

The New Brazilian Anticorruption Law

Federation Challenges and Institutional Roles

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After a long period of military dictatorship, Brazil's democracy established a new constitutional order. The 1988 Constitution laid the foundation for governance and anticorruption strategies that could achieve the objectives specified in Article 3: to build a free, just, and solidaristic society; to guarantee national development; to eradicate poverty and substandard living conditions; to reduce social and regional inequalities; and to promote the well-being of all, without prejudice as to origin, race, sex, color, age, or any other form of discrimination.

Corruption has plagued society since the earliest of times, and as history has advanced, corruption seems to have become more resistant to preventive measures. Today, corruption is a billion-dollar business that consumes funds intended for health care, education, and infrastructure, and impedes the realization of Brazil's constitutional objectives. A study conducted in 2010 by the Federation of Industries of São Paulo State calculated that the cost of corruption in Brazil in 2008 was between 1.38 percent and 2.3 percent of the country's GDP, or between R\$41.5 billion and R\$69.1 billion.¹

Over the past decade, the Brazilian Congress has undertaken a series of legislative reforms and promulgated new laws enhancing Brazil's anticorruption legal framework. Even the Organisation for Economic Co-operation and Development's (OECD's) Working Group on Bribery² recognized Brazil's efforts to implement the International Anti-Bribery Convention and recommendations. Nevertheless, Brazil still scores very low in anticorruption rankings such as the Transparency International Corruption Perceptions Index and the World Bank Worldwide Governance Indicators.

This chapter first explains the national context in which the new anticorruption laws have appeared, focusing on the peculiarities of the Brazilian Federation model and the existing anticorruption legal framework, including the features of the new Anticorruption Law, Act 12,846/2013. The chapter then clarifies the roles of the private sector, the Office of the Comptroller General, and the Ministério Público. The chapter concludes that the Anticorruption

1 See the Federation of Industries of São Paulo State website at <http://www.fiesp.com.br/indices-pesquisas-e-publicacoes/relatorio-corruptao-custos-economicos-e-propostas-de-combate/>.

2 See OECD Working Group on Bribery, *Brazil: Phase 2. Follow-up Report on the Implementation of the Phase 2 Recommendations* 3 (2010), <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/45518279.pdf>.

Law is a major paradigm shift in addressing corruption in Brazil, not least because it demands changes in the way that both the public and the private sectors deal with anticorruption challenges.

The Challenges of the Brazilian Federation Model

Dynamic political and institutional arrangements shape the use of power; understanding federalism as a way to share power and responsibility is critical to comprehending the roles of national institutions.

It is not possible to advocate a pure or authentic model of federalism. Research shows a broad range of federation frameworks and meanings, creating a colorful kaleidoscope of experiences and structures for each and every federalized nation, based on geopolitical factors, political leadership, and diverse historical legacies. Contextual and circumstantial flexibility is inherent to a federal system, and historically the pendulum has swung between more centralized and, at times, decentralized governance.

The complex influence of factors on the formation of federations is summarized in James Bryce's³ notions of centrifugal and centripetal forces on political constitutions. Centripetal forces act on independent states, which merge to form one large sovereign state through an agreement or a treaty after partially giving up their sovereignty (segregative formation). In the United States,⁴ for example, the township was organized before the county, the county before the state, the state before the union. Conversely, centrifugal pressures impel unitary states to break down and disperse into several states linked by a federation (aggregative formation). Moreover, scholars generally recognize two levels of federal government: national and state.⁵

On February 24, 1891, the day of the promulgation of the first republican constitution in Brazil, political institutions were modeled on the American federal system, based on the "compound republic" ideas of Alexander Hamilton, James Madison, and John Jay.⁶ But unlike the U.S. experience, Brazil's federalism was the result of centripetal forces (segregative formation) that,

3 James Bryce, *Studies in History and Jurisprudence* (Clarendon 1901).

4 See Alexis de Tocqueville, *Democracy in America*, vol. 1, 61–81 (Henry Reeve Henry transl., J. C. Spencer ed., J. & H. G. Langley 1841).

5 C. Friederich, *Trends of Federalism in Theory and Practice* (Pall Mall 1998); M. Burgess, *Comparative Federalism: Theory and Practice* (Routledge 2006); D. Elazar, *Federalism: An Overview* (HSRC 1995); E. L. Gibson, *Federalism and Democracy in Latin America* (Johns Hopkins U. Press 2004); V. A. Earle, *Federalism: Infinite Variety in Theory and Practice* (F. E. Peacock 1968); Ivo D. Duchacek, *Comparative Federalism: The Territorial Dimension of Politics* (U. Press Am. 1987).

6 A. Hamilton, J. Madison, & J. Jay, *The Federalist: A Collection of Essays Written in Favor of The New Constitution, as Agreed upon by The Federal Convention* (H. B. Dawson ed., Morrisania 1864).

exceptionally, recognized three levels within a symmetrical federal government: the union, the states, and the municipalities.⁷

In short, the municipalities, together with the states, the Federal District (Brasília), and the union,⁸ compose the federal entities in Brazil. Each municipality has administrative and political autonomy and its own executive and legislative branches; the municipal taxes, laws, and institutions tend to vary.⁹

Municipalities occupy a unique position in the Brazilian Federation.¹⁰ According to Anwar Shah, a World Bank specialist in fiscal federalism, “municipal governments in Brazil . . . should be the envy of all governments in [the] developing (or even advanced nations) world.” Similarly, another Brazilian scholar, J. A. de O. Baracho, states that the “municipalism, with its strong prestige in Constitutional order, strengthens the ties between state and community, enhancing planning and applying social policies to foster greater interaction between federal and local government.”¹¹

The Brazilian federal model shaped the internalization of international anticorruption mechanisms. Because municipalities are considered federal entities in Brazil, each municipal branch has the same authority as a state or the union to use anticorruption mechanisms. Thus, all of these federal entities have the power to apply fines to companies or strike deferred prosecution agreements, for example. Therefore, unifying the agenda of the numerous *colegitimates* is a challenge to the implementation of the new Anticorruption Law.

Taking Regulation Seriously

Before examining the perspectives of the new anticorruption law itself, a brief look at Brazilian history in terms of anticorruption legislation is in order.

During President Getúlio Vargas’s administration, Brazil’s 1940 Penal Code (Decree-Law 2,848/1940) dedicated a full chapter to offenses against public administration, with a range of situations envisaged, including 14

7 According to Article 1 of the Brazilian Constitution:

The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the federal district, is a legal democratic state and is founded on: I – sovereignty; II – citizenship; III – the dignity of the human person; IV – the social values of labor and of the free enterprise; and V – political pluralism.

8 The federal district has both municipality and state competences; therefore, it is not considered a federation-level entity here.

9 Otherwise, municipalities would have no judiciary power and no public prosecutors. For municipal matters, state’s judges and public prosecutors are entitled to act.

10 See J. A. L. Sampaio, *O Município no Direito Comparado*, in *Vinte Anos da Constituição Federal de 1988* 661–87 (Cláudio Pereira de Souza Neto, Daniel Sarmento, & Gustavo Binenbojm eds., Lumen Juris 2009).

11 A. Shah, *The New Federalism in Brazil* 14 (PRE Working Paper Series, World Bank 1990); J. A. de O. Baracho, *O Princípio da Subsidiariedade: Conceito e Evolução*, 200 *Revista de Direito Administrativo* 25 (Apr.–June 1995).

articles¹² for public officials' misconduct¹³ and 10 articles¹⁴ for ordinary citizen's corrupt acts.

