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# Brazil's Olympic-Era Anti-Corruption Reforms

BY ANDREW B. SPALDING<sup>†</sup>

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## INTRODUCTION

A country once renowned for glorifying corruption now leads what may be the furthest-reaching anti-corruption investigation in history. Brazil, once typified by its “Brazilian jeitinho” way of creatively navigating social problems,<sup>1</sup> now executes “Operation Car Wash,” bringing down political and business leaders by the dozens.<sup>2</sup> So too has Brazil’s Congress adopted a series of dramatic, and effective, new anti-corruption laws, in response to public outcries for reform. It is deeply ironic, but not at all coincidental, that Brazil concurrently hosted the Summer Olympics. This paper chronicles the extraordinary series of events that connect – in a line that is straight but certainly not obvious – Brazil’s modern anti-corruption movement with its hosting of the 2016 Summer Games.

Brazil’s history gave rise to the Brazilian jeitinho and associated systemic corruption.<sup>3</sup> But after a 1988 constitutional revolution and an era of soaring economic optimism, Brazil would pursue, and then win in 2007 and 2009 respectively, the 2014 FIFA World Cup and the 2016

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1. Juliana Mello, *The Brazilian Way of Doing Things*, BRAZIL BUS. (Mar. 26, 2012), <http://thebrazilbusiness.com/article/the-brazilian-way-of-doing-things>.

2. Brian Nicholson, *Brazil's Operation Car Wash*, INT'L BAR ASS'N (Apr. 8, 2015), <http://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=7960b146-65c4-4fc2-bb6a-c6fbb434cd16>.

3. *Infra* Part I.

Summer Olympics.<sup>4</sup> Immediately thereafter, an unforeseen series of political and economic developments – including the Mensalão corruption scandal, a sharp downturn in Brazil's economic prospects, and then the government's increase in public transportation fares – would spark public outrage over bad governance generally and corruption specifically. These ultra-expensive sporting mega-events became symbols of everything the people were protesting.<sup>5</sup>

As this article shows, Brazil's public institutions would respond in two dramatic ways. First, Congress adopted a series of four important laws – here called the “Four Pillars” – that created a new anti-corruption legal regime.<sup>6</sup> Second, federal prosecutors would launch “Operation Car Wash,” which utilized the new legal tools that certain of those new anti-corruption laws created.<sup>7</sup> The result is beyond ironic: many of the very political and business leaders who pursued the Olympic bid, benefited illicitly from the Olympic preparation, and even helped to enact the new anti-corruption laws, have been taken down in the reform movement they helped to create.

#### I. THE TRADITIONAL CULTURAL CONTEXT

Jeitinho is variously translated as the “little way out,” “adroitness,”<sup>8</sup> a “knack,” or even a “clever dodge” way of accomplishing tasks.<sup>9</sup> It can include “talking yourself out of a fine when paying a bill late, jumping the queue if you see some acquaintance ahead in the queue, or asking for a receipt with a higher amount (than what you actually paid for) so that you can claim more money back for expenses.”<sup>10</sup> The Brazilian Jeitinho is described as a uniquely “Brazilian way” of doing such things and is seen as integral to the national identity of Brazil, “o pais do jeitinho” or “the land of jeitinho.”<sup>11</sup> One group of Brazilian scholars notes a general belief that the Brazilian jeitinho “identifies Brazil as a nation” and is “central to

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4. *Infra* Part II.

5. *Infra* Part II.A.

6. *Infra* Part III.

7. *Infra* Part III.D.1.

8. Peter B. Smith et al., *How Distinctive are Indigenous Ways of Achieving Influence? A Comparative Study of Guanxi, Wasta, Jeitinho, and “Pulling Strings,”* 43 J. OF CROSS-CULTURAL PSYCHOL. 135, 137 (2011).

9. Maria Cristina Ferreira et al., *Unraveling the Mystery of Brazilian Jeitinho: A Cultural Exploration of Social Norms,* 38 PERSONALITY & SOC. PSYCHOL. BULL., (Dec. 5, 2011), at 331, 331.

