Legal Regulation on Combating Corruption: Brazil's report

I. Introduction

Corruption is a serious institutional dysfunction. The lenient view of corruption as the "grease of the wheels of development" is no longer accepted[1]. Much on the other hand, graft is currently understood as the "sand of the wheels"[2]. As one of the main factors hindering economic and social development, the combat of corruption has become a top priority in the agendas of public and private actors, including academia.

The Law School Global League has joined such efforts. It has created a group formed by scholars from several countries, including Brazil, Russia, Italy, Germany, United Kingdom and Turkey, and organized academic conferences on the topic. This report was prepared to the benefit of the group studying corruption, as a contribution to the creation of a comparative critical mass regarding such serious crime.

This report aims to describe the extant legal framework on combating corruption in the Federative Republic of Brazil. The purpose is to contribute to the dissemination of knowledge and to expand awareness of the applicable regulation and of the related institutions, mechanisms and instruments.

The second chapter addresses the general aspects of corruption. The third chapter deals with prevention of corruption in the public sector. Chapter four is dedicated to anti-corruption compliance in companies. Chapter five tackles the criminal liability for corruption. The last chapter, six, focuses on seizure and confiscation of corruption proceeds.

II. Corruption and Development

II.1 Corruption: General Aspects

If one searches for the word "corruption" on Google, the answer is an astonishing 41 million entries. Anyone could argue, however, that this is not a so impressive number. For example, the word "business" leads to 1.8 billion entries, while "law" leads to 433 million entries, and "government" leads to 414 million entries. In fact, a simple comparison of these numbers may give the impression that corruption is not as important as are business, or law, or government. But this is not necessarily a correct analysis. The magnitude of Google entries does not reflect the relative importance of each term, since they cannot be compared among themselves. Just as a matter of single comparison, the nature of the word corruption is not the same as the nature of the word business. Although some entries in a Google search for the words business or law or government may carry negative aspects for each entity or concept, most of the

[1] The "grease of the wheels" hypothesis was put forward by serious scholars, mainly political scientists. In summary, it argued that when regulatory burden was high and governance was low, corruption could increase efficiency. Corruption could compensate bad policies and bureaucracy as it would have the strength to mitigate or circumvent such distortions. In this perspective, corruption would be a positive contribution for growth and development. For instance, Nathaniel H. Leff argued that "(...) if the government has erred in its decision, the course made possible by corruption may well be the better one". LEFF, Nathaniel H. 'Economic development through bureaucratic corruption". American Behavioral Scientist 8:11-22, p. 11. Samuel P. Hutington asserted that "(...) in terms of economic growth, the only thing worse than a society with rigid, over-centralized, dishonest burocracy is one with a rigid, over-centralized and honest bureaucracy"). HUTINGTON, Samuel. **Political order in changing societies**. New Haven: Yale, 1968, p. 386.

[2] The "sand of the wheels" hypothesis was first asserted by MYRDAL, Gunard. **Asian drama: an inquiry into the poverty of nations**. New York: Pantheon Books, 1968.

entries obtained show how the world is a better place for having a set of laws, or an organized business structure, or any acting government.

Conversely, entries for the word "corruption" carry almost inevitably a negative tone. If one breaks down on Google the word corruption, it will be found that there are 1.4 million entries for the term "police corruption", or 776 thousand entries for "public corruption", or 580 thousand entries for "political corruption". In a flash of hope, the term "fighting corruption" has 677 thousand entries, and this is not for sure a bad start.

So it seems that corruption is something that everyone would like to get rid of (with exception of the corruptors and the corrupted, of course). At least publicly, no one defends corruption. Every politician or public servant or members of the judiciary or even the police force say publicly that they are frontally against any type of corruption. But this is not the perception of the population, all over the world, about this subject.

A recently published survey made by the European Commission - Special Barometer 397, February 2014 - in all of its State Members shows that:

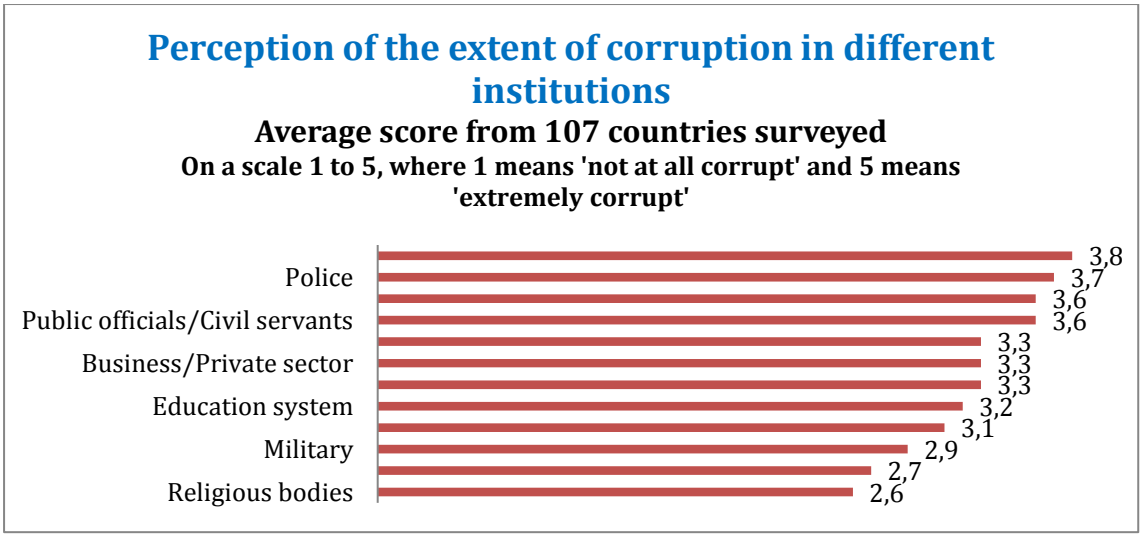
- 76% of respondents think that corruption is widespread in their own country.
- 26% think that it is acceptable to do a favor in return for something that they want from the public administration or public services.
- 59% believe that bribery and the abuse of positions of power for personal gain are widespread among political parties.
- 26% agree they are personally affected by corruption in their daily lives.
- 56% think the level of corruption in their country has increased over the past three years.
- 73% agree that bribery and the use of connections is often the easiest way of obtaining some public services in their country.