Articles 316, 317 and 333¹⁵ define specific corruption offenses in the Penal Code, including official misconduct, where a public official demands an unlawful advantage¹⁶ or practices active or passive bribery.¹⁷ In general, any payment or advantage requested, solicited, or received by a public official, whether promised or offered, is against the law, regardless of the value of the payment or advantage.

During the 1960s, the Tax Evasion Law (Act 4,729/1965) established the falsification of accounting documents as a criminal offense, and Decree-Law 201/1967 defined a series of acts related to abuse of office by mayors and council members as misconduct and established sanctions for those acts.

At the very end of the dictatorial regime, Act 7,492/1986, which regulates crimes against the Brazilian financial system, came into force.

Other than these rules, most of the relevant anticorruption legislation was passed under the new constitution.

12 Arts. 312–36 of the Penal Code.

13 Brazil adopted a broad concept of “public official” for criminal law purposes:

Art. 327: For the purposes of criminal law, anyone who, even though temporarily or unpaid, performs a public job, position or function is considered to be a public official.

Para. 1. Anyone who performs a public job, or holds a 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 considered to be a public official.

Para. 2. The penalty is increased by 1/3 (one third) if the offender on the crimes established at this Chapter holds a function in a committee, steering board or advisory organ of a governmental entity or of an entity owned by the government.

14 Arts. 328–37 of the Penal Code.

15 “*Concussão*,” according to art. 316: “Demanding an improper advantage, for oneself or for another, directly or indirectly, even when out of his/her duties (functions) or before assuming his/her duties (functions) but because of them. Penalty – deprivation of liberty from 2 (two) to 8 (eight) years and fine.”

“Passive corruption,” according to art. 317: “Requesting or receiving an improper advantage for oneself or for another person, directly or indirectly, even if outside or prior to assuming the public office, but due to such function, or accepting a promise of such an advantage. Penalty – deprivation of liberty from 2 (two) up to 8 (eight) years and fine.”

“Active corruption,” according to art. 333: “Offering or promising an improper advantage to a public official, in order for him to conduct, to omit or to delay an official act. Penalty – deprivation of liberty from 2 (two) to 12 (twelve) years and fine.

Sole Paragraph – The sentence is increased by 1/3 (one third) if in order to get the advantage or to follow the promise, the public official holds back or omits an official act or practices that act breaking his official duties.”

16 In the Brazilian Penal Code, this criminal offense is called “*concussão*.”

17 In the Brazilian Penal Code, this criminal offense is called “active” and “passive” corruption, the former being the demanding side and the latter the supplying side.

The “Law on Administrative Improbity” (Act 8,429/1992) is an important piece of anticorruption legislation, regulating both civil and administrative infractions. This law describes in Articles 9, 10, and 11 a series of actions that, if practiced by public officials, are subject to penalties. These articles are divided among acts concerning illicit enrichment of public officials, squandering of public assets, and offenses against the principles of public administration.

Anyone who induces or contributes to an act of improbity or who benefits from such an act, directly or indirectly, is subject to punishment under the law, regardless of whether an individual or a legal entity committed the act. Even if the public official is the recipient of the money, anyone who took part in the official’s enrichment is also liable. Inasmuch as this law has a civil nature and provides civil sanctions, it may be applied to both individuals and legal entities.

The Public Procurement Act (Act 8,666/1993) established rules about public procurement and contains provisions on both criminal and civil penalties regarding procurement and bidding fraud.

Complementary Act 135/2010, which amends Complementary Act 34/1990 (the “Law of Ineligibilities”), was the result of a people’s initiative. This was a bill signed by over 1 million voters to increase the anticorruption liability of political candidates. Pursuant to the so-called Clean Record Law, any politician who has been impeached or who has resigned to avoid impeachment, or any politician who has been convicted by a judicial courts will be disqualified as a potential candidate for political office for any level of government for eight years.

In this legal context, Brazil signed the Inter-American Convention against Corruption (1996), ratifying it in 2002 (Decree 4,410/2002); the OECD’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), ratifying it in 2000 (Decree 3,678/2000); and the UN Convention against Corruption (2004), ratifying it in 2006 (Decree 5,687/2006).¹⁸

Even considering that most provisions related to corruption offenses and the relevant penalties had already been laid down in the Brazilian legal framework or were under legislative discussion before the three above-mentioned conventions were signed, their ratification had a significant political impact. Accordingly, some legislative innovations for antimoney laundering crimes and tools, the introduction of a broad legal concept of foreign public officials, and preventive access to information mechanisms are highlighted below.

18 According to a recent study conducted by the National Secretariat of Judicial Reform, the legislative process to internalize international treaties and conventions in Brazil took between five and seven years. See Ministério da Justiça, *O Impacto no Sistema Processual dos Tratados Internacionais* 166 (José Luis Bolzan de Moraes coord., Ministério da Justiça, Secretaria de Reforma do Judiciário 2013).

Act 9,613/1998, known as the Money Laundering Act, was created through compromises made at the Vienna Convention in 1988 to promote accountability in multiple sectors of the economy. Identifying clients and keeping records of operations and suspicious communications make people and companies subject to it. In 2012, it was amended by Act 12,683, resulting in considerable progress in preventing and combating money laundering by raising the fine to as much as R\$20 million, securing goods against deterioration and devaluation, admitting any criminal offense as the origin of illicitly obtained money, and including new agents subject to the law.

In accordance with the Organization of American States (OAS) and OECD Conventions, Act 10,467/2002 amended the Brazilian Penal Code, adding Articles 337-B and 337-C, which established criminal liability for acts of corruption and bribery committed by foreign public officials and institutions. Article 337-D was added to provide a legal definition of “foreign public officials” for criminal prosecution purposes.

Besides investigative and repressive legislation, transparency has become more evident in Brazil. The Information Access Act (Act 12,527/2011) enhances prevention policies to promote transparency and to open government recognition. An important gain for community empowerment and civil society monitoring was made by impelling public entities to process information requests, ensure proactive disclosure, and guarantee full online access to official information of all branches at the local, regional, and federal levels.

As the scope of fraud and corruption varies, legislation also has to develop in order to serve as a starting point to conquer corruption. Brazil has shown, by its commitments made internationally and effective regulation implemented nationally, that fighting corruption is a prominent item on its political agenda and that the new Anticorruption Law is the step that was missing.

Act 12,846/2013: Overcoming the Liability of the Legal-Entity Loophole

Although public officials and corrupt agents could be prosecuted under the existing law, the lack of liability of legal entities for corrupt practices constituted a dangerous regulatory gap.

The regulation loophole was spotlighted by the OECD Working Group on Bribery in a 2007 report, which recommended¹⁹ taking urgent steps.

Brazil has not taken the necessary measures to establish the liability of legal entities for the bribery of a foreign public official. The Work-

19 Other OECD recommendations were raising awareness and providing training for applying the foreign bribery offense on society stakeholders, public institutions, and diplomatic representatives; and putting in place the due diligence process to verify that applicants were engaging in acts of bribery, protect whistleblowers, encourage Brazilian business activities in foreign markets, and ensure that law enforcement authorities were provided with sufficient resources. Some clauses related to tax offenses were also introduced.

ing Group has determined that the current statutory regime for the liability of legal entities is inconsistent with Article 2 of the Convention. As a consequence legal entities are not punishable in Brazil for foreign bribery by effective, proportionate or dissuasive sanctions as required by Article 3 of the Convention. The Group recommends that this serious gap in the law be urgently addressed, and welcomes recent initiatives taken by Brazil in this regard.