10. *Id.* at 331.

11. *Id.*

the collective psyche of a whole nation.”<sup>12</sup>

Jeitinho’s roots can be traced to Portuguese colonization, which created a contrast between the highly hierarchical forms of social control imported from Europe with a more native preference for informal and affectionate social relationships.<sup>13</sup> With the end of colonization in 1822, the country would enter a century and a half of often violent oscillations between highly decentralized and ostensibly democratic but highly ineffective representative governments, and highly centralized military dictatorships, neither of which tended to elicit trust in government.<sup>14</sup> This pendulum swung with particular force in the late twentieth century. After a series of mid-century ineffective governments the military seized control in 1964.<sup>15</sup> The military created a strong centralized government which stimulated economic growth but was widely perceived as oppressive and corrupt. The transformation occurred in 1988 with the founding of the modern Republic of Brazil, a constitutional government founded on checks-and-balances, separation of power, federalism, and the protection of individual rights.<sup>16</sup> This revolution would also sow the seeds of Brazil’s modern anti-corruption movement.

But the many years of colonization, dictatorship, and highly ineffective government had already given rise to jeitinho. The so-called “Brazilian dilemma” – between a native cultural preference for informal, affective relationships and the impersonal, hierarchical, and ineffective governments of colonization and military dictatorship – helped to create this jeitinho, in which interpersonal strategies are used to navigate through hierarchical governmental structures.<sup>17</sup> Jeitinho becomes “a typically Brazilian way to overcome bureaucracy” and “break laws and norms to attain a certain objective.”<sup>18</sup> Brazilians thus learned how to beat the system, even at its own game.

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12. *Id.* at 331.

13. *Id.* at 332.

14. *See, e.g.*, ROLLIE E. POPPINO ET AL., BRAZIL, ENCYCLOPEDIA BRITANNICA (2017), at <http://www.britannica.com/EBchecked/topic/78101/Brazil/25036/>.

15. HISTORY WORLD, HISTORY OF BRAZIL, <http://www.historyworld.net/wrldhis/PlainTextHistories.asp?groupid=891&HistoryID=aa88> (last visited Apr. 9, 2017).

16. *See, e.g.*, David V. Fleischer, *Government and Politics*, in BRAZIL: A COUNTRY STUDY, (Rex A. Hudson ed.), Washington: GPO for the Library of Congress, 1997; Keith S. Rosenn, *Separation of Powers in Brazil*, 47 DUQ. L. REV. 839, 850–51 (2009).

17. Ferreira et al., *supra* note 10, at 332.

18. *Id.*

Scholars, and particularly Brazilian scholars, have disagreed on the extent to which *jeitinho* is synonymous with corruption. Brazilian anthropologist Roberto DaMatta distinguishes between “positive *jeitinho*,” which does not cause damage to others, and “negative *jeitinho*,” which knowingly breaks the law and more closely approximates corruption.<sup>19</sup> Similarly, Professor Livia Barbosa sees a distinction between “*dar um jeitinho*” (to have a way out) and “*jeitinho Brasileiro*” (the Brazilian way out), where the former refers to corruption while the latter refers to a creativity and pragmatism that do not threaten social order.<sup>20</sup> Another Brazilian scholar, Alberto Carlos Almeida, found that Brazilians in the abstract tend to clearly distinguish between three categories: *jeitinho*, favor, and corruption. Favor implies reciprocity and is based on trust and does not involve a violation of established laws or norms; *jeitinho* may be engaged in with strangers, and involves only a minor infraction; while corruption involves substantial material gain.<sup>21</sup> Some scholars have found that a spectrum exists within the minds of Brazilians, with favor at the positive end, corruption at the negative end, and *jeitinho* somewhere in the middle.<sup>22</sup> But regardless of the cultural and intellectual appeal of these clean academic distinctions, other scholars found through interviews that Brazilians had trouble distinguishing between the three in practical scenarios.<sup>23</sup>

Despite this legacy of colonization and dictatorships, Brazilians hoped that winning and then hosting the Olympic Games would announce a new era in Brazilian history. They were right, though perhaps not at all in the way they expected.

