

## Chapter 4

### The Four Pillars of Brazil's Governance Legacy

#### Executive Summary

On the eve of hosting the 2014 FIFA World Cup and 2016 Summer Olympics, public outrage in Brazil over government corruption and mismanagement spilled into the streets. In a remarkable display of democratic legitimacy, the Brazilian government responded by enacting four important statutes: a 2011 law reforming public procurement; another 2011 law guaranteeing public access to government information; a 2013 law addressing corporate participation in public corruption; and a 2013 law that gave federal prosecutors powerful new enforcement tools. These statutes constitute the four pillars of Brazil's Olympic governance legacy. Taken together, they have fundamentally reshaped Brazilian anti-corruption enforcement in ways that will endure long after the 2016 Olympics have ended. This chapter discusses the historical and cultural forces that drove enactment of these four pillars, and describes each of the pillars in detail.

Chapter 1 discussed Brazil's bold redefinition of the Olympic legacy. Though legacy is traditionally thought of in economic terms, Brazil has created for itself a governance legacy – a series of laws that have an impact well beyond the Olympic Games, and that will endure after the Games are done. This chapter describes that legacy.

Brazil's Olympic governance legacy has four pillars: four distinct statutes, two of which were enacted in 2011 and two in 2013. They were, to varying degrees, enacted in response to public concerns about governance generally and corruption specifically that arose on the eve of hosting the World Cup and Olympic Games. The four pillars are: the 2011 procurement reforms, called the Regime Diferenciado de Contratações and known as the RDC; the 2011 freedom of information law that addressed the government's role in corruption by obligating agencies to make information available to the public; the 2013 Clean Companies Act that addressed the corporate sector's role in public corruption by creating corporate liability for bribery, incentivized cooperation with government investigations, and incentivized corporate compliance programs; and the 2013 organized crime bill which authorized the enforcement tools that allowed federal prosecutors to blow open the Petrobras scandal and many other corruption schemes. This combination of laws – enacted in such a short span and to such dramatic effect – is beyond rare. It may well be historically unprecedented.

These pillars did not arise out of thin air, but rather, were a democratic government's response to surging public discontent about public corruption. The exposure of a 2005 vote-buying scheme that resulted in the convictions of several high-profile public officials, called Mensalão, injected the issue of public corruption into the public's consciousness and discourse in dramatic ways. Soon thereafter, optimism about the economic prospects of this BRIC nation began to wane, as a result of global economic changes and controversial domestic fiscal policies. At about this time, the populace came to recognize that a cash-strapped government, now proven to be corrupt, would be one of only three countries to host back-to-back the two most expensive sporting events in the world: the FIFA World Cup and the Olympic Games. Against this

backdrop, Brazil adopted what might be called the two minor pillars of its governance legacy: the 2011 procurement reforms and freedom of information law.

Public discontent would then surge when, in 2013, the government announced rate hikes for public transportation. Outraged, the public took to the streets in large-scale demonstrations over corruption specifically and government mismanagement generally. In a breathtaking example of legitimate democratic processes actually working, Brazil's Congress responded to these protests with the 2013 adoption of its two major pillars: the Clean Companies Act and the organized crime law. As subsequent enforcement initiatives has demonstrated, Brazilian governance will never be the same.

These four pillars make for a stark contrast between the two BRIC nations simultaneously hosting the FIFA World Cup and Olympic Games back-to-back. In Russia – host of the 2014 Winter Olympics and 2018 FIFA World Cup – allegations of corruption were rampant. But we saw neither a credible legislative response, nor effective enforcement actions. Russian corruption continued in impunity. Brazil, in dramatic contrast, has addressed deeply-rooted public corruption with adopting a four-part legislative framework and then a series of enforcement actions. In so doing, Brazil is self-consciously addressing a culture that once tolerated corruption and glorified *jeitinho* (see chapter 2), seeking to move beyond a history of official corruption bred under colonization and military dictatorships. Brazil thus redeems Coubertin's idea (see chapter 1) of the Olympic Games as a venue for promoting an ethic of international fair play.

This chapter will discuss the four pillars in order of their enactment: first, the procurement reforms; then the freedom of information law; the Clean Companies Act will be third; and finally, the organized crime law.

## I. Procurement

The harms of corruption in the specific realm of government procurement are obvious to all. Government officials may be bribed to accept

bloated contracts, or inferior products, or both, all at the public's expense. But in trying to prevent corruption, procurement presents a series of counterintuitive, and underappreciated, policy trade-offs. This chapter is designed to clarify what is at stake in procurement, how Brazil has addressed those competing concerns in response to the imperatives of hosting the sporting mega-events, and the corruption risks that may yet remain.

The first trade-off is between transparency and cost. Transparency is generally thought to be an antidote to corruption: where processes are open to the public, and readily reviewable, the risk of cost inflation would seem to go down. And controlling corruption is generally among the ways to control costs. But as this chapter will explain, and as the Brazilian experience has shown, sometimes transparency can actually exacerbate cost inflation. In this regard, transparency can cause the precise harm that anti-corruption measures are designed, at least in part, to prevent. The relationship between transparency and cost is thus not as simple as may first appear.

So too, in procurement as in government generally, do we suspect that the concentration of power can give rise to corruption. We might assume multiple companies working on project would be better than a single company with monopolistic control over the project; the various companies might tend to keep each other in check, increasing accountability and decreasing graft. But again, experience has shown that multiple companies sharing responsibility in procurement projects creates inefficiencies that tend to result in increased costs and delays. Again, an effort to reduce corruption might increase costs to the public.

Brazil was keenly aware of these trade-offs, and of the challenges inherent in its procurement regime, before the World Cup and Olympics. But the mega sporting events became an impetus to experiment with a new procurement regime. This new regime, described in this chapter, is at least designed to make public procurement more streamlined and efficient. The extent to which these efficiency-minded reforms will create corruption risks remains to be seen. This subsection describes basic procurement concepts,

briefly describes the procurement regime that was in place prior to the World Cup and Olympics, and then explains Brazil's new corruption reforms.

### *Procurement Fundamentals*

Procurement, of course, is the acquisition of goods and services. In using the term, some draw a distinction between public and private procurement, and others define the term to include only acquisition by a government entity. For the purposes of this paper, procurement refers to any acquisition by official Olympic organizing entities whether public, private, or a combination of the two.<sup>1</sup>

For large scale events, or government projects, procurement is typically accomplished through a regulated process that requires potential suppliers of goods and services to bid against each other with the goal of maximizing the quality of the good or service offered while minimizing its cost.