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With respect to the liability of legal entities, the Working Group acknowledges the recent initiatives taken by Brazil in this area and recommends that Brazil (i) take urgent steps to establish the direct liability of legal entities for the bribery of a foreign public official; (ii) put in place sanctions that are effective, proportionate and dissuasive, including monetary sanctions and confiscation; and (iii) ensure that, in relation to establishing jurisdiction over legal entities, a broad interpretation of the nationality of legal entities is adopted.²⁰

In a similar vein, during the third round (2011) of review in the implementation of the Inter-American Convention against Corruption, when serious concerns were raised about the gap in legal entities' liability, the Committee of Experts suggested the following recommendation:

Adopt measures to allow application of the appropriate penalties, subject to its constitution and the fundamental principles of its legal order, to companies domiciled in its territory that engage in the conduct described in article VIII of the Convention, regardless of the penalties that may be applicable to the persons linked to those companies who may be involved in the commission of acts constituting such conduct.²¹

Unlike other countries' legal systems, there were no specific provisions directed at anticorruption compliance in Brazil. There was, for instance, no analogue to the internal controls requirement of the U.S. Foreign Corrupt Practices Act (FCPA). Therefore, Brazilian law did not punish corporate corruption properly.

Indeed, most cases of grand corruption have at least one thing in common: the use of companies and structures established through legal means to hide illegal acts. A 2011 World Bank study reviewed over 200 cases of corruption and concluded that shelf companies were an active and often-used means of concealing corruption.²²

20 OECD Working Group on Bribery, *supra* note 2, at 4.

21 The recommendations were made in the *Final Report* that was adopted by the committee, in accordance with the provisions of arts. 3(g) and 25 of its *Rules of Procedure and Other Provisions*, at the plenary session held on Sept. 16, 2011, at its 19th meeting, held at OAS Headquarters, Sept. 12–16.

22 The *Stolen Assets Recovery Initiative* report reviewed grand corruption investigations from 80 different countries and found that almost 70 percent of these cases involved corporate vehicles that concealed, at least in part, beneficial ownership information. See E. van der D.

In 2010, the Office of the Comptroller General (Controladoria-Geral da União; CGU) prepared the long-awaited draft bill in cooperation with the Ministry of Justice and the Federal Attorney General's Office (Advocacia Geral da União; AGU) establishing the direct liability of legal entities for acts of corruption committed against the national and foreign public administration. The bill (Bill 6,826/2010), which was inspired by the FCPA Act (1977) and the United Kingdom's Bribery Act (2010), was submitted to the Chamber of Deputies in February 2010.

At the Chamber of Deputies, apart from the existing Committees on Work, Administration, and Public Service; Taxation and Finances; Industrial, Commercial, and Economic Development; Justice, Constitution, and Citizenship, a special committee was created to inform the Chamber of Deputies on the matter. That special committee began its work in October 2011.

The special committee was given a great number of tasks, and it was by far the most active committee, and the one that took longest to give its opinion. Among those who took part in the discussion, apart from representatives, were many interest groups, including the CGU; civil society organizations representing companies and entities dealing with compliance, such as the Federation of Industries of São Paulo State, Comitê Anticorrupção e Compliance do Instituto Brasileiro de Direito Empresarial, Instituto Ethos de Empresas e Responsabilidade Social, Instituto de Estudos Sócio Econômicos, and PATRI Políticas Públicas e Relações Institucionais & Comerciais; as well as lawyers, law professors, and agencies involved in anticorruption and governance endeavors. There were organized seminars and forums outside the Congress, in São Paulo, Curitiba, and Recife, and capitals of member-states situated in the southern, southeastern, and northeastern regions of Brazil.

There were push-backs on various points and discussions on penalties, whether they should be mitigated, and if so, how it would be achieved. The special committee's final official opinion was given in April 2013. The other committees gave their opinions in June 2013.

Due to the legislative process of the bicameral Congress, after approval by the Chamber of Deputies was given, the bill was forwarded to the Senate. Plenary sessions and discussions ended in the Senate in July 2013. Back at the Chamber of Deputies, the draft law was sent to President Dilma Rousseff, who rejected three provisions: (a) the limitation of the fine, which would not exceed the value of the good or service provided for in the public contract; (b) the necessity and legal requirement of proving intention or fault for some sanctions, as opposed to civil strict liability; and (c) the provision that the extent of involvement of public officials in the corrupt act must be considered a circumstance for applying the sanctions. After that, the draft law was transformed into the law, Act 12,846/2013, in August 2013.

The draft law was debated at a turbulent time, when government expenses on contracts linked to the 2014 FIFA World Cup tournament and the 2016 Summer Olympic Games generated dissatisfaction throughout the population. Consequently, in June 2013, people went to the streets demanding more public spending on public health, education, and transportation. During the year leading up to the World Cup, Brazil experienced an extensive anticorruption campaign largely motivated by citizens through social media. The online mobilization followed large investigations conducted by traditional media outlets. Alongside the protests was the trial, Criminal Case No. 470, in the Supreme Court, well known as the “Mensalão case,”²³ which made corruption policies and issues a matter of popular discussion. The public sentiment of growing intolerance for corruption and the scene of the economic crisis in Brazil created an environment for the new Anticorruption Law’s easy approval.²⁴

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- 23 Criminal Case No. 470 began as a political scandal, known as “Mensalão,” that took place during President Luiz Inácio Lula da Silva’s government. Since 2004, the Brazilian Press had been writing on an alliance between the Worker’s Party and the Brazilian Labor Party (PTB) involving bribery. In 2005, a congressional committee of inquiry began investigating a bribery scheme involving the Brazilian Post Office (“CPI dos Correios”). In this context PTB’s president, Representative Roberto Jefferson, first brought up the term “Mensalão” (meaning, roughly, “big monthly payment”), insinuating that there was a bribery procedure organized by important people in the Worker’s Party involving a monthly, expensive payment to congressmen in exchange for political support inside Congress. There was a complex plot, involving advertising agencies, high-ranking political figures, financial institutions, and public companies. The Ministério Público Federal filed Criminal Case No. 470 before the Brazilian Supreme Court in November 2007, accusing 40 people, among them the former presidential chief of staff minister in Lula’s government, the former president of the Worker’s Party, and the former treasurer of the Worker’s Party. The trial, broadcast on a public television channel, began in 2012. The criminal offenses described involved money laundering, bribery (active and passive corruption), tax evasion, fraudulent management of a financial institution, conspiracy, and embezzlement. In 2013, 25 defendants were accused of different criminal offenses, and 11 were arrested. In November 2013 the Supreme Court president ordered the imprisonment of the authorities. In February 2014, after a close vote among justices of the Supreme Court (6 to 5), 8 defendants, including some of those already arrested, were absolved of the crime of conspiracy, which altered their term of imprisonment. Pursuant to the Brazilian Constitution, justices of the Brazilian Supreme Court are chosen by the president and must be approved by the Senate. At the time of the trial of Criminal Case No. 470, 8 out of the 11 justices had been appointed by Worker’s Party presidents, 6 by President Lula, and 2 by President Rousseff. Despite the criticism directed at the trial and the positions held by the justices, Criminal Case No. 470 is considered an unprecedented event in Brazilian history and a victory for democracy.