If these numbers are so dramatic for a highly developed region of the globe, what can be expected if the analysis included all the countries in the world?

The Global Corruption Barometer 2013 published by Transparency International shows the results of a survey made with more than 110,000 respondents in 107 countries. Some of the key findings of this survey are the following:

- Bribery is widespread - 27% of the respondents report having paid a bribe in the last 12 months when interacting with public institutions and services.
- Public institutions entrusted to protect people suffer the worst level of bribery - 31% of people who came in contact with the police report having paid a bribe; for those interacting with the judiciary, the share is 24%.
- Governments are not thought to be doing enough to hold the corrupt into account.
- The democratic pillars of societies are viewed as the most corrupt - around the world, political parties, the driving force of democracies, are perceived to be the most corrupt institution.
- Powerful groups rather than public good are judged to be driving government actions.
- Hopefully, the survey shows that people state they are ready to change this status-quo.

The same survey shows the perception people have about the level of corruption in different institutions in each of the countries surveyed. Again, the results are quite amazing. Political parties, police, parliament and public officials are viewed as the most corrupt institutions worldwide. To make things worse, both political parties and parliament are considered as the pillars of a democratic society.



Source: Transparency International - Global Corruption Barometer - 2013

But the effects of corruption are not only a matter of low national esteem, or lack of ethical standards, or even a "cultural shame". The most devastating effect of corruption is its cost to the population of every single country in the world. Resources that should be used to improve the quality of life of the population are embezzled, in a criminal way, from the poor ones who need desperately for such funds.

How could we estimate the cost of corruption? Of course, there is not any easy answer to this question. Generally speaking, corrupt people do not sign receipts acknowledging that they stole money from companies; and normally, these companies are state-owned ones. For obvious reasons, the level of corruption is traditionally much higher in state-owned entities than in the private sector. The lack of an individual owner who has invested his/her own money to establish and manage a company is a crucial factor to explain why the level of corruption is so high in state-owned entities. The owner is "the government" who is not a specific person. It is an amorphous entity which delegates to some individuals - normally for a short period of time - the task of managing a company. What is much worse, quite often these "managers" are appointed by the "government" with the main purpose of stealing money from these state-owned entities. The lack of perceived confidence in public officials or civil servants (as shown in the table above) is an obvious portrait of how people feel about these persons and their respective governments.

Although difficult to measure, some studies made in Brazil suggest that the cost of corruption may reach between 1.35 % of GDP (FIESP 2006) to 5% of GDP (*Época* 2008)[3]. Regardless of the real scale, these numbers indicate that corruption may reach amazing figures. For a GDP of US$ 2.2 trillion (2012), the cost of corruption could be estimated between US$ 30 billion to US$ 110 billion.

If one compares the annual expenditures made in education or health in Brazil, for example, it is easy to understand the significance of the estimated amount of the money stolen from public vaults. The expenditures made in health represent 3.5% of the Brazilian GDP in 2013, while the direct expenditures made by the central government in education represent only 1.0 % of the Brazilian GDP.

[3] POWER, Timothy J.; TAYLOR, Matthew M., "Introduction: Accountability Institutions and Political Corruption in Brazil" In **Corruption and Democracy in Brazil: The Struggle for Accountability**, POWER, Timothy J.; TAYLOR, Matthew M. (eds.), Notre Dame: University of Notre Dame Press, 2011, p. 1.

The more dramatic consequence of the corruption is not the amount of money which is embezzled by a small number of public servants or congressmen. The real cost of corruption is to place the population of a country in a hopeless fight against poverty and ignorance. The case of education in Brazil is again a typical example of the government indifference to the real needs of the population: in the recently published Learning Curve Study made by The Economist Intelligence Unit and Pearson International (2014), among 40 countries researched, Brazil is ranked number 38, ahead only of Mexico (ranked 39) and Indonesia (ranked 40). This report, in the own words of its publishers, is part of a wide-ranging program seeking to distil some of the major lessons on the links between education and skill development, retention and use. If one analyses the Learning Curve Study and the Corruption Index published by International Transparency, probably would find that it is not a simple coincidence that the countries ranked higher in the Learning Curve Study are the ones which are also perceived as the less corrupt countries according to the Transparency International Corruption Index (CPI).

The signals are very clear: the higher the perceived level of public sector corruption in a specific country, the lower its degree of development, and the lower public expenditures are destined to improve the well-being of its citizens. This is the perverse cost of corruption.

III. Prevention of corruption in the public sector

III.1. Country's Framework

The Federative Republic of Brazil is the result of an indissoluble union of, currently, 26 states, 5,570 municipalities and the Federal District[4].