It is no secret that procurement is highly vulnerable to corrupt practices.<sup>2</sup> The 2004 OECD Global Forum on Governance identified lack of transparency and lack of accountability as two of the major threats to corruption in procurement.<sup>3</sup> At all stages, issues like bribery or kickback arrangements could present themselves. Further, as will be discussed below, there are specific corruption risks unique to each stage of the procurement process.<sup>4</sup> While some are specifically addressed in the Clean Companies Act, others are addressed by the various procurement laws outlined here.<sup>5</sup>

Procurement generally consists of three distinct stages: (i) Pre-Bidding, (ii) Bidding, and (iii) Post-Bidding stages.<sup>6</sup> In the Pre-Bidding stage, entities formulate their needs, the process they will use to meet those needs, and the timeline that they will provide for the bidders to place a bid.<sup>7</sup> In the Bidding stage, entities open an invitation to bid and after evaluating bids, offer an award, at least in theory, to the best bidder.<sup>8</sup> Finally, in the Post-Bidding stage, the awarding entity manages the contract with the bidder and completes payment.<sup>9</sup>

The Pre-Bidding stage is generally the least susceptible to corruption. At the Bidding stage, however, bidders may engage in corruption by independently, or in concert with some or all of the other bidders, attempting to influence the outcome of the awarding of the bid. This can take the form of bid suppression, complimentary bidding, bid rotation, or customer or market division.<sup>10</sup> All of these relate to an attempt to restrict competition and to cause the requestor to pay more than it otherwise would.<sup>11</sup>

In the Post-Bidding stage, after the award has been granted, corruption is often found in instances where costs run over or products or services are not delivered. This is the stage where things such as mischarging costs, charging for products or services that were not delivered, and substitution of products or services -- particularly those of an inferior quality -- occur.<sup>12</sup>

The first two stages in particular -- pre-bidding and bidding -- can play out in a couple different ways in procurement law, as the next section describes.

### *Brazilian Procurement Before the World Cup and Olympics*

The first piece in Brazil's Olympic procurement regime is the Concessions and Public Private Partnerships (PPPs), which are both ways the government can award contracts to private entities to provide a public service. Concessions are governed by law 8987/95 (Concession Law) and PPPs are governed by law n° 11.079/04, passed in 1995 and 2004 respectively.<sup>13</sup> With both concessions and PPPs, the government will delegate the provision of a public service during a fixed period of time.<sup>14</sup> Practically, there is little difference between the operation of the concession or the PPP; the main difference is the source of funding for the project. When the government awards concessions, the investment for the project comes from the private entity. Conversely, when a PPP is awarded, the cost of the investment is shared by the private entity and the public. A common example would be the awarding of a company to construct and manage a toll-road on behalf of the government. Both Concessions and PPPs have been granted in relation to the World Cup and Olympics.

The second piece of the traditional Brazilian procurement regime is the Brazilian Procurement Law 8666/93, which established the rules and regulations for public procurement. The law applies to general government procurement of services, goods, and construction, and requires a two-step bidding process to complete a procurement project.<sup>15</sup>

In the first step, the government extends a request for proposal (RFP) for the creation of a technical project. A technical project in this sense is a project that addresses the needs assessment, planning, and budgeting phase of the Pre-Bidding stage of the procurement project. This request is subjected to public bidding and the best bid is given the award for the creation of the technical project.

After the technical project is completed, the government then moves to the second step of bidding which is again open to the public and uses the technical project from the first step to determine the needs, budget and other planning of the remainder of the procurement project. In the case of the Procurement Law, bidding is open and transparent, allowing others to see what bids have been in the past and see the bids of their competitors once the bidding process has opened.<sup>16</sup> Adding up the time limits for all of these different procedures involved, before the project is even started, the time it may take can be between 180 days and 285 days, if the time limits are not exceeded due to legal disputes.<sup>17</sup>

#### *Mega-Event Procurement Reforms*

The traditional Procurement Law has two features that, at first glance, may appear to promote efficiency and accountability, but that have created new and serious problems. The first concerns the pre-bidding and bidding stages. Under the Procurement Law, these bids are solicited separately, and awarded to separate companies. The company that is helping the government to design the project is thus different from the company that builds the project. Though four eyes are often better than two, the difficulty arises when the construction phase encounters a problem. If the project, as designed and thus

far built, proves inadequate, and requires additional time and money to complete, neither the firm that won the bid for the technical project nor the firm that won the construction project wishes to accept the blame. Instead, each will point the finger at the other: the construction firm will claim that the problem lies with the design, while the design firm will attribute the problem to poor execution of a blameless plan. Unable to settle, the two companies will proceed to litigate, obviously causing delays and increased costs. Ultimately, the problem is that the interests of the design firm, and the interests of the construction firm, are not aligned; when trouble arises, each blames the other, and attributing fault is slow, costly, and imprecise.

The second problem concerned the ironic tension between transparency and inflation. The traditional Procurement Law followed the practice of “open bidding,” in which the government publicly announces the project’s budget before issuing its RFP (request for proposal). Open bidding reflects the default assumption that transparency will tend to limit corruption and costs. However, Brazilian experience proved the opposite to be sometimes true. A bidder that is capable of bidding substantially under the government’s budget might inflate the bid to more closely approximate the available government funding. In this way, open bidding tended to drive up costs.

The Regime Diferenciado de Contratações, law No. 12462/11 and locally known as the RDC, is Brazil’s experiment with addressing the inefficiencies with traditional procurement. So too was the law passed to specifically address the procurement needs of the 2014 World Cup and 2016 Olympics.<sup>18</sup> The law is designed to expedite the public procurement process because of massive infrastructure projects that were undertaken and that are still underway in Brazil. Put another way, Brazil’s hosting of the World Cup and Olympics provided a catalyst to experiment with an alternative procurement regime.

The law modifies the usual procurement process under the Procurement Law in two ways relevant to this study. First, it allows the government to conduct a single, integrated bidding process for both the design and construction, combining the pre-bidding and bidding phases. The construction bidding no longer depends on the existence of an elaborate design



already prepared by a separate design company (who had won the bid in a prior bidding process). Instead, the government will provide a general description of what it needs from the project, and companies will simultaneously bid for the design and construction of the project.