## II. WINNING THE OLYMPIC GAMES

The 2009 announcement that Brazil would be the first South American city in history to host the Olympic Games was met with large public gatherings celebrating the news.<sup>24</sup> In what was then an era of great optimism, the Olympics (in conjunction with the FIFA World Cup) were expected to announce to the world Brazil's arrival as a

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19. *Id.*

20. Smith et al., *supra* note 9, at 137.

21. Ferreira et al., *supra* note 10, at 332–33.

22. *Id.*

23. *Id.*

24. See, e.g., Shasta Darlington, *Brazilians Celebrate Olympics Bid in Rio de Janeiro*, CNN (Oct. 2, 2009, 11:35 PM), <http://www.cnn.com/2009/WORLD/americas/10/02/rio.celebration/>.

modern, developed, and capable country, and to stimulate Brazil's economic development. Carlos Roberto Osorio, Secretary General of the Brazilian Olympic Committee, gave the following interview, showing the depth of Brazilian optimism:

Our motivation to participate in this process is to take advantage of an event like the Olympic Games to make a real difference in the city and in the country, in various ways. First, in terms of the city of Rio itself, [it is] the amount of investment in infrastructure that the Games will bring to the city. Actually, Rio didn't ask Brazil for money to do many new things; we are accelerating existing processes. Because of the time frame of the Games, things that would be done in [twenty] years will be done in seven years. We are talking about metro expansion, roads, airport renovation. So, the infrastructure of the city will be transformed — and with that, the quality of life. Also, the ability to attract additional investment. But, these are the tangible [outcomes] of the story — and in our view, the smallest part of the story. We are not shy to say that Brazil is a country that has social problems. One of the biggest problems that we have is the inequalities within our society. We view sports, and the Olympics Games in particular, as an excellent tool to foster social integration, to foster and to motivate young people to join sports, and [to make] Olympic values [part] of their future lives. So the social legacy of the Games will be a very, very important part of our project. Everything that is going to be done in Rio [relates to] a vision of physical legacy — that's very important. But more important is this big opportunity to leverage [social] programs that already exist, to foster integration within the society, and to raise a younger generation to a better standard of living. And sports is an excellent tool to foster education and to deliver this legacy. So, we are very thrilled by the legacy potential. And I think that's one of the reasons that Rio was chosen.<sup>25</sup>

Promoters of the Olympics thus touted the Games as a way of stimulating economic and cultural development. Indeed, winning the FIFA World Cup and the Summer Olympics would set a kind of high-water mark for Brazil's confidence in its ability to govern. But the next several years would bring about something of a confidence drought.

#### *A. Brazil's Olympic Seven-Year Itch*

The Olympic Games are routinely awarded seven years in

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25. Interview by Knowledge@Wharton with Carlos Roberto Osorio, Felipe Monteiro, and Ken Shropshire, *Brazil's Gold: How Rio Won its Olympic Bid*, (Mar. 3, 2010).

advance, giving the host country sufficient time to prepare.<sup>26</sup> But these seven years in Brazil's history would do much more than simply buy time for infrastructure development. They would instead stimulate an historic pivot in approaches and attitudes toward corruption.

Mensalão, Portuguese for “big monthly stipend,” was a bribery scheme in which the Workers' Party<sup>27</sup> made secret payments to members of congress in return for supporting the party's legislative agenda.<sup>28</sup> The scandal erupted in 2005 when an opposing party member claimed the Workers' Party was paying members of congress 30,000 reais a month (around \$12,000 USD in 2005), and the money had come from the public treasury by way of fake advertising contracts entered into by state-owned companies.<sup>29</sup> From the initial accusation, the scandal spread to include bribery allegations against the state-run postal system and extortion allegations against the Workers Party.<sup>30</sup> The scandal eventually implicated numerous congressmen and Jose Dirceu, then-Chief of Staff to President Luiz Inacio Lula da Silva.<sup>31</sup> The Supreme Federal Tribunal of Brazil convicted twenty-five people including top legislators, senior Working Party officials, businessmen, and former president da Silva's Chief of Staff; many were sentenced to prison.<sup>32</sup> In a country where the legal code offers extraordinary protections to the political and financial elite,<sup>33</sup> the event was a social and legal turning point. It was a landmark case, being the first-time high-ranking politicians were found guilty of corruption in a criminal trial and served prison terms.<sup>34</sup> Indeed, the convictions gave the