The country adopts the presidential system, which permits the president to be elected directly by the population for a term of four years, reelection being permitted once. The federal Executive power is vested on the president, who is assisted by the state Ministries.

At the federal level, the Legislative branch is bicameral: a lower house, the Chamber of Deputies ("Câmara dos Deputados") and a higher house, the Federal Senate ("Senado"). Each state and each municipality have their own legislative powers, the so-called Legislative Assembly ("Assembleia Legislativa"). Within the constitutional boundaries, federal, state and municipal authorities may pass legislation.

The Judiciary is structured at state and federal levels. Each state has vested judges and a State Superior Court of Justice. The Federal system is organized and competence is distributed to the Supreme Court of Justice, the Superior Court of Justice, Regional Federal Courts and to federal judges. Labor, electoral and military matters are subject to a separate and specialized legal structure.

The Brazilian legal system stems from the civil law rooted-tradition.

III.2. Brief Framework of Regulation on Combating Corruption

Bribery is a crime in our legal system since the Penal Code of the Empire of 1830[5]. However, only in the past decades more structured and stable actions were taken in order to ensure prevention and detection, investigation, prosecution and sanctioning of bribery.

[4] Article 1 of the Brazilian Constitution of October 5, 1988, provides for the indissoluble union.
[5] Articles 130 to 134 of Law of December 16, 1830.

For instance, the Administrative Improbity Law was passed in 1992[6]. In 1998, the legislation criminalizing money laundering and concealment of assets, rights and valuables by means of misuse of the financial system was enacted (the so-called "Anti-Money Laundering Law"), with harsh punishments[7]. The same law created the Council for the Oversight of Financial Activities ("Conselho de Controle de Atividades Financeiras"). The Federal Office of the Comptroller General ("Controladoria Geral da União - CGU") was created in 2001 and remodeled in 2003[8]. During the decade of 2000, the powers of the Federal Police, the Federal Revenue Service and the Public Prosecutorial Service ("Ministério Público") were expanded. In 2010, the Clean Rap Sheet Law ("Lei da Ficha Limpa") was enacted, barring candidates who have been convicted of certain crimes to run for office for local or federal seats and making such person not able to run for eight years after the issuance of the sentence[9]. On November 20011, the Access to Information Law was passed, enabling the access to public information, the monitoring of governmental actions and spending and the repression of corruption[10]. On August 2013, the "Anti-corruption Law", ascribing strict administrative and civil liability to bribery acts[11].

Brazil's role as part of the international community combating corruption can be traced back to the landmark year of 2000. In that year, Brazil promulgated and enacted as domestic law the Organization for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[12]. Two years later, Inter-American's Convention against Corruption was recognized as part of the Brazilian normative body[13]. United Nation's Convention against Transnational Organized Crime and Convention against Corruption received similar treatment and entered the national set of applicable rules, respectively, on 2004 and 2006[14].

Like in most jurisdictions, the offence of bribery has repercussions in the civil and administrative spheres (*see* sub-items of III.2 and IV, below) and criminal sphere (*see* V, below).

III.2.1 National Anti-Corruption Law

During the months of June and July of 2013, rallies broke out virtually in every Brazilian major city. A ubiquitous demand in such rallies, among others, was the "end of corruption".

As the first impacts of the social turmoil were perceived, an immediate congressional reaction ensued. The draft bill that was being discussed for over three years became an urgent political matter. The result was the enactment of Law No. 12,846, of August 1, 2013, known as the "Anti-corruption Law"[15], which came into force on January 29, 2014.

The Anti-corruption Law introduced strict administrative and civil liability of legal entities for certain bribery and bribery related practices. It includes under the scope of protection harmful acts practiced against both national and foreign public officials and administration. Private sector bribery, unfortunately, was not included in the scope of the law.

The following are considered wrongful acts indicated by article 5:

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6 Law No. 8,429, of June 2, 1992.
7 Law No. 9,613, of March 3, 1998, as amended by Law No. 12,683, of July 9, 2012.
8 It was created on April 2, 2001, by means of the Provisional Measure No. 2,143-31, and displays its current institutional framework by force of enactment of Law No. 10,683, of May 28, 2003.
9 Complementary Law No. 135, of June 4, 2010.
10 Law No. 12,527, of November 18, 2011.
11 Law No. 12,846, of August 1, 2013.
12 By means of enactment of Decree No. 3,678, of November 30, 2000.
13 By means of enactment of Decree No. 4,410, of October 7, 2002.
14 Respectively, by means of enactment of Decree No. 5,015, of March 2004 and Decree No. 5,687, of January 31, 2006.
15 The law was published on August 2, 2013.

"I - to promise, offer or give, directly or indirectly, an undue advantage to a public official, or third person related to him;
II - as duly evidenced, to finance, defray, sponsor or in any way subsidize the performance of the wrongful acts provided for in this law;
III - as duly evidenced, to use an interposed individual or legal entity to conceal or dissimulate its real interests or the identity of the beneficiaries of the acts performed;
IV - regarding public tenders and contracts:
a) to thwart or defraud, through an adjustment, arrangement or any other means, the competitive character of the public tender procedure;
b) to prevent, disturb or defraud the performance of any act of public tender procedure;
c) to remove or try to remove a tenderer by fraud or by an offer of any type of advantage;
d) to defraud a public tender or a contract arising therefrom;
e) to create, in a fraudulent or irregular manner, a legal entity to participate in a public tender or enter into a contract with the Public Administration;
f) to gain an undue advantage or benefit, in a fraudulent way, of amendments or extensions of contracts executed with the Public Administration, without legal authorization, in the public tender deed or in the respective contractual instruments; or
g) to manipulate or defraud the economic and financial balance of the contracts made with the Public Administration.
V - to hinder the investigation or assessment activity of public bodies, entities or officials, or interfere with their work, including within the scope of regulatory agencies and supervisory bodies of the national financial system."