Second, the RDC eliminates the requirement for open bidding. It does not require the government to make its budget publicly available before issuing the RFP. The government has the option of conducting closed bidding, and not disclosing the budget, although the government has to justify doing so. Many believe that this process will produce better financial results for the government, for the reasons described above: the lowest bidder will not allow its bid to creep up to be as close to the budget as possible.

However, skeptics of the RDC are quick to point out that this financial benefit comes at the apparent cost of transparency. The instinct that transparency limits corruption, and secrecy exacerbates it, is immediately triggered. Moreover, some critics believe that the most powerful companies can use inappropriate influence to find out the budget amount anyway; if this were true, secrecy would indeed be compounding corruption. But our interviews suggested that companies can no longer expect to obtain that non-public information in closed-door private meetings. The mores of Brazilian government are changing.

The RDC can and will be used for a limited subset of projects, including Olympic and World Cup projects. The mega-events are regarded as a kind of experiment in this new procurement regime. Though most Olympic projects have not used the RDC, the Olympics nonetheless served as a catalyst for adopting this new regime. Leading procurement professionals expect a post-Olympic dialogue on whether the RDC did in fact constitute an improvement over the traditional procurement system, and whether further reforms should be adopted.

### *Expenditure Oversight: the Responsibility Matrix*

In addition to the RDC, the Brazilian government has adopted two mechanisms that allow public oversight of government expenditures: the Responsibility Matrix and the Transparency Portal.

The function of the Responsibility Matrix is to provide information both to the public, and to the government, on the projects the government has committed to completing and the roles of various government offices in doing so.<sup>19</sup> The idea of government accountability in mega-sporting events was first established through a Responsibility Matrix for the World Cup in Brazil in 2014.<sup>20</sup> For the Olympics, the APO has enumerated the timeline for each project on a scale of 1-6 in the Matrix.<sup>21</sup>

The Responsibility Matrix is complemented by a Transparency Portal. Enacted in 2011, the Transparency Portal makes information available on the allocation of funds by the Federal Executive Branch. The search engine can obtain data on direct expenses of the Federal Government, resource transfers to states and municipalities, agreements with individuals, corporations or government entities, forecasting and revenue collection. The Transparency Portal also lists companies that have been sanctioned from the Federal Public Administration or by Brazilian states.

In adopting the portal, Brazil is joining seven other countries and various civil society organizations in the founding of the Open Government Partnership (OGP). OGP aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption and harness new technologies to strengthen governance, and, as such, fits perfectly with the goals of our work at the Office of the Comptroller General of Brazil.<sup>22</sup>

The Responsibility Matrix and Transparency Portal will be tested by the Rio Games. The Olympic Games require a vast amount of equipment, supplies, and services to be a success, and Rio 2016 is no exception. The Organizing Committee has estimated that more than 30 million items will be needed in order to meet the demands of the 2016 Olympic and Paralympic Games alone, not including the goods and services that the city, state, and federal

governments will need to enlist to accommodate the games.<sup>23</sup> Rio will need general public infrastructure projects as well as specific sports facilities.

In the area of general public infrastructure, there are four main categories of projects: mobility projects, social development projects, environmental projects, and urban renewal projects.<sup>24</sup> The key mobility projects are Light Rail Vehicle, completion of the BRT Transolímpica, the BRT Transoeste, and the road to the Olympic Park. According to the Brazilian Olympic Portal, the purpose of the Light Rail is to improve traffic.<sup>25</sup> The purpose of the BRT TransOlympica is to reduce time travelled between the Barra and Deodorra by “54%”.<sup>26</sup> The BRT Transoeste is already a functioning highway, but needs improvements.<sup>27</sup> The important social development project is the installation of four future arena schools. During the development of the idea of hosting the Olympics, the municipal council created the idea of using movable architecture during the Games to be repurposed after the games. After the Games, the Arena of the Future will be dismantled and transformed into four municipal schools, each with a capacity for 500 students. Three will be in the region of Barra and Jacarepaguá and in São Cristóvão.<sup>28</sup> The key urban renewal project is to add roads and tunnels to Porto Maravilha, add flood control to Tijuca, redevelop of the neighborhoods surrounding the João Havelange Olympic Stadium, and revitalize of the urban area of Deodoro.

The sporting events will take place in four unique venues in Rio de Janeiro in 2016: Copacabana, the Barra, Deodoro region, and the Maracana region.<sup>29</sup> Each region comes with its own unique attributes and set of problems. Overall, there are 31 facilities being built by a mixture of the federal government, state government, local government, and private contractors comprehensively called a PPP (Public-Private Partnership).<sup>30</sup> Of the four regions, the Barra has the most infrastructure being developed.<sup>31</sup>

Necessary infrastructure in the Barra Region includes the Olympic Golf Course, the Pontal, and the Rio Olympic Park, The Rio Olympic Arena, The Maria Lenk Aquatic Park, the Olympic Tennis Center, the Olympic Aquatics Stadium, the Velodrome, Arenas Cariocas 1, 2, and 3, and four pavilions.<sup>32</sup> The Rio Olympic Park will be the central focus of the games from an infrastructure

perspective. The Olympic Park will host: basketball, track cycling, gymnastics, trampoline gymnastics, rhythmic gymnastics, handball, judo, wrestling, wrestling, swimming synchronized swimming, water polo, diving, taekwondo, fencing and tennis.<sup>33</sup> The Rio Olympic Park is financed by a PPP, with help from the Federal Government of Brazil and will cost roughly 1.7 billion.<sup>34</sup> Necessary infrastructure in Copacabana includes Copacabana Stadium, Fort Copacabana, Lagoa Rodrigo de Freitas, and the Marina da Gloria.<sup>35</sup> The Copacabana Region will host volleyball, endurance events such as the triathlon, and sailing.<sup>36</sup> Necessary infrastructure in the Deodoro region includes the Youth Arena, the Rugby Arena, the National Equestrian Center, the National Shooting Centre, the National field Hockey Centre, and Rio Radical Park.<sup>37</sup> Necessary infrastructure for the Maracana region includes the João Havelange Olympic Stadium, Maracanã Stadium, Gym Maracanãzinho, the Sambadrome, and the Waterpark Julio de Lamare.<sup>38</sup>

The Transparency Portal and Responsibility Matrix become powerful symbols of a changing era in Brazilian government. Perhaps at least as powerful a symbol, and one enacted at roughly the same time, also concerned public access to information, as the next subsection describes.