Another high-profile political scandal was the Sanguessugas (leeches) scandal, also known as ambulance’s mafia, that took place in 2006. It was a conspiracy among congressional representatives involved in the purchase of ambulances. These representatives acted together in embezzling public funds consisting of federal transfers for public health care. There were administrative procedures taken to revoke 72 representatives’ terms in office.

- 24 In addition to the popular display of discontentment, Brazil, with the sixth-largest GDP in the world, has faced economic challenges over the past few years. Since 2010, when economic growth was at 7.5 percent, the Brazilian economy has steadily decreased. In 2011, growth was at 2.7 percent, in 2012 at 1 percent, and in 2013 there was a slight improvement, to 2.3 percent, according to the Brazilian Institute of Geography and Statistics. According to the Worldwide Governance Indicators, the “control of corruption” and “voice and accountability” indicators dropped by one percentile from 2011 to 2012. In Transparency International’s International Corruption Perception Index, Brazil lost three positions from 2012 to 2013, going from 69th place to 72nd place. Aside from that, in March 2014 Standard & Poor’s

The draft law was discussed in the Chamber of Deputies' special committee for over two years; it was then sent to other committees, to the Senate, back to the House, and finally to the president, which took less than four months. That this accelerated legislative process took place during the period of intense popular demonstrations against corruption was no coincidence. It is clear that popular dissatisfaction, expressed at this relevant time, overcame lobbyists' interests in freezing the legislative process of the Anticorruption Law.

International recommendations for Brazil to close the loophole became stronger, as did institutional²⁵ pressure, as well as pressure from the press and civil society. By signing international conventions against corruption such as those of the OAS, OECD, and the United Nations, Brazil committed to the implementation of such a law. The fight against corruption is a global matter, and the liability of legal entities is especially relevant to this issue. Domestically, Brazil had effective legal dispositions on bribing public officials, but corporate corruption was still hard to combat effectively in the existing legal framework.

Act 12,846 was approved on August 1, 2013, and pursuant to its influence on the drafting of the law, apart from the president, the minister of justice, the AGU, and the CGU signed the law. The law was promulgated on August 2 and, after a 180-day period of *vacatio legis*, came into force on January 29, 2014.

The Main Features of the New Brazilian Anticorruption Law

Act 12,846/2013, the so-called new Anticorruption Law,²⁶ established a comprehensive system to fight domestic and international corporate corruption in Brazil. The new law created liability for legal entities committing illicit acts against foreign public officials or national public administration, that is, in the three branches of government and at all levels of the Brazilian

downgraded Brazil's credit rating, creating concerns about foreign investment. Expectedly, the Brazilian government is concerned about maintaining those investments. It was an auspicious time to approve a law such as the Clean Companies Act.

25 The National Strategy for Combating Corruption and Money Laundering (Estratégia Nacional de Combate à Corrupção e Lavagem de Dinheiro; ENCCLA) was created in 2003 by an initiative taken by the Ministry of Justice as a way to contribute to the systematic fight against money laundering in Brazil. It is an articulation of agencies from the three branches of government, the Ministérios Públicos, and society that, directly or indirectly, prevent and combat corruption and money laundering and identify and recommend measures of improvement. Currently, around 60 agencies take part in ENCCLA, including the police, the judiciary, the CGU, the Federal Court of Accountability (TCU), and the Securities and Exchange Commission.

26 Strictly speaking, Act 12,846 should not be called the "Anticorruption Law," because it is really just the missing part of the anticorruption legal puzzle; there are other laws directed at curbing corruption. The term "Clean Companies Law" is more appropriate in the sense that it points out the specific innovation implemented by that law. However, inasmuch as the term "Anticorruption Law" has already become widespread among lawyers, public officials, and the juridical community in Brazil, it would not be worthwhile to semantically "swim against the stream."

Federation. A recent comparative study concluded that the “Brazilian law either meets or exceeds all OECD Convention requirements, except those on Enforcement.”²⁷

Administrative and Civil Strict Liability

According to the Brazilian Constitution—just as in the German and Italian constitutions—only individuals can be held criminally liable for corruption offenses. These individuals may face criminal, civil, and administrative sanctions. A legal entity, however, can face only civil and administrative proceedings.²⁸

Nicola Bonucci, the director of legal affairs at the OECD, predicted that one of the issues the OECD would “vigorously debate” while reviewing the Brazilian Act 12,846 in June 2014 was that, while the OECD gives preference to criminal liability for the offense of bribery of foreign public officials, the Brazilian Anticorruption Act creates only civil and administrative liability for such offenses.²⁹

To consider social interests and comply with international conventions, without neglecting constitutional boundaries, the new Brazilian Anticorruption Law establishes administrative and civil mechanisms to curb corporate corruption. Criminal liability for legal entities, however, depends on constitutional amendments, which require a qualified majority in Congress. Proper implementation of an administrative and civil sanctioning system can enhance the fight against corruption.

Another change in Brazilian law is the incorporation of “strict liability”³⁰ for corrupt acts, which means that legal entities are held liable without requiring legal proof or verification of actual fault or prior penalties. It is sufficient to prove the existence and practice of the corrupt act, the resulting consequences, and the casual connection between them. Strict liability sets aside difficulties of demonstrating subjective elements of the acts of the legal entity’s manager, required in criminal proceedings.

Who Is Subject to the New Anticorruption Law?

In that corrupt acts have both a supply and a demand side, seeking only the public official’s accountability for corrupt acts is not enough. Thus

27 Sonia Zaheer, *Brazil’s Landmark Clean Companies Act: Comparison to the OECD Anti-Bribery Convention and Issues*, Pacific McGeorge Global Business & Dev. L.J. (2014).

28 An exception is art. 225, para. 3, which allows criminal liability for legal entities only for environmental crimes.

29 See Stella Dawson, *Brazil’s Corporate Bribery Law Is a Step Forward but Faces Tough Scrutiny* (2013), <http://www.trust.org/item/20131122222839-uqg1w/>.

30 The use of the strict liability model for corruption acts is innovative. The standard of strict liability (or objective liability) is used in other areas of the Brazilian legal system; for example, in consumer issues, environmental damage, and state liability.

Act 12,846/2013 includes the liability of other relevant actors in corruption schemes: the companies themselves.

In the general provisions, Article 1 establishes the target of the Anticorruption Law, clarifying that the object of the law targets any type of company under Brazilian regulation, whether incorporated or not, and regardless of the form of organization or corporate model adopted for it. The law also governs any foundation, association, or foreign company that has a registered office, branch, or representation in Brazilian territory (even if the registration is temporary).

This broad concept embraces all types of enterprises and also oversees companies' transformation, incorporation, merges, and splits. It also contemplates joint liability cases of controlling or controlled companies, joint ventures, and economic groups that have engaged in corrupt practices.

Typology of Corruption Conduct

Article 5 describes in five items corrupt acts that threaten national and foreign public assets, principles of public administration,³¹ and international commitments made by Brazil.