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26. See generally, Int'l Olympic Comm., *Olympic Games Candidature Process*, <https://www.olympic.org/all-about-the-candidature-process> (last visited May 15, 2017).

27. The Workers' Party won the Brazilian presidency in 2003 with the election of Luiz Inacio Lula da Silva. Christopher Minister, *Luiz Inacio Lulu da Silva, Brazil's Progressive President*, THOUGHTCO. (Last updated July 2, 2014), <https://www.thoughtco.com/luiz-inacio-lula-da-silva-brazil-2136592> (last updated July 2, 2014).

28. *Q & A Brazil's 'Big Monthly' Corruption Trial*, BBC (Nov. 16, 2013), <http://www.bbc.com/news/world-latin-america-19081519>; See H.J., *infra* note 32.

29. Chris Barrett, *Mensalao: The Implications of Brazil's Largest Corruption Scandal*, ARG. INDEP. (Dec. 26, 2012), <http://www.argentinaindependent.com/currentaffairs/mensalao-the-implications-of-brazil%e2%80%99s-largest-corruption-scandal/>.

30. H.J., *The Economist Explains: What is Brazil's "Mensalao"?*, THE ECONOMIST, (Nov. 18, 2013), <http://www.economist.com/blogs/economist-explains/2013/11/economist-explains-14>.

31. See *Id.*

32. Simon Romero, *Key Brazilians in Graft Case Must Go to Jail, Court Says*, N.Y. TIMES (Nov. 14, 2013), <http://www.nytimes.com/2013/11/15/world/americas/key-brazilians-in-graft-case-must-go-to-jail-court-says.html>.

33. *Id.*

34. See *The Meaning and Implication of the "Mensalao," Brazil's Largest Trial on Political Corruption*, WILSON CTR. (Oct. 4, 2013, 10:00 AM to 12:00 PM),

Brazilian people and international observers hope that the courts may finally be able to keep corruption in check.<sup>35</sup>

So too would the economic mood change dramatically in those years. As the lead-off letter in the famous BRIC acronym,<sup>36</sup> optimism swirled around Brazil in the first decade of the twenty-first century. But economic conditions worsened dramatically in the 2010s. Global commodity prices declined sharply, and President Dilma Rousseff adopted a controversial policy of incurring substantial government deficits to spend heavily on social programs and tax breaks for favored industries. Though political support for her Workers Party increased, the economy began to shrink, credit-rating agencies downgraded Brazil's debt to junk status, and the public's optimism about both its economic future and trust in the government's ability to navigate through economic challenges worsened significantly.<sup>37</sup>

Finally, in June 2013, the government's proposed rate hikes in public transportation incited protests and even riots in more than eighty cities – Rio, Sao Paulo, and Brasilia, as well as Manaus, Recife, Belo Horizonte, Curitiba, Porto Alegre, and others.<sup>38</sup> Numbering in the hundreds of thousands, protestors voiced their concerns over not just the public transportation rate hikes, but poor government and the cost overruns of hosting the upcoming sporting events.<sup>39</sup> As one commentator put it, the protestors spoke out against “poor quality of public services, lavish investment on international sporting events, low standards of healthcare and wider unease about inequality and corruption.”<sup>40</sup> Protests continued into 2014, as so many of the infrastructure projects promised for the dual mega-events of the World

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<https://www.wilsoncenter.org/event/the-meaning-and-implication-the-mensalao-brazils-largest-trial-political-corruption>.