## II. Freedom of Information Law

Law No. 12.527/2011, widely known as the freedom of information (FOI) law or information access law (its more common moniker in Brazil), was perhaps the first major signal of the government's intention to enact meaningful anti-corruption law. While perhaps the least prominent of the four pillars, it would prove a precursor to the extraordinarily impactful statutes of 2013.

Based on the principle, “publicity as the general precept, and secrecy as the exception,”<sup>39</sup> the FOI law moves to an era of active transparency, in which the government is obligated to publish certain forms of information without a request.<sup>40</sup>

It brings an end to what Brazilians called the “eternal secrecy,” in which public documents had an indefinite period of confidentiality<sup>41</sup> because highly classified documents could see their classification renewed indefinitely. Indeed, when the FOI law was under consideration in Congress, some lawmakers had pushed for keeping the “eternal” classification for certain categories of documents – including nuclear and aerospace technology, national defense, and diplomatic relations – but the provision was ultimately defeated.<sup>42</sup> So too did the bill create controversy about the potential disclosure of military intelligence concerning human rights violations during the military dictatorship.<sup>43</sup>

Specifically, the law has three core components. First, it obligates the federal, state, and municipal governments, and all branches thereof, as well as state-owned companies and even non-profits receiving government funds, to publish various kinds of information, including documents on government spending, without a request. These so-called “active transparency” obligations extend to the official contact details of all employees, financial operations, spending, procurement contracts, and answers to frequently asked questions.<sup>44</sup> Second, the law empowers any citizen to request information from the government and obliges the government to provide any such documents that are not classified.<sup>45</sup> Third, it reduces the terms of confidentiality of documents designated as top secret, secret, and undisclosed for 25, 15, and 5 years respectively, and ends the possibility of renewal of these periods.<sup>46</sup>

Preliminary data suggest that Brazilian government is starting to comply with the law, although patterns and attitudes will take time to reform. According to one study in 2014, of all valid requests for information under the new law, 40% unanswered, 18% partially answered, and 31% received full responses. Of the partial or full responses, 51% were deemed of good quality. Of eight jurisdictions, Sao Paulo and the Federal Government had the best response rates. Notably, the worst two were the city and state of Rio de Janeiro.

### III. Anti-Corruption Law: the Clean Companies Act

While the FOI law targets the public sector, the corporate sector is the target of another statute. Passed in 2013, Brazil's Anti-Corruption Law, also referred to as the Clean Companies Act ("CCA"),<sup>47</sup> adopts a number of measures to increase corporate liability and accountability, and to incentivize the growth of a compliance industry and culture.

Brazil obviously had a law on the books before the mega-events that prohibited official corruption; all governments do. But it failed to create the corporate compliance culture that has proven in other countries to be so critical to anti-corruption enforcement. Enacted in 1992,<sup>48</sup> the Administrative Improbability Law prohibits illicit enrichment that arises from acts of administrative misconduct. Both public officials and private individuals or entities that are a party to the illegal act may be subject to penalties under the law.<sup>49</sup> The prohibited acts include a wide variety of behavior that captures "any kind of patrimonial advantage by reason of holding public positions," including direct or indirect economic advantages to act or not act in the position's official capacity.<sup>50</sup> Public officials can also violate the law by hindering or entering into a public contract without due process.<sup>51</sup> While the Administrative Improbability law apparently covers any corrupt acts of public officials, and places liability on both the government agent and any private entity that was a party to the act, there remained a gaping fundamental weakness: the statute created no corporate liability (though courts have since created certain, limited forms of corporate liability). Because sporting events involve corporations, this piece proves critical.

Accordingly, in response to the Mensalão scandal and public protests, Brazil adopted the CCA. Indeed, the law marks an important milestone in Brazil's fight against corruption and was intended by Dilma's administration to send a strong message that the corruption tides have turned in Brazil.

## *An Anti-Corruption Law with Teeth*

The CCA's essential prohibition is the promising, offering, or giving of an "undue advantage" to a public official or third person related to the public official. This provision mirrors the bribery prohibition in the Organization for Economic Cooperation and Development's Anti-Bribery Convention, to which Brazil is a party.<sup>52</sup> The statute also prohibits a number of other forms of corporate corruption concerning public tenders, shell companies, and obstructing public investigations of companies suspected of corporate wrongdoing.<sup>53</sup>

In comparison to the Improbability Act, and to comparable anti-corruption laws in other countries, the CCA has a number of noteworthy provisions. First, it moves beyond the Improbability Act by prohibiting not just the bribing, but the solicitation or offer of a bribe. This brings the act into conformity with the OECD Convention, and other nations, and obviously serves to prohibit a much broader swath of conduct.

Second, the act imposes strict liability on the company for the acts of its employees.<sup>54</sup> That is, when an employee commits a violation, the company automatically becomes liable; the prosecutor need not prove that the company intended, authorized, or even had knowledge of the bribe independently of the employee. This is similar to the U.S. model, but different from the U.K. In the U.S. owing to a long-established principle of *respondeat superior*, the company is liable for the acts of its employee as long as the employee was acting in the course of employment (defined very broadly) and intended at least in part to benefit the company.<sup>55</sup> The U.S. statute, like Brazil's CCA, does not need to prove somehow that the company was also liable, independently of whatever the employee did; if the employee did it while acting as an employee, the company is also liable. Similarly, under the CCA a company will be liable "for the wrongful acts . . . performed in their interest or for their benefit."<sup>56</sup> The U.K., by contrast, has recently provided companies a defense to liability for the acts of its employees. If the company can prove that it had a good faith compliance program in place – that is, that it took appropriate measures to prevent the

violation – but the violation occurred nonetheless, the company will not be liable. Brazil’s CCA eschews the British approach, containing an explicit provision holding companies strictly liable. Though time will tell, this will likely mean that a company is liable no matter what it, apart from the employee, did or did not do.