Article 5 For the purposes of this law, all acts committed by legal entities mentioned in Article 1's sole paragraph are injurious to the domestic or to the foreign Public Administration, if they threaten the national or foreign public assets, the principles of public administration or the international commitments assumed by Brazil, by:

I – Promising, offering or giving, directly or indirectly, a public agent or third part related to him an improper advantage;

II – Financing, funding, sponsoring or otherwise subsidizing, the practice of any illicit acts established in this Law;

III – Using a person or an entity to hide or conceal the identity or the intention of the one who benefits from the acts performed;

IV – Regarding bids and contracts:

a) Frustrating or defrauding, by combination or any other way, the competitive nature of the public bidding procedure;

b) Preventing, hindering or defrauding the performance of any act of public bidding procedure;

c) Chasing away or trying to chase away any bidder, by fraud or otherwise by offering him an advantage of any kind;

d) Defrauding a public bidding or a public procurement;

31 Art. 37 of the Brazilian Constitution defines the principles of public administration as legality, impersonality, morality, publicity, and efficiency.

e) Creating, fraudulently or irregularly, an entity to participate in public biddings or to conclude public procurements;

f) Obtaining advantage or improper advantage by deception, modifications or extensions of contracts with the government, without authorization by law, convening public bidding or its contractual arrangements; or

g) Manipulating or defrauding the public procurement arrangement's economic and financial balance;

V – Hindering government's research or supervisory activities or intervening in its operations, especially regarding regulatory agencies or any of the National Financial System's supervisory bodies.³²

Congress members wisely adopted the strategy of using descriptions of offenses pertaining to individual criminal, administrative, and civil liability that had already been consolidated in Brazilian jurisprudence and by scholars, mostly from the Penal Code, the Law on Administrative Probity (Act 8,429/1992), and the Public Procurement Act (Act 8,666/1993).

Sanctions, Regulation, and Sentencing

The Anticorruption Law sanctioning system comprises administrative and judicial sanctions.

The principle of *audi altera partem*, as well as the right of due process, must be observed to enforce the sanctions, provided in Article 6:

I – Fine in the amount of 0.1% (one-tenth percent) to 20% (twenty percent) of the gross revenues³³ of the year previous to the initiation of administrative proceedings, excluding taxes, which will never be less than the advantage earned when possible to estimate; and

II – Special publication of the conviction.

Article 6 is one of the most controversial articles in the Anticorruption Law, because it sets the amount of the fine that can be applied to companies that are accountable for detrimental acts against Brazil's public administration.

Article 7 lists factors to consider when a sentence is about to be passed, namely: the seriousness of the violation; the benefit that the offender could or would have gotten from the infraction; the nature of the commission of the crime; the severity of damage or the risk of damage, whichever is relevant under the circumstances; the negative effects of the act; the offender's economic situation; the company's cooperation in bringing to light the infractions; the existence of internal mechanisms or procedures toward promoting

32 See the original text in Portuguese at http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12846.htm.

33 If it is not possible to determine the company's annual gross revenue as a reference, the fine will be any amount from R\$6,000 (approximately US\$2,500) to R\$60,000,000 (approximately US\$25,000). See art. 6, para. 4.

integrity (compliance); audit and whistle-blowing triggers of accountability; the effectiveness of a code of conduct and ethics applied within the company; and the value of the contracts established.

Article 7 could be considered harsh because it states that acts can produce liability without proof of intention and knowledge on the part of company directors.

The “name and shame” sanctioning strategy,³⁴ another interesting stipulation in Article 7, refers to the level of publicity that the court’s conviction receives, at the relevant company’s expense, in widely disseminated media. In many commercial markets, upholding a reputation of trustworthiness is crucial for a company’s success and business performance. This legal provision targets the company image, producing a sort of reputation-shaming effect, through the extensive disclosure of the corrupt practice. In the same vein, Article 22 creates the National Registry of Punished Companies (Cadastro Nacional de Empresas Punidas), which gathers all the sanctions applied at all levels of the federation and makes them public.

The enforcement of legal stipulations on administrative matters does not rule out further enforcement on judiciary terms. The judicial sanctions, described in Article 19, regard (a) the forfeiture of property, rights, or goods that represent advantage or profit directly or indirectly obtained from the corrupt act; (b) the cessation or suspension of activities; (c) the compulsory legal entity’s dissolution in Brazil; and (d) the prohibition from receiving public incentives, grants, donations, or loans from public or publicly controlled financial institutions for one to five years.

Deferred Prosecution Agreement

Article 16 provides a sort of deferred prosecution agreement (DPA) that already exists in Brazil as a leniency agreement in Brazil’s Economic Law. Article 17 allows the DPA to be used in Brazil under not just the new Anticorruption Law but also the Public Procurement Act.

According to the new Anticorruption Law, the highest authorities of each branch of government can strike an agreement with companies if the latter collaborate with investigations and are cooperative throughout the administrative process, which would result in the identification of other companies involved and in quicker access to documents and information. Therefore, the DPA can be an enforcement tool to address offenses by legal entities. The DPA is intended to encourage self-reporting by companies, as opposed to being

34 See J. G. van Erp, *Naming and Shaming in Regulatory Enforcement* (2012), <http://hdl.handle.net/1765/31662>, which “identifies three aspects of firms’ reputations that can motivate compliance. First, a reputation is a financial asset, because it enables firms to increase their market share, share value or business opportunities. Second, entrepreneurs do not only strive for a good reputation because it pays off financially, but also because they value being regarded as respectful, credible and reliable, and want to act in accordance with social norms. Third, a reputation defines duties and obligations and thus increases firms’ awareness about normative expectations of its stakeholders.”

faced with the inconvenience of waiting and then fighting an administrative or a civil prosecution. For that matter, an important prerequisite to reaching the agreement is the company's corporate compliance program.

To benefit from the DPA, the company must observe certain requirements. It has to take the initiative to show interest in cooperating, and it has to cease completely its involvement in the infracting or offending acts. Also, it is necessary that the company admit its participation in the wrongdoing and completely cooperate with investigations.

This behavior can lead to a reduction of up to two-thirds of the amount fined and can also exempt companies from the aforementioned shaming sanctions. Still, the company will not be exempt from making good any damage caused. After the DPA's conclusion, if the requirements are not fulfilled, the company will be prevented from striking another DPA for three years.

Authorities Entitled to Investigate

The new Brazilian Anticorruption Law establishes that the liability of legal entities for acts of national and foreign bribery falls to each body and entity in the three branches of government (executive, legislative, and judicial) at every level of the federation (union, member-states, the Federal District, and municipalities). The OECD Working Group on Bribery, in analyzing the draft bill,³⁵ observed that it provided "mechanisms to establish liability and a uniform system throughout the country, with a view to strengthening the fight against corruption in accordance with the unique features of the Brazilian federal system."

Although there are decentralization benefits, there is also a major challenge for coordinating and implementing the Anticorruption Law system throughout the huge number of federal legal entities. There are 5,561 municipalities in Brazil, 26 states, the Federal District, and the union itself, totaling 5,589 federal entities, each one empowered to act under the rules of the Anticorruption Law.

The main authorities of each branch of all federal entities can investigate, conduct an administrative procedure (Article 8), propose DPAs (Article 16), and file lawsuits (Article 19).

Brazil's scattered form of federalism can lead to conflicting decisions. Because there is no central administrative mechanism for implementing uniform procedures and interpreting such matters, imbroglios that arise from administrative procedures will increase or encourage the judicialization of administrative proceedings so that legitimate final decisions can be arrived at. Keeping in mind that the Brazilian judicial system operates less than efficiently, it will be some time before courts can start ruling on cases involving the Anticorruption Law.