35. Romero, *supra* note 34.

36. *Brazil, Russia, India, and China – BRIC*, INVESTOPEDIA <http://www.investopedia.com/terms/b/bric.asp> (last visited May 15, 2017) (referring to Brazil, Russia, India, and China and “the idea that China and India will . . . become the world’s dominant suppliers of manufactured goods and services . . . while Brazil and Russia will become similarly dominant as suppliers of raw materials.”).

37. *See Brazil’s Fall*, THE ECONOMIST (Jan. 2, 2016), <http://www.economist.com/news/leaders/21684779-disaster-looms-latin-americas-biggest-economy-brazils-fall>.

38. Jonathan Watts, *Brazil Protests Erupt Over Public Services and World Cup Costs*, GUARDIAN (June 18, 2013), <https://www.theguardian.com/world/2013/jun/18/brazil-protests-erupt-huge-scale>.

39. *Id.*

40. *Id.*



Cup and Olympics were scaled down, delayed, or cancelled.<sup>41</sup>

As a result, and in response to the diverse crises of the period between winning and hosting the 2016 Games, Brazilian democracy would do precisely what it was designed to do: adopt laws that the people demanded.

### III. THE FOUR PILLARS OF BRAZIL'S ANTI-CORRUPTION REFORMS

As public discontent mounted, Brazil's Congress would respond by enacting four distinct statutes, two of which were enacted in 2011 and two in 2013. They were, to varying degrees, enacted in response to the public concerns about governance generally and corruption specifically that arose on the eve of hosting the World Cup and Olympic Games. The four pillars are: (1) the 2011 procurement reforms, called the Regime Diferenciado de Contratações and known as the RDC;<sup>42</sup> (2) the 2011 freedom of information law that addressed the government's role in corruption by obligating agencies to make information available to the public;<sup>43</sup> (3) the 2013 Clean Companies Act that addressed the corporate sector's role in public corruption by creating corporate liability for bribery, incentivizing cooperation with government investigations, and incentivizing corporate compliance programs;<sup>44</sup> and (4) the 2013 organized crime bill which authorized the enforcement tools that federal prosecutors would use in the Petrobras investigation.<sup>45</sup> This combination of anti-corruption laws – enacted in

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41. Jonathan Watts, *Fury and Frustration in Brazil as Fares Rise and Transport Projects Flounder*, GUARDIAN (Feb. 6, 2014), <https://www.theguardian.com/world/2014/feb/06/brazil-bus-chaos-fare-rise>.

42. Law No. 12,462/11; Andy Spalding, *Andy Spalding on Brazil's First Pillar: Procurement Reform*, FCPA BLOG (July 19, 2016, 6:18AM), <http://www.fcpcblog.com/blog/2016/7/19/andy-spalding-on-brazils-first-pillar-procurement-reform.html>.

43. Law No. 12,572/11; Conectas Hum. Rts., *Transparency: Freedom of Information Law Comes into Effect in Brazil Amid Climate of Distrust, Expectations, and Pressure*, (May 30, 2012), <http://www.conectas.org/en/actions/justice/news/transparency-freedom-of-information-law-comes-into-effect-in-brazil-amid-climate-of-distrust-expectation-and-pressure>.

44. Law No. 12,846/13; GAN BUS. ANTI-CORRUPTION PORTAL, BRAZILIAN CLEAN COMPANY ACT, at <http://www.business-anti-corruption.com/anti-corruption-legislation/brazil> (last updated Nov. 2015).

45. Law No. 12,850/13; Antenor Madruga & Luciano Feldens, *Brazil: White-Collar Crime Defense*, GLOB. INVESTIGATIONS REV. (Aug. 8, 2016), <http://globalinvestigationsreview.com/insight/the-investigations-review-of-the-americas-2017/1067457/brazil-white-collar-criminal-defence>; Andy Spalding, *Andy Spalding on Brazil's Fourth Pillar: The Organized Crime Law*, FCPA BLOG (July 28, 2016), <http://www.fcpcblog.com/blog/2016/7/28/andy-spalding-on-brazils-fourth-pillar-the-organized-crime->

such a short span and to such dramatic effect – has few historical precedents.