Thirdly, the statute makes clear that companies owned by the government – typically called state-owned enterprises (“SOEs”) are deemed an extension of the government, such that these companies’ employees are public officials.<sup>57</sup> In the U.S. context, for example, whether employees of SOEs are foreign officials was a matter of much dispute, as the statute did not explicitly address the question. Only in 2011 did the U.S. courts resolve the question, holding just as the CCA now does that SOE employees are to be treated as officials.<sup>58</sup>

Finally, and perhaps most importantly, the statute imposes two forms of liability on companies: civil, and administrative.<sup>59</sup> Notably, the statute does not impose criminal liability on companies, but this is not inappropriately lenient, much less scandalous. Though the U.S., U.K., and many other jurisdictions around the world hold companies criminally liable, many (such as Germany) do not. And indeed, corporate criminal liability is a relatively new phenomenon in the history of law. International conventions such as the OECD Anti-Bribery Convention require signatory states to hold companies liable in accordance with their underlying principles of law, recognizing that some jurisdictions simply do not recognize the criminal liability of corporations. The CCA should not be thought as somehow less effective in this regard.

The CCA’s penalty provisions are especially strong; companies may even say severe. The penalty is to be calculated as a percentage, up to 20%, of the gross earnings in the company’s most recent fiscal year preceding the onset of enforcement proceedings.<sup>60</sup> Note what the statutory penalty is not. First, it is not calculated based on the amount of the bribe, as some might assume; a bribe of relatively modest proportions could give rise to a substantial penalty. Second, it is not a function of the earnings that resulted from the bribe. In the



U.S., for example, a company's financial penalty for foreign bribery is calculated based on the profits made possible by the bribe(s).<sup>61</sup> The CCA, by contrast, disregards both the size of the bribe and the size of the profits made possible by the bribe. Finally, note that this statute does not calculate profits based on annual profits, but rather, annual gross earnings. Accordingly, a company that is losing money – that is, one that has no annual profits – can still be fined. Where the bribes proved to be bad business, and became a losing proposition, the company may nonetheless be fined. So too may the company be debarred, or prohibited from conducting further business with the government, and in some circumstances may even be dissolved.<sup>62</sup>

### *Changing Enforcement to Transform Corporate Culture*

To understand the CCA's enforcement-side provisions, a brief overview of the U.S. system can be helpful. Though Brazil does not appear to be emulating the U.S., it is trying to build a system that now exists in the U.S. and has proven central to anti-corruption enforcement.

Federal anti-corruption laws in the U.S., particularly anti-bribery laws, are enforced by the U.S. Department of Justice and, to a lesser extent, the U.S. Securities and Exchange Commission. These agencies out of necessity have limited budgets. The principal aim of public anti-corruption enforcement is to maximize general deterrence – to prevent persons within their jurisdiction from committing similar acts. While specific deterrence refers to preventing recidivism – the defendant's repeated violation – general deterrence refers to preventing persons other than the defendant from committing similar violations. Accordingly, the U.S. enforcement agencies seek to maximize general deterrence while operating on a fixed budget. It might be said that they are looking for the maximum general deterrence return on the dollar.

One way – the traditional way -- to achieve both specific and general deterrence is to bring wrongdoers to trial. If convicted, the defendant company would face a stiff penalty and considerable reputational damage through the negative press. However, trials present two challenges for the enforcement

agencies. First, they are extremely resource-intensive, as the gathering of evidence (discovery) and resulting trials are notoriously drawn-out and expensive, consuming vast amounts of the enforcement agencies' time, money, and personnel. Second, because they are so resource intensive, the agency can try a relatively small number of companies. As a matter of simple math, because each company requires so much time to investigate and try, and assuming fixed resources, the agencies cannot try as many companies as they could if the trial process were substantially shorter than various legal and practical circumstances presently permit. Finally, a trial is unpredictable; the government can rarely be sure that, after all the time and money spent on trying a company, it will actually get a conviction. Accordingly, the U.S. Department of Justice realized that trials are no way to maximize the general deterrence "bang for the buck." They would get relatively few companies, with unpredictable results.

Meanwhile, criminal trials in particular are likewise a losing proposition for the defendant company. The company also feels the drain on resources, as key personnel are distracted from their regular duties and high-priced corporate litigators rack up billable hours. So too is the unpredictability of trials a major down side to the defendant company: they may get an acquittal, but so too may they get a conviction with an unexpectedly severe penalty. Finally, trials will generally produce negative press for a company, harming their reputation and, for public companies, their stock value. Even if ultimately acquitted, the reputational damage can be very hard to overcome.

Accordingly, as U.S. anti-corruption enforcement has increased over the last decade, so too has the use of alternatives to trial. Increasingly, U.S. enforcement authorities are proposing, and companies are accepting, an alternative form of investigation and settlement. Indeed, in the U.S., with anti-bribery law in particular, trials against corporate defendants are nearly unheard of. Rather, the DOJ and the corporate defendants agree to resolve the allegations by a different route.

That route has four core components. The first is occurs at the investigation stage. When an allegation of wrongdoing arises, either within a

company or publicly, the company will not wait for the government to catch wind of the suspicions and begin to investigate the company. Rather, the company conducts its own investigation into its own potential wrongdoing. With an “internal” investigation, typically for lesser alleged offenses, the company will conduct the investigation in-house. When the misconduct is larger-scale, more systemic, or where the in-house lawyers are potentially implicated, the company may conduct an “independent” investigation. Here, the board of directors will retain an outside law firm, one that has not previously represented or been affiliated with the company, to conduct a factual investigation into the wrongdoing and formulate conclusions concerning what wrongdoing may have occurred, the liability the company may face, and which steps the company should take in terms of internal governance and the retaining or firing of implicated personnel. That law firm does not represent the company, and is not advocating on behalf of the company. But neither does it represent the government. Rather, it is an independent third party, with no loyalties to either side of the prospective dispute, seeking an impartial account of the facts. Either way, when the investigation is complete, a substantial factual record, and a report summarizing the factual and legal conclusions, will be compiled. That report is left in the company’s possession.