Administrative penalties are severe. They include application of a fine and the publication of the condemnatory decision in a widely read newspaper[16]. Fines may range from 0.1% up to 20% of the gross revenues (or R$6,000.00 up to R$60,000,000.00, if the gross revenue cannot be ascertained), or at least the amount of the undue advantage, if possible to estimate.

For the application of administrative penalties, the sanctions may be adjusted upwards or downwards based, among others, on the seriousness of the offence, the benefit obtained or intended, the losses caused by the wrongful act, the economic strength of the offender, the contract amount with the harmed public entity, potential cooperation with the investigation and the existence of internal mechanisms of integrity, audit and incentive for the reporting of irregularities, as well as the enforcement of codes of ethics and conduct[17].

As the law explicitly stated that companies may have their liability mitigated by implementing compliance programs, a wave of implementation has recently begun in the private sector. The content of such programs vary in their scope, regulatory and internal needs, standards and controls and oversight measures. The Federal Executive Power shall establish the criteria of evaluation of the compliance programs[18], but, up to this date, such guidance was not made available. In any case, the effective implementation of such programs may, hopefully, serve as an additional fostering element to enhance the anti-bribery culture in Brazil.

The corporate veil may be lifted under certain circumstances (i.e. abuse to facilitate, disguise or dissimulate wrongful bribery acts) and, in such case, the effects of the sanction may reach officers, board members and shareholders[19]. Controlling companies, controlled companies and under common control, or consortium members shall be jointly liable for payment of pecuniary administrative sanctions and for the relevant duty to fully indemnify[20].

On top of administrative sanctions, judicial sanctions may apply and, likewise, are quite severe. They include, pursuant to article 19:

[16] Article 6 of Law No. 12,846, of August 1, 2013.
[17] Article 7 of Law No. 12,846, of August 1, 2013.
[18] Article 7, sole paragraph of Law No. 12,846, of August 1, 2013.
[19] Article 14 of Law No. 12,846, of August 1, 2013.
[20] § 2 of article 4 of Law No. 12,846, of August 1, 2013.

> "I - The loss of the assets, rights or valuables representing the advantage or profit, directly or indirectly, obtained from the wrongdoing, except for the right of the damaged party or of third parties in good faith;
> II - Partial suspension or interdiction of its activities;
> III - Compulsory dissolution of the legal entity;
> IV - Prohibition from receiving incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or institutions controlled by the government, from one to five years.
> § 1. The compulsory dissolution of the legal entity will be established when the following is evidenced that:
> I - the corporate personality was used on a regular basis to ease or promote the performance of wrongful acts; or
> II - the legal entity was organized to conceal or dissimulate illicit interests or the identity of the beneficiaries of the acts performed.
> § 2. The application of the sanctions set forth in items II to IV of the caput will depend on proof of negligence or intent.
> § 3. The sanctions may be applied in an isolated or cumulative manner.
> § 4. The Public Prosecutor Office or the Public Advocacy Office, or the judicial representative body of the public entity, or their equivalent, may request the freezing of assets, rights or values necessary to guarantee the payment of the fine or to ensure the full restitution for the damage caused, as provided for in Article 7, except for the right of third parties in good faith."

In addition to administrative and judicial penalties, the convicted company's name shall be included in registries that impede them from participating in public bids and contracting with the government, namely, the National Registry of Punished Companies ("Cadastro Nacional de Empresas Punidas – CNEP") and the National Registry of Inapt and Suspended Companies ("Cadastro Nacional de Empresas Inidôneas e Suspensas – CEIS")[21].

Leniency agreements are permitted, limited to once each 3 years[22]. The execution of such an agreement may reduce the application of the administrative fine by up to two thirds, exempt the convicted company from the obligation to publish the condemnatory conviction in newspapers and from the prohibition to receive incentives, subsidies, grants and loans of public funds[23]. However, the execution of the leniency agreement does not eliminate the need to fully indemnify the harm caused by the wrongful act[24].

It is clear that the legal liability of the entities under the Anti-corruption law runs in parallel to the individual liability of the offender, co-offender or participant of the offence[25]. Also, if the illegal act constitutes a violation under other laws - such as the improbity law or public procurement law -, the process of accountability and sanctions therein shall not be affected[26].

Enforcement of the Anti-corruption Law may prove to be a challenge. Due to the structure of the Brazilian government (with federal, state and municipal entities with jurisdiction over the matter) and the lack of a specific, designated authority to implement the law, several authorities may concurrently enforce it[27]. Conflicts of interests, overlap and duplicity of efforts and multiplied costs are only a few of the problems and consequences arising out of such legal scenario. The only exception is for bribery acts committed by foreign public officials that can only be enforced by the Federal Office of the Comptroller General ("Controladoria Geral da União - CGU")[28].