These four pillars make for a stark contrast between the two BRIC nations simultaneously hosting the FIFA World Cup and Olympic Games back-to-back. In Russia – host of the 2014 Winter Olympics and 2018 FIFA World Cup – allegations of corruption were rampant. But we saw neither a credible legislative response, nor effective enforcement actions. Russian corruption continued in impunity.<sup>46</sup> Brazil, has addressed deeply-rooted public corruption with adopting a four-part legislative framework and then a series of enforcement actions.<sup>47</sup> In so doing, Brazil is self-consciously addressing a culture that once tolerated corruption and glorified *jeitinho*, seeking to move beyond a history of official corruption bred under colonization and military dictatorships. Brazil thus redeems Pierre de Coubertin's idea of the Olympic Games as a venue for promoting an ethic of international fair play.<sup>48</sup>

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

#### *A. The First Pillar: Procurement Reform*

The harms of corruption in the specific realm of government procurement are obvious to all. Government officials may be bribed to accept bloated contracts, or inferior products, or both, all at the public's expense. But in trying to prevent corruption, procurement presents a series of counterintuitive, and underappreciated, policy trade-offs. The first trade-off is between transparency and cost. Transparency is generally thought to be an antidote to corruption: where processes are open to the public, and readily reviewable, the risk of cost inflation would seem to go down.<sup>49</sup> Put another way,

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l.html.

46. See Ilan Berman, *Putin's Olympic Corruption*, USA TODAY (Feb. 20, 2014), <https://www.usatoday.com/story/opinion/2014/02/20/putin-olympics-sochi-corruption-russia-column/5655815/>.

47. *Supra* notes 43-45.

48. Pierre de Coubertin was the founder of the modern Olympic Games. Norbert Muller, *The Idea of Peace as Coubertin's Vision for the Modern Olympic Movement: Development and Pedagogic Consequences*, SPORT J. (Mar. 7, 2008), <http://thesportjournal.org/article/the-idea-of-peace-as-coubertins-vision-for-the-modern-olympic-movement-development-and-pedagogic-consequences/>.

49. *Transparency and Accountability are the Main Antidotes for Corruption*, BARBADOS

controlling corruption is a standard cost control mechanism. But as the Brazilian experience has shown, sometimes transparency can actually exacerbate cost inflation.<sup>50</sup> In this regard, transparency can cause the precise harm that anti-corruption measures are designed, at least in part, to prevent. The relationship between transparency and cost is thus not as simple as may first appear.

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

Brazil was keenly aware of these trade-offs, and of the challenges inherent in its procurement regime, before the World Cup and Olympics. But the mega sporting events became an impetus to experiment with a new procurement regime.<sup>51</sup> This new regime is at least designed to make public procurement more streamlined and efficient.<sup>52</sup> The extent to which these efficiency-minded reforms will create corruption risks remains to be seen.

Procurement is the acquisition of goods and services.<sup>53</sup> In using the term, some draw a distinction between public and private procurement, and others define the term to include only acquisition by a government entity.<sup>54</sup> For the purposes of this paper, procurement

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FREE PRESS (Feb. 26, 2008, 2:31 PM), <https://barbadosfreepress.wordpress.com/2008/02/26/transparency-and-accountability-are-the-main-antidotes-for-corruption/>.

50. See *The Brazilian Crisis: Lessons from an Emerging Economy*, ONE BRIEF (Mar. 17, 2016), <http://www.theonebrief.com/the-brazilian-crisis-lessons-from-an-emerging-economy/>.

51. Renato Parreira Stetner & Paulo Henrique Spirandeli Dantas, *Public Procurement in Brazil* PRAC. L. CO. (Mar. 1, 2013), [https://uk.practicallaw.thomsonreuters.com/0-521-5566?\\_\\_lrTS=20170402065602319&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/0-521-5566?__lrTS=20170402065602319&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

52. Andy Spalding, *Brazil Emerging*, TRANSPARENCY INT'L BLOG (Apr. 9, 2015), <http://blog.transparency.org/2015/04/09/brazil-emerging/>.