The second core feature of modern U.S. anti-bribery enforcement concerns what happens next – that is, what happens with the report. The company has now spent millions, or tens of millions, on an investigation into its own wrongdoing, and possesses a comprehensive report with supporting documentation. Needless to say, the U.S. Department of Justice would like to get its hands on the report. Accordingly, it offers to the company “cooperation credit.” By the terms of this deal, if the company hands over the investigation’s findings, and makes its employees available to further interviewing, and otherwise cooperates with the government, the government will offer a penalty that, it claims, is substantially less than what the defendant would likely get if convicted at trial. The company now must make a decision. It can risk the unpredictability of a trial, with its exorbitant costs, substantial drain on

company resources, and undoubtedly negative press. Or, it can accept the government's offer of cooperation credit and turn over to the government the results of its investigation, buying itself a reduced penalty, predictability of outcome, reduced lawyer's fees, and reduced negative press.

Invariably, companies select the latter route: they choose to cooperate. The turning over of its investigation conclusions is widely referred to as "voluntary disclosure:" the company voluntarily discloses the results of its findings. The return for voluntary disclosure is the cooperation credit. Notably, the government cannot force companies to accept this deal, and yet the companies invariably do. It is perceived to be in the interests of both parties.

This deal culminates in the third core feature of the U.S. settlement process: the deferred prosecution agreement (DPA) or nonprosecution agreement (NPA). DPAs and NPAs are forms of settlement, in which the government agrees to either defer prosecution or to forego prosecution altogether in exchange for the company accepting certain terms of settlement. The terms will include a penalty and might also include disgorged profits, the termination of various personnel, the withdrawal of business from the problematic markets, or acceptance of a government-imposed monitor. Under a DPA, the government in effect gives the company a trial period in which to demonstrate its compliance with the law and the settlement terms. DPAs are agreements between the enforcement agency and the defendant; they do not involve judicial oversight. With a NPA, by contrast, a judge will sign off on the agreement, but with minimal oversight. The difference does not prove terribly important. DPAs and NPAs are two minor variations of the basic negotiated settlement.

The fourth unique component of this enforcement procedure concerns the role of compliance programs. Compliance programs are designed to prevent violations of given laws through training, monitoring, and the maintenance of an appropriate company culture. With respect to a given area of federal law – be it environmental, health care, or in our case, anti-corruption – a company that knows itself to be at risk may invest in compliance to varying

degrees. Of course, it may not invest at all, liking its chances that it will not violate the law or, at least, will not get caught. It may create a mediocre compliance program, and may or may not work to support that program by creating a culture within the company that values compliance. Or, the company may take compliance seriously, investing in a first-rate program and taking substantial effort to back up those programs with company culture.

The U.S. Department of Justice wishes to incentivize the growth of compliance programs, and will therefore reward companies for quality programs in several different stages of enforcement. First, the government may decide not to investigate a company at all. Though these decisions are not public, practitioners take for granted that, given the DOJ's limited resources, one factor it may consider in deciding whether to investigate a company at all is whether it had a quality compliance program in place at all. Second, the DOJ may investigate a company but then decide not to penalize it. That is, the DOJ does not find sufficient reason to penalize the company. A formal decision not to penalize a company is called a declination, and while these too are rarely public, the government has recently publicly declined to penalize a small number of companies based at least in part on the quality of the company's compliance program. Finally, when the DOJ does find sufficient evidence of culpability to enter into a DPA or NPA with the company, a quality compliance program can lead to a penalty reduction, as authorized by the U.S. Sentencing Guidelines.

Brazil's CCA introduces this enforcement regime into Brazilian anti-corruption enforcement. Though necessarily announcing that it is eschewing or even discouraging traditional trials, multiple provisions of the CCA are designed to foster the growth of an enforcement regime based on self-investigation, voluntary disclosure, and cooperation credit through settlements.

First, the CCA contains a list of enumerated factors that the government will consider when determining appropriate sanctions. The first six provisions of Chapter III, Article 7 are predictable and rather unremarkable: the seriousness of the offense, the advantage gained by the illicit conduct, whether the illicit act was completed, the degree or risk of damage, and the offending

company's economic circumstances.<sup>63</sup> However, the next two provisions are harbingers of a new enforcement era. Section 7.VII provides that penalties will be determined in part based on the cooperation of the legal entity in the investigation of the wrongdoing. This is cooperation credit. The next provision, 7.VIII, provides that penalties will also be based on the existence of internal procedures designed to promote integrity, including but not limited to auditing, whistleblowing, and self-enforcement of the codes of ethics and conduct. These are all features of what the west (or north, as it were) calls a compliance program.

Additionally, the CCA authorizes the relevant enforcement agency to enter into what the statute calls "leniency agreements."<sup>64</sup> These agreements are analogous to the U.S.-style DPAs and NPAs, but perhaps more aptly named. Unlike the U.S. terminology, the term "leniency agreement" makes its purpose more explicit: to be lenient on the defendant in exchange for the defendant's cooperation. The CCA establishes several requirements that a defendant company must meet if it is to be entitled to a leniency agreement; these requirements are much more specific, and perhaps more exacting, than anything seen in the U.S. system. They include: the collaboration must result in identification of the guilty individuals; the rapid exchange of information; the legal entity must have initiated the cooperation; the entity must completely discontinue its involvement in the investigated wrongdoing; the entity must fully admit its participation in the wrongdoing; and fully and completely cooperate with the investigation until its conclusion.

The CCA is thus a bold effort to stimulate the growth of a new corporate enforcement climate – where companies invest in compliance programs, where they investigate their own potential misdeeds, and where they will cooperate with the enforcement agencies to efficiently negotiate settlements.

#### IV. Organized Crime Law

Of the four pillars, Brazil's new organized crime statute, passed in August of 2013 – is perhaps most remarkable, both for its impact and for the

circumstances that led to its enactment. The statute provides a definition of organized crime and authorizes a number of law enforcement methods to investigate and prosecute organized crime. The federal prosecutors' use of these tools led to the Petrobras scandal.

The bill was supposedly proposed to go after organized crime (e.g. drug trafficking, etc.) generally and specifically a group of violent protestors known as the Black Bloc. Wearing black disguises, these protestors became highly more organized and visible in the 2013 anti-corruption protests, engaging in vandalism and theft.<sup>65</sup> During the early stages of congressional consideration, there was no mention that these enforcement tools could, or would, be used to go after high-level officials and businesspersons engaged in graft. But word on the street is that the advocates pushing for adoption of this bill may well have understood its potential to convict the very politicians who would vote to support the bill.