35 OECD Working Group on Bribery, *supra* note 2, at 36.

This environment of uncertainty could have a negative impact on international companies that do business in Brazil. Due to the way the judicial system works, and the fact that all federal entities enjoy a large degree of autonomy, the CGU, the federal government, and higher courts currently cannot impose a completely uniform procedure for the implementation and practice of the new law.

Another issue related to the thousands of public authorities empowered to apply the Anticorruption Law is the possibility of the inadequate use of the DPA standard, especially in small municipalities.

According to Article 16, the authorities that represent each branch within a federal entity are entitled to adopt a DPA with companies involved in wrongdoing that effectively collaborate with investigation and administrative procedures. For this to happen, the company has to identify other companies that took part in the corrupt act or acts and provide relevant information and documents quickly. So the DPA is a way to accelerate and improve investigations from the government's perspective, and to mitigate penalties or legal consequences from the company's perspective.

There are many municipalities that have a deficient or incipient administrative structure, a lack of resources, or an insufficiently trained staff. Despite the formal and symmetrical federation autonomy (which the Anticorruption Law provides for), some municipalities have a very low Human Development Index (HDI) ranking and are likely to have difficulty in applying the Anticorruption Law, especially when complex cases arise. This difficulty may cause opacity on the details of a DPA's terms and duration, and on how companies meet such agreement terms. Even worse, the lack of structure and expertise in small and poor municipalities can create a situation where the effect is contrary to that intended by the law. The empowerment of local authorities can be turned into a tool for corrupt agents to bribe businesspeople.

In 2013, Transparency International classified³⁶ Brazil as a country engaged in "Little or No Enforcement" of the OECD Anti-Bribery Convention.³⁷ Enforcement is not just a challenge related to the Anticorruption Law. Specifically, it is a problem in the Brazilian judicial system. Among the causes of difficulties in enforcement are the great number of judicial actions, the excessive opportunities to appeal, and the lack of modernization. These problems are frequently brought to the public's attention. But the main concern is not just the lack of judicial decisions; the small number of investigations opened into potentially corrupt activities is also troubling. In this light, nonjudicial ways of resolution become an interesting tool for dealing with corruption offenses.

36 F. Heinmann et al., *Exporting Corruption Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery* (Transparency Intl. 2013).

37 The lack of enforcement is not just a Brazilian issue. According to the Transparency International 2013 study, 30 of 38 countries that signed the OECD Anti-Bribery Convention, which represents 38.2 percent of world exports, are barely investigating and prosecuting foreign bribery.

Countries should make efforts to curb corruption among institutions and public officials to achieve social and economic development and to attract international investments. But it is certain that there will be no good governance without consistent legal regulation, an engaged society, and accountable institutions.

Meanwhile, Brazil has a large number of interconnected oversight bodies that constitute a national network with the institutional mission of fostering mechanisms for preventing, detecting, punishing, and eradicating corrupt acts. This network includes the CGU and state and municipalities comptroller systems, the federal and state courts of accountability, the Federal Police Department, the State Judiciary Police, the federal and state-level *Ministério Públicos*, the Supreme Court, the Superior Court of Justice, the state courts, the National Council of Justice, the National Council of the Federal Prosecutor, the AGU and state and municipalities attorneys' offices, the Public Ethics Commission, and the Ministry of Justice.³⁸

Facing the above concerns gives rise to institutional challenges that need to be resolved. According to the cooperative federalism model, all federal entities share responsibilities in achieving constitutional objectives and improving skills of governance; further, they must work in partnership (federal statehood) to put forward an integrative exercise of authority to curb corruption. The importance of the CGU and the *Ministério Público* in this matter is highlighted next.

Federal Cases and Standards: The Crucial Role of the CGU

The CGU³⁹ is the agency of federal government created in 2003 to assist the president of the republic in eliminating corruption, having within its structure the Secretariat for Prevention of Corruption and Strategic Information. Assistance from the CGU is provided for matters that, within the executive branch, are related to defending public assets and enhancing management transparency through internal control activities, public audits, corrective and disciplinary measures, corruption prevention, and coordinating ombudsman's activities.

38 The Ministry of Justice's Secretariat of Judiciary Reform (Secretaria de Reforma do Judiciário do Ministério da Justiça) constitutes an innovative approach to enhance cooperative federalism. Although it is linked with the executive branch, it has the institutional goal of articulating stakeholders, directly and indirectly, to find solutions for the Brazilian judicial system. It was created to promote, coordinate, systematize, and receive proposals regarding judiciary reform. Its main role is to articulate the executive, judiciary, and legislative branches, *Ministérios Públicos*, state governments, and organized civil society and international organizations. All this aims at modernizing the judiciary's management through constitutional reform and legislative changes currently underway in Congress.

39 The CGU portfolio is available at http://www.cgu.gov.br/Publicacoes/balancas/arquivos/_cgu.pdf.

In other words, at the federal level, the CGU is in charge of initiatives to curb and prevent corruption, and also to educate individuals, the public, and companies on anticorruption issues. Recently, the CGU has faced new challenges, working with matters directly related to the Information Access Act and the Anticorruption Law.

At the federal executive branch level, Article 9 of the Anticorruption Law is clear in indicating that the CGU is responsible for investigating, conducting administrative proceedings, and imposing sanctions for acts of corruption. And Article 8, Paragraph 2 reserves the right for the CGU to use any federal executive branch agency procedure that has been filed under the Anticorruption Law.

The CGU, as a federal institution, can directly act when federal matters are involved. However, at the state and municipal levels of implementing laws, the CGU occupies a cornerstone position. Foreseeing the new challenges of the Anticorruption Law and the strengthening of the cooperative federation model, the CGU acts like a mirror that reflects good technical practices for state and municipal governments, so as to unburden conflicting decisions and inefficiency arising from DPAs.

The CGU regularly issues publications,⁴⁰ such as booklets, brochures, and instruction manuals, which are published in an easy-to-read format and written in a clear and objective way that dissects legal provisions, which at first blush may seem complicated to the legally untrained eye. This pedagogical work⁴¹ is especially relevant when dealing with the effectiveness of the law's stipulations, because it serves as orientation for public officials and policy makers, and also for civil society.

The empowerment of civil society through access to easy-to-use, high-quality information has the potential to create a stakeholder committed to the observance of the law. Particularly at the local level, if citizens become engaged in promoting accountability and making their voices heard, law enforcement can be improved.

Because the Information Access Act is enforced at the state and municipal levels, the CGU already has a consistent record of collaborative work, for example, publishing the *Manual for Law of Access to Information in States and Municipalities*⁴² and *Technical Guidance for Municipalities' Local Regulation of the Information Access Act and Checklist*.⁴³ Even though the manuals are not mandatory and do not have to be observed by states and municipalities, in con-

40 The CGU's guidelines and booklets are available at <http://www.cgu.gov.br/Publicacoes/>.

41 Two CGU initiatives on civil society education should be highlighted: (a) Portalzinho da CGU is an educational website designed for children (<http://www.portalzinho.cgu.gov.br>), and (b) the "Say No to Petty Corruption Campaign" (<http://www.cgu.gov.br/redes/diga-nao>).

42 Available at http://www.cgu.gov.br/Publicacoes/transparencia-publica/brasil-transparente/arquivos/manuall_lai_estadosmunicipios.pdf.