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21 Articles 22 and 23 of Law No. 12,846, of August 1, 2013.
22 § 8 of article 16 of Law No. 12,846, of August 1, 2013.
23 § 2 of article 16 of Law No. 12,846, of August 1, 2013.
24 § 3 of article 16 of Law No. 12,846, of August 1, 2013.
25 Article 3 of Law No. 12,846, of August 1, 2013.
26 Articles 29 and 30 of Law No. 12,846, of August 1, 2013.
27 Articles 9 and 19 of Law No. 12,846, of August 1, 2013.
28 Article 9 of Law No. 12,846, of August 1, 2013.

III.2.2 Other relevant legislation

III.2.2.1 Anti-Money Laundering Law (Law No. 9,613, of March 3, 1998, as amended)

Brazilian Anti-Money Laundering Law addresses the crimes of money laundering and concealment of assets, rights and valuables. The crimes set forth in this law are subject to imprisonment from 3 to 10 years, plus fine[29].

Several private sector entities are obliged to identify customers, maintain updated records and report certain transactions to the competent authorities[30]. Entities and respective management individuals who fail to comply with the requirements of the law are subject to severe sanctions, which may range from warning, temporary disqualification for holding a management position and suspension or revocation of authorization to operate[31].

III.2.2.2 Administrative Improbity Law (Law No. 8,249, of June 2, 1992, as amended)

In the set of legal tools aimed at combating corruption, an important piece is the Administrative Improbity Law (Law No. 8,429, of June 2, 1992, as amended). It regulates improbity acts performed by public agents against the administration, be it direct, indirect or foundational at the federal, state or municipal levels, as well as, in short, by any company which receives public funds, subsidies, grants or credit. Similarly to the Anti-corruption law, this rule is in the realm of civil liabilities.

Under the improbity law, those who instigate or participate or who benefits from the improbity acts, even if not public officials, shall also be subject to the penalties established in such rule (*see* V, below). In case of illicit enrichment, the wrongdoer shall fully indemnify the public coffers and shall return the amounts resulting from the unjust enrichment[32].

III.2.2.3 Public Procurement Law (Law No. 8,666, of June 21,1993) and The Differentiated Regime of Public Contracts (Law No. 12,462, of August 4, 2011)

Another important law is the Public Procurement Law (Law No. 8,666, of June 21, 1993), which regulates public procurement and the execution of contracts regarding works and services at all governmental levels, including funds, public foundations, public companies, mixed-capital entities etc.

This law sets forth a number of crimes that can be included in a wider concept of corruption, meaning obtaining an undue advantage to someone to the detriment of the public interest[33]. If convicted, under this law, the public official may be banned from its position and wrongdoers, in general, are subject to fines and imprisonment sentences that vary from six months up to several years.

Due to the closeness of the Confederation Soccer Games, the World Cup, the Olympic and the Paraolympic Games and the need to perform major infrastructure works, the federal government enacted a provisional measure and, later on, the so-called law of the Differentiated Regime of Public Contracts (Law No. 12,462, of August 4, 2011). Such law aimed at speeding the procurement process for determined governmental contracts. The sanctions for corruption crimes related to this law are the same as those for the Public Procurement law[34].

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29 Article 1 of Law No. 9,613, of March 3, 1998, as amended by Law No. 12,683, of July 9, 2012.
30 Articles 9, 10 and 11 of Law No. 9,613, of March 3, 1998, as amended by Law No. 12,683, of July 9, 2012.
31 Article 12 of Law No. 9,613, of March 3, 1998, as amended by Law No. 12,683, of July 9, 2012.
32 Articles 5 and 6 of Law No. 8,429, of June 2, 1992.
33 Articles 89 to 99 of Law No. 8,666, of June 21, 1993.
34 Article 47 of Law No. 12,462, of August 4, 2011.

III.3. Law Enforcement Actors and Civil Society

Several actors play important roles to combat corruption in Brazil.

The Federal Office of the Comptroller General ("Controladoria Geral da União - CGU") is an agency of the Federal Executive Branch[35]. Among its main functions (i.e. audit and monitoring of use of public funds, disciplinary action and national ombudsman) is the prevention of corruption. CGU's Secretariat of Transparency and Corruption Prevention "formulates, coordinates and fosters programs, actions and regulations aimed at disciplining corruption prevention practices at the government level and in government relations with the private sector"[36].

The Federal Court of Accounts of Brazil ("Tribunal de Contas da União - TCU") is and administrative court. It is in charge of auditing the accounts of managers and people in charge of federal funds, assets and other valuables, overseeing public expenditures and monitoring and punishing misconducts[37]. It is the main government auditing authority and is exclusively dedicated to such activities.

It is worth mentioning ENCCLA, the acronym of the National Strategy to Fight Corruption and Money Laundering ("Estratégia Nacional de Combate à Corrupção e à Prevenção à Lavagem de Dinheiro"). Created in 2003 by the Ministry of Justice, it aims to articulate the efforts of actors of the executive, judiciary and legislative spheres, at the federal, state and municipal levels, together with the Public Prosecutorial Service ("Ministério Público") and the civil society. Nowadays, 64 entities are part of ENCLLA.

the Business Principles to Combat Bribery - Small and Medium Companies Edition, by Transparency International and

Recent noteworthy initiatives are the creation of the National Registry of Companies committed to Ethics and Integrity – Pro-Ethical Companies Registry ("Cadastro Nacional de Empresas Comprometidas com a Ética e a Integridade – Cadastro Empresa Pró-Ética"), by the Federal Comptroller General and Ethos Institute[38]. The purpose of the registry is "to assess and to promote companies which voluntarily engage in the construction of an environment of integrity and trust in commercial relationships, including those with the public administration"[39].