Of its various enforcement tools, two have proven of particular significance to anti-corruption enforcement. First, it provides an obstruction of justice charge: a person who obstructs investigations is subject to the same punishment range as one who promotes, constitutes, or finances a criminal organization.<sup>66</sup>

Second is the expanded plea bargain. Though plea bargaining previously existed under Brazilian law, it was much more restricted and thus a much less effective tool in the prosecutor's arsenal. Under the previous regime, judges could only reduce the penalty by one to two thirds, or grant a pardon post-conviction if the judge determined that the defendant's cooperation was useful to the conviction.<sup>67</sup> A defendant could thus not be sure, at the time of confession, of the plea bargain's effects on his/her conviction and sentence. Laws that previously governed plea bargains include the Heinous Crimes Law (8.072/1990), the Law on Economic and Tax Crimes, and Against Consumer Relations (8.137/1990), the Law on Crimes Against the Financial System (7.492/1986, as amended by Law 9.080/1995), Law 9.269/1996, which altered Article 159 of the Penal Code (on extortion with kidnapping), the

Money-Laundering Law (9.613/1998), the Cooperation and Witness Protection Law (9.807/1999) and the Law on Combating Drug Misuse (11.343/2006).<sup>68</sup>

The new organized crime law goes significantly further. It does not merely provide for a sentence reduction or eventual pardon. Rather, it allows the prosecutor to not bring charges at all under certain circumstances. Specifically, a prosecutor or judge may grant complete impunity, or reduce a penalty by up to two thirds, for a defendant who has effectively and voluntarily cooperated with the investigation, provided that the cooperation produces one of five results: 1) the identification of other participants in the crime; 2) information on the structure and control of the criminal organization; 3) the prevention of additional criminal activity by the organization; 4) the complete or partial recovery of the criminal proceeds; or 5) the location of the victim.<sup>69</sup> So too may the prosecutor dismiss the complaint against the defendant if (s)he is not the leader of the criminal organization and is the first member of that organization to enter into a plea agreement with the enforcement authorities.<sup>70</sup>

As the next chapter will show, the obstruction of justice charged and the enhanced plea bargain have made possible what may be the largest anti-corruption prosecution in history: Petrobras.

---

<sup>1</sup> As explained earlier [reference Olympic Governance section], the governing bodies of the 2016 Olympics consist of both public and private entities.

<sup>2</sup> Some, such as those in the OECD, believe that public procurement is the activity undertaken by a government that is the most vulnerable to corruption. See generally OECD PRINCIPLES FOR INTEGRITY IN PUBLIC PROCUREMENT, p. 9 (2009), available at [www.oecd.org/gov/ethics/48994520.pdf](http://www.oecd.org/gov/ethics/48994520.pdf).

<sup>3</sup> *Supra* INTEGRITY IN PUBLIC PROCUREMENT, note 8 at 3.

<sup>4</sup> See Office of the Inspector General, Procurement Fraud Handbook, U.S. GENERAL SERVICES ADMINISTRATION 14-16 (Dec. 2012), available at <http://www.gsaig.gov/?LinkServID=6486B647-A5DF-C154-010A408470CAEoB8>.

<sup>5</sup> For more details on the Clean Companies Act See [reference to Carter's section on the CCA].



---

<sup>6</sup> Integrity in Public Procurement: Good Practice from A – Z, OECD 21-24 (2007), available at <http://www.oecd.org/development/effectiveness/38588964.pdf>.

<sup>7</sup> Id. at 22.

<sup>8</sup> Id. at 24.

<sup>9</sup> Id. at 25.

<sup>10</sup> For further discussion on these forms of bid rigging, see supra Procurement Fraud Handbook, note 14 at 14-16.

<sup>11</sup> See Id. at 24.

<sup>12</sup> Id., at 17-25.

<sup>13</sup> Public Procurement in Brazil: Overview, PRACTICAL LAW (Oct. 1, 2014) <http://us.practicallaw.com/o-521-5566?q=&qp=&qo=&qe=>.

<sup>14</sup> Id.

<sup>15</sup> Procurement Law. Lei 8666/93 de 21 de Junho de 1993 (Braz.). CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 22.

<sup>16</sup> Bids that have been made are submitted to the public in the Official Gazette. Id. at art. 20.

<sup>17</sup> Id.

<sup>18</sup> Lei 12462, de 4 de Agosto de 2011 (Braz.).

<sup>19</sup> Id.

<sup>20</sup> Matrix of Responsibilities, World Cup Portal: Brazilian Federal Government website on the 2014 FIFA World Cup, <http://www.copa2014.gov.br/en/brasilecopa/sobreacopa/matriz-responsabilidades>

<sup>21</sup> Responsibility Matrix, Brazil 2016: The Official Website of the Federal Government About the Olympic and Panolympic Games in 2016, <http://www.brasil2016.gov.br/en/paraolimpiadas/governanca/matriz-de-responsabilidades>. 1 meaning that conceptual project in development based on the commitments of candidacy; 2 means that the draft or basic project/term of reference is under development; 3 means that notice with invitation to bid posted (for government projects) or a request for proposal published (private); containing scope, cost and schedule; 4 meaning signed contract; 5 meaning work completed, or service available; and 6 means that the project is delivered (status “Ready for Operation” granted). Id.

<sup>22</sup> “Transparency, Monitoring, and Control,”

<http://www.cgu.gov.br/assuntos/informacoes-estrategicas> (last visited Jul. 5, 2016).

<sup>23</sup> João Saravia, Procurement for Rio 2016™ Olympic and Paralympic Games, RIO 2016 (Jun. 2012), available at [http://www.brazilcouncil.org/sites/default/files/OlympicCommittee\\_Procurement%20Presentation2012.pdf](http://www.brazilcouncil.org/sites/default/files/OlympicCommittee_Procurement%20Presentation2012.pdf); Rio 2016 Launches Procurement Portal in Order to Meet Games Demands, RIO2016.ORG (Aug. 8, 2013) available at <http://www.rio2016.org/en/news/news/rio-2016-launches-procurement-portal-in-order-to-meet-games-demands>.

<sup>24</sup> Id.

<sup>25</sup> Infrastructure, Brazil 2016: The Official Website of the Federal Government About the Olympic and Pan-Olympic Games in 2016,

---

<http://brasil2016.gov.br/en/olimpiadas/legado/infraestrutura> (last visited Jul. 5, 2016).