43 Available at http://www.cgu.gov.br/Publicacoes/transparencia-publica/brasil-transparente/arquivos/guia_checklist.pdf.

nection with federal principles of autonomy, they have had a positive impact on the implementation of transparency web portals, an online system that citizens can check to find the amount and destination of public money that has been spent by the Brazilian government, on the federal, state, and local levels.

It is a known fact that corruption is not an isolated phenomenon. It is a global bane that affects all countries and institutions. In 2007, before the anticorruption draft bill was presented, the CGU, in compliance with Brazil's ratification of the OECD Anti-Bribery Convention and with the support of the United Kingdom's embassy in Brazil, launched a booklet about the convention's terms, objectives, and legal implications that was addressed to judges, prosecutors, lawyers, policy makers, legal practitioners, and entrepreneurs. Aligned with the trend of international cooperation on anticorruption issues, Brazil's internal federal cooperation must be fortified and must become more uniform in approach. The CGU can strongly contribute to the Anticorruption Law's implementation, by defining standards on administrative procedures and the imposition of sanctions, as well as providing technical notes and developing capacity-building programs for the benefit of municipalities' administrative staffs.

CGU leadership should mitigate the omission or misuse of the new Anti-corruption Law tools, which is a great concern among the companies subject to the law.

Toward Anticorruption Enforcement: The Ministério Público's Role

The 1988 Constitution is the historical milestone of a new era of the Brazilian republic, and, without a doubt, the Ministério Público⁴⁴ occupies a prominent position in the constitutional order, having an institutional mission that is both noble and arduous.

Aside from its role in criminal prosecution, the Ministério Público also plays a large part in representing collective rights of all kinds. Just as society struck back against the lack of a voice during the dictatorial regime,⁴⁵ the Constituent Assembly wisely empowered the Ministério Público to be a legitimate representative of society's voice in the public sector, in order to defend democracy and human rights. But instead of working as criminal investigators, the prosecutors became political agents of social transformation, standing at the

44 The Portuguese version of the institutional name is used—instead of using “Prosecutor's Office,” “General Attorney's Office,” or a free translation (e.g., “Public Ministry”)—to emphasize the unique and broader institutional role in the Brazilian constitutional system in comparison with other countries. The Ministério Público's autonomy and institutional independence led to arguments that it could have become a “fourth branch of government” in Brazil.

45 The authoritarian military government ruled Brazil from 1964 to 1985.

forefront of the fight against corruption in Brazil. Hence there are innovative prerogatives⁴⁶ for Brazilian public prosecutors.

In terms of implementing the Anticorruption Law under the constitutional rules, the Ministério Público faces two challenges: to investigate and curb corporate corruption, and to articulate the clockwork of Anticorruption Law implementation in order to develop and disseminate policies and good practices among the different federal entities.

According to Article 19 of the law, the Ministério Público, like the union, the states, the Federal District, and the municipalities, is entitled to file lawsuits against legal entities that have engaged in corrupt acts.

Acting as a law enforcement authority on administrative, civil, and criminal law, the Ministério Público investigates and files civil and criminal actions. It is also one of the institutions entitled to file public civil actions, but recent studies have shown that it files a greater number of actions than other co-legitimates. This extensive experience with criminal and administrative improbity investigations demonstrates that the Ministério Público has a more robust and suitable background to deal with such matters⁴⁷ compared with other co-legitimates. Apart from this, the extensive reach and influence⁴⁸ of the Ministério Público, being an institution that has a presence in all federation entities, is well posited to strategically and effectively carry out its mission, which is to improve effective cooperation among federal agencies, organizations, and entities that have a role in combating and minimizing corruption in Brazil.

If, on the one hand, the federalist model leads to uncoordinated authorities, each applying the law as it sees fit, the Ministério Público on the other hand, works closely with municipalities' matters to avoid dispersed efforts against corruption. It is clear that the work done by the Ministério Público on a domestic scale has a positive effect on coordinating anticorruption initiatives at the local, regional, and national levels.

But what if the local authority does nothing about corporate bribery that takes place in a state or municipal public procurement? The Ministério Público can do something about it, because it is empowered by the constitution to make individuals and legal entities accountable for their actions.

46 The Ministério Público in Brazil upholds a prerogative based on administrative and political autonomy, an autonomous budgetary initiative, and functional independence (arts. 127 and 128 of the Brazilian Const.).

47 Among all institutions with legal standing, the Ministério Público filed about 95 percent of civil lawsuits to protect collective rights. See *RT informa*, 6(37) Editora Revista dos Tribunais 5 (May–June 2005).

48 According to a 2012 publication produced by the National Council of the Public Prosecutor (Conselho Nacional do Ministério Público; CNMP), there were 10,663 public prosecutors in Brazil and 34,954 Ministério Público clerks and interns spread throughout the Brazilian states and municipalities. See CNMP, *Ministério Público: Um retrato — ano 2: Dados de 2012* 45 (CNMP 2013).

Besides the direct legal standing for bringing anticorruption cases into courts, when administrative omission is observed (e.g., if a mayor or a council makes no effort to hold a corrupt agent or company accountable for corrupt actions), the Ministério Público is entitled by Article 20 of the Anticorruption Law to act in place of absent local authorities, and may judicially propose even administrative sanctions against the corrupt actors.

Apart from its investigative mission, the Ministério Público is a catalyst and an agent in strengthening state and municipal anticorruption investigative bodies.

The Anticorruption Law reaffirms the duty to adequately structure the federal comptroller system. Some states already have a more advanced structure, following the path led by the CGU, but a great many entities, especially in the poorest municipalities, do not have agencies prepared to investigate corruption, conduct administrative procedures, create or establish DPAs, or impose adequate penalties. At the local level, the public prosecutor can propose agreements⁴⁹ to local authorities to engage them in investigating and applying sanctions by implementing certain administrative structures. If a local government does not adequately develop its internal control systems under the new Anticorruption Law, the Ministério Público, on behalf of the people, can file actions against that municipality and oblige it to do so.

Thus, the public prosecutor can work together with the local government to promote good governance practices and implement the requisite administrative structures to investigate and apply sanctions, as well as promote accountability under the Anticorruption Law.

Besides seeking to strengthen good governance practices at the local governmental level, the Ministério Público works with civil society and the public at large to understand anticorruption issues.⁵⁰ Brazilian citizens have already demonstrated their dissatisfaction with the effects of corruption, and the Ministério Público can enhance the opportunity for the people's voices to be heard. In this sense, nonrepressive ways to implement the law, through education for instance, is an innovative tactic.

49 The Conduct Adjustment Commitment (*Termo de Ajustamento de Conduta*; TAC) is an alternative way to implement the effectiveness of an extrajudicial procedure. The TAC consists of a commitment meant to adjust the offender's conduct to legal requirements through penalties or in a way to make up for the damage caused. It represents a possibility for building a nonjudiciary solution to a conflict of interests, for example. Although designed to be used by public entities, TACs are more commonly used by the Ministério Público in matters of environmental law, consumer law, administrative law, civil law, and the like. If the requirements of the commitment are not fulfilled, lawsuits can be filed based on the commitment alone. For further information about the TAC's main features, see G. de A. Rodrigues, *Ação Civil Pública e Termo de Ajustamento de Conduta. Teoria e Prática* (Forense 2006).