[35] It was created on April 2, 2001, by means of the Provisional Measure No. 2,143-31, and displays its current institutional framework by force of enactment of Law No. 10,683, of May 28, 2003.
[36] http://www.cgu.gov.br/english/AreaPrevencaoCorrupcao/AreasAtuacao/, acess on May 2, 2014.
[37] TCU's competences are provided in the Brazilian Constitution, articles 71 to 74 and 161.
[38] Cite source.
[39]. Adheshion to the Registry Tutorial, page 2, November, 2013.

IV. Criminal liability for corruption

Pursuant to the Brazilian Constitution, "there is no crime without a previous law to define it, nor a punishment without a previous legal commination"[40]. The attribution of a criminal offence depends upon the previous existence of a law criminalizing such act or omission and the respective commination. Brazil criminalizes public corruption. However, private sector corruption is not a crime up to this date.

Criminal liability in Brazil for corruption is limited to individuals. A legal entity is subject to civil and administrative liabilities but, aside from environmental crimes[41], it cannot be held criminally liable. Only individuals can be authors of the offence of bribery, either actively or passively. Thus, to the extent applicable, officers, board members and management in general may be held criminally liable for a corrupt act.

The offence of passive bribery is described in Article 317 of the Brazilian Penal Code (Law No. 2,848, of December 7, 1940, as amended):

> "Art. 317. To request or receive, for himself/herself or for a third party, directly or indirectly, even if outside or prior to assuming the public function, but as a result of such function, an undue advantage, or to accept promise of such advantage.
> Penalty - Deprivation of liberty from two (2) up to twelve (12) years plus a fine.
> § 1. The penalty is increased by one third if, as a consequence of such advantage or promise, the public official delays or omits to practice any of its duties or practices it breaching his/her functional duties. (…)"

Active bribery is a crime set forth in Article 333 of the same code:

> "Art. 333. To offer or promise an undue advantage to a public official, to instigate him to practice, omit or delay its duties.
> Penalty - Deprivation of liberty from two (2) up to twelve (12) years plus a fine.
> Sole §. The penalty shall be increased by one third if, as a consequence of such advantage or a promise, the public official delays or omits to practice any or its duties or practices it breaching his/her functional duties."

In order to implement OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Penal Code was amended in 2002[42], and articles 337-B to 337-D were included to criminalize active bribery and traffic of influence of foreign officials.

Active bribery in an international business transaction is an offence under Article 337-B:

> "Art. 337-B. Promising, offering, or giving, directly or indirectly, any improper advantage to a foreign public official or to a third person, in order for him or her to put into practice, to omit, or to delay any official act relating to an international business transaction.
> Penalty – Deprivation of liberty from one (1) up to eight (8) years plus a fine.
> Sole §. The penalty is increased by one third if, as a result of the advantage or promise, the foreign public official delays or omits, or puts into practice the official act in breach of his or her functional duty."

Traffic of influence in an international business transaction is criminalized under Article 337-C:

[40] Article V, item XXXIX.
[41] Article 225, § 3 of the Brazilian Constitution and article 3 of Law No. 9,605 of February 12, 1998.
[42] Law No. 10,467, of June 11, 2002.

> "Art. 337-C. Requesting, requiring, charging, or obtaining, for oneself or for another person, directly or indirectly, any advantage or promise of advantage in exchange for influencing an act carried out by a foreign public official in the exercise of his or her functions relating to an international business transaction.
> Penalty – Deprivation of liberty from two (2) up to five (5) years plus a fine.
> Sole §. The penalty is increased by half, if the perpetrator alleges or insinuates that the advantage is also intended for a foreign public official."

As seen above, the concept of "public official" is key to the offence of public corruption. For criminal purposes, the relevant definitions are those contained in the Brazilian Penal Code for national bribery and both in the Penal Code and in the applicable international conventions for transnational bribery.

The Penal Code defines "public official" as follows:

> "Art. 327. For the purposes of criminal law, anyone who, even though temporarily or unpaid, performs a public job, position or function is deemed to be a public official.
> § 1. Anyone who performs a public job, position or function in a para-state body or who works for a service-providing company hired or contracted to carry out any typical activity in the Public Administration is also deemed to be a public official. (…)
> § 2. The penalty shall be increase by a third when the authors of the crimes foreseen in this Chapter occupy commissioned, trust positions or management or counseling functions in the direct state bodies, mixed-economy corporations, public companies or foundations created by the public power."

A different, specific definition of "foreign public official" applies, however, to the offence of active bribery and of traffic of influence in international business transactions. For the application and interpretation of crimes:

> "Article 337-D. A foreign public official is deemed to be, for the purposes of the criminal law, anyone, even though temporarily or in an unpaid capacity, who holds a position, a job or a public function in state bodies or in diplomatic representations of a foreign country.
> Sole paragraph. Anyone who holds a position, a job or function in an organisation or enterprise directly or indirectly controlled by the Public Authorities of the foreign country or in international public organisations is deemed to be equivalent to a foreign public official."