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> Id.

<sup>29</sup> Four Regions, 31 Facilities and an Unprecedented Wave of Emotion in Brazil, Brazil 2016: The Official Website of the Federal Government About the Olympic and Panolympic Games in 2016,

<http://brasil2016.gov.br/en/olimpiadas/instalacoes/competicao> (Last visited Jul. 5, 2016).

<sup>30</sup> APO Announces Responsibility Matrix for the 2016 Games, Brazil 2016: The Official Website of the Federal Government About the Olympic and Panolympic Games in 2016, (Jan. 28<sup>th</sup>, 2014),

<http://brasil2016.gov.br/en/noticias/apo-announces-responsibility-matrix-2016-games> (Last visited Jul. 5, 2016).

<sup>31</sup> Barra Region, Brazil 2016: The Official Website of the Federal Government About the Olympic and Pan-Olympic Games in 2016,

<http://brasil2016.gov.br/en/olimpiadas/instalacoes/barra> (Last visited Jul. 5, 2016).

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Copacabana Region, Brazil 2016: The Official Website of the Federal Government About the Olympic and Pan-Olympic Games in 2016,

<http://brasil2016.gov.br/en/olimpiadas/instalacoes/copacabana> (Last visited Jul. 5, 2016).

<sup>36</sup> Id.

<sup>37</sup> Deodoro region, Brazil 2016: The Official Website of the Federal Government About the Olympic and Pan-Olympic Games in 2016,

<http://brasil2016.gov.br/en/olimpiadas/instalacoes/deodoro> (Last visited Jul. 5, 2016).

<sup>38</sup> Maracana region, Brazil 2016: The Official Website of the Federal Government About the Olympic and Pan-Olympic Games in 2016,

<http://brasil2016.gov.br/en/olimpiadas/instalacoes/maracana> (Last visited Jul. 5, 2016).

<sup>39</sup> Greg Michener, Analyzing Brazil's New Freedom of Information Law, OBSERVING BRAZIL (Dec. 13, 2011),

<http://www.observingbrazil.com/2011/12/13/analyzing-brazils-new-freedom-of-information-law/>.

<sup>40</sup> See Marcelo Sarkis, Access to Public Information in Brazil: What Will Change with Law No. 12.527/2011?, FREEDOMINFO.ORG (May 14, 2012),

<http://www.freedominfo.org/2012/05/access-to-public-information-in-brazil-what-will-change-with-law-no-12-5272011/>.

<sup>41</sup> See Id.

<sup>42</sup> Week in Review, 06/22/12, BRAZIL PORTAL,

<https://brazilportal.wordpress.com/tag/freedom-of-information-law/>.

- 
- <sup>43</sup> See Fabrizio Rigout & Camila Cirillo, Evaluating Readiness for the Implementation of Open Government Systems: The Brazilian Case in Comparative Perspective, PLAN, [http://www.planbrasil.com/repositorio/arquivo/artigo/Rigout&Cirillo\\_EvaluatingReadinessForImplementation.pdf](http://www.planbrasil.com/repositorio/arquivo/artigo/Rigout&Cirillo_EvaluatingReadinessForImplementation.pdf).
- <sup>44</sup> Michener, *supra* note xxxix.
- <sup>45</sup> See Week in Review, *supra* note xlii.
- <sup>46</sup> See Rigout, *supra* note xliii.
- <sup>47</sup> Lei N° 12846, de 1º De Agosto de 2013 (Braz.).
- <sup>48</sup> COLIN NICHOLLS ET AL., CORRUPTION AND MISUSE OF PUBLIC OFFICE 652-53 (2d ed. 2011).
- <sup>49</sup> Lei N° 8249, de 2º de Junho de 1992, art. 3. Private liability extends to direct and indirect benefit from the improper act. *Id.*
- <sup>50</sup> COLIN NICHOLLS ET AL., *supra* note 48, at 653.
- <sup>51</sup> Lei 8249, *supra* note xlix, at Art. 10.
- <sup>52</sup> Lei 12846, *supra* note xlvii, at Ch. II, Art. 5.I.
- <sup>53</sup> See generally *Id.*, at Ch. II, Art. 5.
- <sup>54</sup> *Id.*, at Ch. I, Art. 2.
- <sup>55</sup> THE CRIMINAL DIV. OF THE DEP'T OF JUSTICE & THE ENF'T DIV. OF THE SEC, A RES. GUIDE TO THE FED. CORRUPT PRACTICES ACT, NOV. 12, 2012, available at <https://www.sec.gov/spotlight/fcpa.shtml>.
- <sup>56</sup> Lei 12846, *supra* note xlvii, at Ch. I, Art. 2.
- <sup>57</sup> *Id.*, at Ch. 2, Art. 5, § V, ¶ 2.
- <sup>58</sup> *U.S. v. Esquenazi*, 752 F.3d 912 (11<sup>th</sup> Cir. 2014).
- <sup>59</sup> See Lei 12846, *supra* note xlvii, at Chs. III & IV.
- <sup>60</sup> *Id.*, at Ch. III, Art. 6.I.
- <sup>61</sup> Criminal Div., *supra* note lv, at p. 68-9.
- <sup>62</sup> Lei 12846, *supra* note xlvii, at Ch. VI.
- <sup>63</sup> *Id.*, at Ch. III, Art 7.I – 7.VI.
- <sup>64</sup> *Id.*, at Ch. V.
- <sup>65</sup> See Garcia-Navarro, Lulu, “Brazil’s Black Bloc Activists: Criminals or People Power?” (Oct. 22, 2013), available at <http://www.npr.org/2013/10/22/239860341/brazils-black-block-activists-criminals-or-people-power>.
- <sup>66</sup> Lei N° 12850, de 2º de Agosto de 2013, Ch. I, Art 2, § 1. (Braz).
- <sup>67</sup> <http://www.internationallawoffice.com/Newsletters/White-Collar-Crime/Brazil/Delmanto-Advocacia-Criminal/Introducing-plea-bargaining-a-unique-Brazilian-approach> (I did not have access to get this citation information)
- <sup>68</sup> *Id.*
- <sup>69</sup> Lei 12850, *supra* note lxvi, at Ch. II, § I, Art. 4.
- <sup>70</sup> *Id.*, at ¶ 4.