50 The campaigns "What Do You Have to Do with Corruption?" (<http://www.oquevocetemavercorruptacao.com/conteudo/home/index.asp?cod=0>), "Conscious Vote" (<http://www.facebook.com/votoconscientempmg>), and "Everybody against Impunity" (<http://www.facebook.com/TodosContraAImpunidade?fref=nf>) are examples of the Ministério Público's work on developing social awareness related to corruption.

People are close to the government in the municipalities, especially the smaller ones. Education can empower civil society to demand accountability and compel the government to undertake correct acts and actions to benefit the public. Civil society is thus an important stakeholder in ensuring the law's enforcement, demanding accountability, and supervising government actions. Once the public is well informed through the effective establishment of transparency web portals, the Ministério Público will become an effective conduit for local citizens to be heard. Because the voice of citizens has become increasingly influential, and with the mega sporting projects continuing through the 2016 Summer Olympic Games, this popular engagement and public pressure may create a conducive environment for the Anticorruption Law to be enforced.

Compliance Mind-set: The Private Sector's Role

In countries where there is weak rule of law and where bribery is necessary to do business, there is a high risk of corruption. The lack of legal certainty, which ensures the functioning of the market and which companies need to make long-term investments, is not the only problem in such environments. Corrupt practices also diminish the quality of the services offered, harm free competition, reduce institutional morale, and affect company images, among other things.

Globalization has strengthened the private sector's role in the fight against corruption, a role increasingly recognized as internationally important. This movement is in line with the UN Global Compact's 10th principle against corruption, on the private sector's shared responsibility and willingness to play its part in eliminating corruption.⁵¹

In Brazil, the new Anticorruption Law addresses both repressive and preventive measures affecting the way companies do business. The repressive approach brings the feared high fines, strict liability impositions, and bad publicity. As prevention measures, Article 7 of the law introduces concepts such as internal mechanisms of integrity, auditing, whistle-blowing, and company observance of ethics codes as issues to be taken into account for sanction mitigation.

All these dispositions attempt to change the Brazilian business mentality by raising the risks on taking some shortcuts often preferred by companies. The short-term benefits brought by corruption cannot be better than the long-term ones of making a clean deal. The main idea is to stimulate the adoption of preventive measures by creating structures that are not just formal but also have a practical impact on identifying fraud and overcoming fragilities.

51 For further information, see <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/principle10.html>.

In the past, the employee who worked in accord with the Bribery Act was often the only one found guilty, because it was hard to prove whom that employee answered to inside the company. Nowadays, the greater implication of corruption placed on the company by strict liability can make being less susceptible to bribery a major advantage. Hence the importance of investments aimed at implementing preventive measures.

In Brazil, the “Corporate Pact for Integrity against Corruption,” launched in 2006, included private institutions, the UN Office on Drugs and Crime, and the UN Development Programme.⁵² The pact provides guidelines and procedures to be followed in the marketplace by signatory companies. Also, the work implemented by Transparency International, whose approach is focused on three pillars—business integrity, financial integrity, and research and reporting⁵³—can serve as a guideline for conducting business properly and safely.

Companies with anticorruption programs and ethical guidelines were found to have up to 50 percent fewer incidents of corruption, and be less likely to lose opportunities than companies without such programs. Companies with superior performances as corporate citizens were shown not only to match but often to outperform their peers. Better corporate governance in companies located in emerging economies is associated with better performance and market valuation.⁵⁴

Apart from promoting an open and accountable business environment and building corporate social responsibility, companies should consider Brazilian federation challenges and be aware of local dynamics before doing business. This demands that companies invest money and time training employees and creating internal integrity mechanisms, but it is also important to identify peculiarities implemented by municipal decrees and to analyze previous procurement in the municipality.

The Anticorruption Law’s harsh dispositions and the possibilities of mitigation are different ways to engage companies in the fight against corruption. Corporate governance is best achieved by routine and permanent functions that can be measured and improved, and therefore should be the focus of companies.

The Anticorruption Law will be successful if companies are encouraged to internalize compliance benefits and abandon corruption as a profitable solution in fear of the consequences. The “clean companies” concept will certainly have a positive impact on business, not just in mitigating penalties, but most importantly in earning the confidence of all stakeholders, including civil society and the public sector.

52 Further information is available at <http://www.empresalimpa.org.br/>.

53 Further information is available at http://www.transparency.org/whatwedo/activity/engaging_the_private_sector_in_the_fight_against_corruption.

54 Transparency Intl., *Global Corruption Report 2009: Corruption and the Private Sector* (Cambridge U. Press 2009), <http://www.transparency.org/whatwedo/publications/doc/gcr/>.

Conclusion

Brazil is experiencing a paradigm shift in combating corruption, moving from a domestic point of view to a more progressive, international one. Ensuring observance of the law on all federal levels is a matter of investing in the enforcement capacities of agencies and the training of personnel, because a uniform judicial or administrative interpretation and implementation demands time and coordination. Cases will take time to get to the courts. And the administrative dispositions are more likely to be implemented than the judicial ones.

In complying with international obligations and community wishes, the new Brazilian Anticorruption Law fills a loophole in the national legal framework against corruption by establishing the administrative and civil liability of corrupt acts committed by a legal entity, and not just an individual.

Due to the Brazilian federation model, there are 5,589 federal entities empowered to enforce sanctions against corrupt acts. On the one hand, empowering local governments by raising municipalities to federal entity status can be considered a strategic advantage. But on the other hand, the abundant number of *colegitimates* empowered to apply the Anticorruption Law and its penalties could lead to inconveniently conflicting decisions, and could undermine deferred prosecution agreements. Or worse, the lack of proper institutional structures and expertise, especially in the smaller and poorer municipalities, could have the effect of not curbing corruption at the local level. Instead, ineffective institutions could create opportunities for further corruption.

The challenge ahead is to build a comprehensive and unified agenda of cooperative anticorruption enforcement that orchestrates different contexts, needs, and policies. This would create an atmosphere of overarching unity, linking diverse actors within the Brazilian federal system in the enforcement of the anticorruption legal regime. Envisaged as a federal network that composes and, in a unified way, governs the wide array of political and administrative interests among the federal entities, and balances and coordinates the different developmental stages of each federal entity as it undertakes this journey of anticorruption enforcement.

At the federal level, the CGU occupies a central position in implementing the Anticorruption Law. Through federal cases and standards to be followed by other federal entities, the CGU currently has an important pedagogical role to perform. It bears noting that, additionally, the CGU can further contribute by providing technical training to staff working at the state and local levels.

The Ministério Público can continue its important work of developing awareness of the law and providing support for the appropriate implementation of it by coordinating its efforts with local authorities. Such a position is a consequence of its unique institutional situation and characteristics, its constitutional functions, and its rootedness in the Brazilian territory.

As the ultimate target of corruption efforts, the private sector has a major role to play in the law's effective implementation. That is why it is so important to change business mentality. By making repressive measures tougher than they used to be, the law encourages companies to adopt preventive practices against corruption.

As Carlos Drummond de Andrade, one of Brazil's most influential poets, put it, "Laws are not enough. Lilies do not arise from the laws." In the same vein, although anticorruption laws are already on the books, a huge effort on several fronts is crucial if corruption, with its deep historical roots, is to be diminished and eventually eradicated. As the 2013 public demonstrations on anticorruption made apparent to all, Brazil as a country needs—and has through the public voice asked for—political mobilization at the highest levels for this new legal framework, based on widely shared ideals, to be implemented effectively, and consistently, thereby enabling Brazil's anticorruption goals to be met.