Legal literature on the topic and existing case law define "public official" quiet widely. The approach is function-based: anyone exercising a public function, job or position is considered a public official. OECD has expressed its concern that the definition of "public official" for Brazilian officials and for foreign officials would be different and the latter one less encompassing, for instance excluding those who work "for or on behalf of" a foreign state-controlled company or public international organization and raising doubts as to whether someone exercising public function for a foreign public agency would be considered a public official[43]. These and other topics shall be reviewed next June 2014, on Phase 3 of implementation of OECD's 1997 convention.

For the qualification of an act as bribery, the public official does not need to be discharging his/her functions, being considered graft even if the investiture has not yet occurred. The relevant fact, for purposes of incrimination, is that the illicit act arises out of or has a relationship with his/her position[44], even if the proceeds are received after he/she had left such position.

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[43] OECD's report on Phase 1 Review of implementation of the convention and 1997 recommendation, approved and adopted by the Working Group on Bribery in International Business Transactions on August 31, 2004, p. 6.

[44] A recent high profile corruption case decided last year (the "Mensalao") dealt with sensitive issues related to the crime of corruption. In the penal lawsuit No. 470-MG (a.k.a. "Mensalao" or big monthly allowance or stipend, in Portuguese), the indictment named 38 people, some well-known politicians, high ranked officers of public entities and public officials. The case involved regular, monthly payments made by the Workers' Party ("Partido dos Trabalhadores") to congressmen of the other

Both as regards national or transnational bribery, the advantages received by a public official may be of any nature, pecuniary or non-pecuniary, tangible or intangible. The characteristic of the advantage being "undue" is ascertained by the fact that, under applicable law, the public official is not entitled to such reward. The value or amount of the advantage is irrelevant for the purposes of the bribery offence; however, insignificant "courtesy" gifts may be considered an exception.

The offence of bribery admits incitement, aiding and abetting within the meaning of complicity, as defined by Article 29 of the Penal Code[45], and attempt and conspiracy, as regulated, respectively by Article 14[46] and Article 288[47].

Fines are applied as additional sanctions for bribery (but not in lieu of). The amount of fines may not seem to be representative if compared to the international standard, ranging herein from a couple of Reais to less than two million Reais.

V. Seizure and Confiscation of Corruption proceeds

Pursuant to Brazilian law, proceeds from corruption may be restrained, frozen and seized during the pre-trial and trial periods and, after a conviction is issued, may be confiscated.

The Penal Procedure Code (Decreto-Lei No. 3,689, of October 3, 1941, as amended) regulates such acts as follows:

> "Art. 125. The seizure of real estate property, acquired by the indicted person with the gains of the illicit act, is permitted, even if already transferred to a third party.
> Art. 126. Vehement evidence of the illicit origin of assets is sufficient to the issuance of the seizure order.
> Art. 127. The judge, *ex officio*, at the request of the Public Prosecutorial Service ("Ministério Público") or of the injured person, or by means of representation by the police, may order the seizure, at any stage of the process or even before the submission of the complaint. (…)
> Art. 132. The seizure of movable assets is permitted if, once verified the conditions set forth in art. 126, the measures regulated by Chapter XI of Title VII of this book are not applicable[48].
> Art. 134. The creation of a security interest ("hipoteca legal") over the assets of the indicted person may be requested by the injured person at any stage during the process, provided that there is certainty of the illicit act and sufficient evidence of authorship. (…)
> Art. 137. If the responsible person does not have enough real estate property or have them in an insufficient amount, other movable property may be subject to security interests, pursuant to the terms of creation of such interests over real estate properties. (…)

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political parties that formed the allied governmental-base. Such payments were made with the help of financial institutions and through fake advertising contracts engaged by public entities, such as Banco do Brasil. The crimes attributed to them involved corruption (active and passive), money laundering, conspiracy, among others. Out of the indicted, 25 were convicted. Several of them currently face imprisonment sentences. In the Mensalao, the Justices dissented as to whether there was a need to have the act to be practiced by the public official fully determined (i.e. the vote-buying scheme had to be specific about a certain draft bill or could the vote-buying be in general for parliamentary support?). The majority concluded that, to be considered bribery, some level of indeterminacy of the act is acceptable (vote-buying in general).

[45] "Art. 29. The penalties prescribed for the criminal offence also apply to whomever, in any way, conspires in the criminal offence, insofar as the person concerned is found guilty.
§ 1. If the participation was of a lesser degree, the penalty may be reduced by from one sixth to one third.
§ 2. If any of the conspiring parties wished to take part in a less serious criminal offence, the penalty for this will be applied: the penalty will be increased by up to one half in the event that the more serious consequences were predictable."

[46] "Art. 14. A crime is attempted when:
II. performance has begun, but it is not carried out through circumstances foreign to the wishes of the offender.
Penalty – Except if provided otherwise, the penalty is the same applicable to the crime which was to have been committed, reduced by a range of one third to two thirds".

[47] "Art. 288. More than three (3) people associate together in a gang or band, for the purpose of committing a crime.
Penalty – Deprivation of liberty from three (3) to six (6) years". The notion of conspiracy, in Brazilian law, is different from the one of OECD's Convention, since it is not a separate offence.

[48] The measures indicated in such articles are search and seizure measures.

> Art. 142. The Public Prosecutorial Service ("Ministério Público") may promote the measures referred to in articles 134 and 137, if requested by the Tax Authorities ("Fazenda Pública"), or if the injured person is poor and so requests. (…)
> Art. 144. The interested persons or, in the case set forth in art. 142, the Public Prosecutorial Service ("Ministério Público") may request at civil court, against the civil responsible person, the measures provided by arts. 134, 136 and 137."

