicial measure, the request must be forwarded to the Attorney General's Office (AGU), which, in turn, will petition the Federal Court of the place where the requested measure is to be carried out, who will be responsible for evaluating the request.

Additionally, foreign judicial decisions and other requests can be fulfilled in the national territory, provided they are approved by the Superior Court of Justice, as provided in Article 105, item I, letter *i*, of the Federal Constitution and Articles 960 to 965 of the Code of Civil Procedure. Thus, any cooperation requests from a foreign judicial authority will always be

submitted to the evaluation of the Superior Court of Justice, which is responsible for approving or denying the requested measure.

Therefore, in any case, whether in direct assistance — which dispenses with the participation of the Brazilian Judiciary — or in the approval of foreign decisions — which is the responsibility of the Superior Court of Justice — no act will be carried out in the national territory if it contradicts the fundamental norms of the Brazilian State, which includes fundamental rights and guarantees.

12. Describe your own personal experience(s) as a judge that are relevant to the topic of our focus this year, whether it be presiding over an extradition hearing (a request to extradite an accused person to another country in order to be prosecuted in that other country), or receiving evidence in a court proceeding in your country from a witness who is testifying from another country and with the help of court officials in that other country, or helping to arrange for a witness in a court proceeding in another country to testify from a place in your own country, or responding to a request for assistance from an international court such as The Hague, or something else. These are just examples of things that you may have experienced; they are not meant to be exhaustive.

The Brazilian jurisdiction dealt with a highly significant case involving a well-known Colombian drug trafficker who led a criminal organization specializing in international drug trafficking and money laundering. In this case, international legal cooperation, particularly between Brazil and Spain, was crucial. For the resolution of this judicial process, leading to the conviction of the drug trafficker, the evidence obtained by the Spanish authorities and shared with the Brazilian authorities was essential. In this case, the Spanish authorities confirmed the existence of investigations on the criminal group established in Madrid, which resulted in the seizure of large quantities of drugs and weapons, as well as transcriptions of phone conversations between the leader and other members of the criminal organization.

Although this case was not presided by this Judge, it is an emblematic case that occurred on Brazilian soil, resulting in the arrest and conviction of a well-known drug trafficker who led a criminal organization specializing in international drug trafficking and money laundering. This successful outcome was only possible due to international legal cooperation established between Brazilian and Spanish authorities, demonstrating the relevance of this investigative instrument and the need for its improvement in terms of agility, reliability, and integrity of the shared evidence.

Brasília, July 3rd 2024.

Judge Geraldo Dutra de Andrade Neto

International Relations Secretary of the Brazilian Magistrates Association - AMB



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