Thus, as a mean to secure and preserve evidence, in view of plain evidence of the illicit origin of the assets, the Judiciary may order restrain, freeze and seizure of such assets. Both real estate properties and, in certain conditions, movable assets may be restrained, frozen and seized.

Confiscation is considered an important measure due to its ability to deprive the criminal actor from the benefits of its act, reverting it to the public coffers. Confiscation of proceeds gained from illicit acts, including corruption, is set forth in article 91 of the Penal Code:

> "Art. 91. As a result of a criminal conviction:
> I – the obligation to indemnify for all damages and losses caused by the criminal offence becomes mandatory;
> II – with due regard to the rights of the injured party or to a bona fide third party, the mandatory loss, to the benefit of the Federal government:
> a) of the instruments of the criminal offence, provided that they consist of assets whose manufacture, sale, use, bearing or detention constitutes an illegal act;
> b) of the product of the criminal offence or of any asset or amount constituting a gain made by the offender from committing the criminal offence.
> § 1°. The loss of assets or amounts equivalent to the product or proceeds of the crime may be determined when such products or proceeds cannot be found or are located abroad."

Under Brazilian law, confiscation is a necessary result, a consequence of a criminal conviction. It is applied in addition to the sanction itself, considered a complimentary measure to the sanction. The purpose is to collect from the perpetrator and to hand over to the Federal government's realm of influence the instruments and proceeds of criminal acts. As a result of the conviction, confiscation is mandatory, not a discretionary act.

Confiscation may be directed at to the so-called "instrumentalities", to the products of the offence and to any and all assets or amounts obtained as a result of the criminal act. It may be imposed against individuals or legal entities. A subjective requirement for the confiscation is that the individual who is subject of such act must either be an accomplice or co-author and, in case of it being a legal entity, must have benefited from the crime. It cannot be imposed against an injured party who is or may be entitled to such assets as a result of a civil damages lawsuit or to a bona fide third party.

In case of foreign bribery, confiscation may be a measure hard to implement. In fact, as it is an effect of a conviction and it is unlikely that a foreign public official shall be indicted and convicted in the country, the resulting bribe may not be confiscated. Also, the use of legal entities may jeopardize the confiscation in case of foreign briberies. OECD has recommended Brazil to consider changing its regulation, so as to be able to confiscate graft proceeds of foreign public officials[49].

Additional regulation regarding freeze and loss of property for corruption may be found in other rules. The Anti-corruption Law, as seen above, foresees freeze and loss of property in its article 19.

[49] OECD's report on Brazil: Phase 2 Report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, approved and adopted by the Working Group on Bribery in International Business Transactions on December 7, 2007, p. 56-58.

Other example can be found in the Administrative Improbity Law (Law No. 8,429, of June 2, 1992, as amended), which provides as follows:

> "Art. 6. In case of illicit enrichment, the public agent or the third party beneficiary shall loose the assets or amounts added to their net worth.
> Art. 7. Whenever the improbity act harms the public property or gives rise to illicit enrichment, the competent administrative authority responsible for the inquiry shall request to the Public Prosecutorial Service ("Ministério Público") the freeze of assets of the indicted person.
> Sole §. The freeze of assets referred to in this article shall be applicable over assets that secure the full indemnity of the damages, or over the added amount resulting from the illicit enrichment. (…)
> Art. 12. Regardless of criminal, civil and administrative sanctions set forth in specific legislation, the responsible for the improbity act shall be subject to the following commination (…):
> I – in case of 9°, loss of assets and amounts illicitly added to the networth (…);
> Art. 16. In view of clear evidence of liability, the commission shall notify the Public Prosecutorial Service ("Ministério Público") or to the attorney bureau of the competent body to request to the competent body the seizure of the assets of the agent or the third party who had illicitly enriched or caused damage to the public property. (…)
> § 2°. Whenever applicable, the request shall include investigation, exam and freeze of assets, bank accounts and investments kept by the indicted person abroad, pursuant to the rule and international treaties."

Money laundering law also sets forth seizure, arrest and confiscation, as follows:

> "Art. 4. During investigations or judicial proceedings, upon request made by the prosecutor or the competent police authority, after consulting the prosecutor within twenty-four hours, and with sufficient evidence, the judge may order the seizure or detention of assets, rights and valuables that constitute the object of the crimes referred to in this Law, and which belong to the defendant or are registered under his/her name. (…)
> § 2. The judge shall order the liberation of seized or detained assets, rights and valuables after the legality of their origin has been established. (…)
> § 4. In the event that the immediate implementation of the preventive measures referred to herein may compromise the investigations, the judge—upon consultation with the prosecutor—may issue an order suspending an arrest warrant or the seizure or detention of assets, rights or valuables. (…)
> Art. 7. In addition to the provisions set forth in the Criminal Code, a guilty sentence entails the following:
> I. The forfeiture, in favor of the Union, of any assets, rights and valuables resulting from any of the crimes referred to in this Law, due provision being made for safeguarding the rights of a victim or a third party in good faith;
> II. The suspension of the right to hold positions of any nature in the public service, positions as directors, members of management councils or managers of any of the legal entities referred to in article 9, for a period equal to double the imprisonment term stipulated by the judicial sentence;
> Article 8. If there is an international treaty or convention dealing with the matters referred to in this Law and upon request of a competent foreign authority, the judge shall order the seizure or detention of assets, rights and valuables resulting from the crimes committed abroad referred to in article 1."

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