53. *Procurement*, Black's Law Dictionary Free (2ND ed.), available at <http://thelawdictionary.org/procurement/> (last visited Apr. 9, 2017).

54. Allison Green, *Difference in Public v. Private Procurement*, CHRON, <http://work.chron.com/difference-public-vs-private-procurement-28985.html> (last visited on Apr. 17, 2017); U.S. GEN. SERV. ADMIN., FEDERAL ACQUISITION REGULATION (FAR), (2005), <https://www.acquisition.gov/sites/default/files/current/far/pdf/FAR.pdf>.

refers to any acquisition by official Olympic organizing entities whether public, private, or a combination of the two.<sup>55</sup> For large scale events or government projects, such as the Olympic Games, procurement is typically accomplished through a regulated process that requires potential suppliers of goods and services to bid against each other with the goal of maximizing the quality of the good or service offered while minimizing its cost.<sup>56</sup>

It is no secret that procurement is highly vulnerable to corrupt practices.<sup>57</sup> The 2004 OECD Global Forum on Governance identified lack of transparency and lack of accountability as two of the major threats to corruption in procurement.<sup>58</sup> At all stages, issues like bribery or kickback arrangements could present themselves. Further, as will be discussed below, there are specific corruption risks unique to each stage of the procurement process.<sup>59</sup> While some are specifically addressed in the Clean Companies Act,<sup>60</sup> others are addressed by the various procurement laws outlined here.<sup>61</sup>

Procurement generally consists of three distinct stages: (1) Pre-Bidding, (2) Bidding, and (3) Post-Bidding stages.<sup>62</sup> In the Pre-Bidding stage, entities formulate their needs, the process they will use to meet those needs, and the timeline that they will provide for the bidders to place a bid.<sup>63</sup> In the Bidding stage, entities open an invitation to bid and after evaluating bids, offer an award, at least in theory, to the best bidder.<sup>64</sup> Finally, in the Post-Bidding stage, the awarding entity

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55. As explained earlier, the governing bodies of the 2016 Olympics consist of both public and private entities. *See id.*

56. *See generally* Nathan Munn, *Olympic Procurement: Past, Present, and Future*, SourceSuite, <http://www.sourcesuite.com/procurement-learning/purchasing-articles/Olympic-Procurement-Past-Present-and-Future.jsp> (last visited May 16, 2017).

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

58. *Id.* at 3.

59. *See* U.S. GEN. SERV. ADMIN., OFF. OF THE INSPECTOR GEN., PROCUREMENT FRAUD HANDBOOK, 13–28 (Dec. 2012), <http://www.gsaig.gov/?LinkServID=6486B647-A5DF-C154-010A408470CAE0B8>.

60. *See infra* Part III.C.

61. For more details on the Clean Companies Act, *see generally* Andy Spalding et al., *3.14 Rio 2016 and the Birth of Brazilian Transparency*, in GLOBAL CORRUPTION REPORT: SPORT (2016).

62. OECD, *Integrity in Public Procurement: Good Practice from A – Z*, 21–25 (2007), <http://www.oecd.org/development/effectiveness/38588964.pdf>.

63. *Id.* at 22.

64. *Id.* at 24.

manages the contract with the bidder and completes payment.<sup>65</sup>

The Pre-Bidding stage is generally the least susceptible to corruption.<sup>66</sup> At the Bidding stage, however, bidders may engage in corruption by independently, or in concert with some or all of the other bidders, attempting to influence the outcome of the awarding of the bid.<sup>67</sup> This can take the form of bid suppression, complimentary bidding, bid rotation, or customer or market division.<sup>68</sup> All of these relate to an attempt to restrict competition and to cause the requestor to pay more than it otherwise would.<sup>69</sup>

In the Post-Bidding stage, after the award has been granted, corruption is often found in instances where costs run over or products or services are not delivered.<sup>70</sup> This is the stage where things such as mischarging costs, charging for products or services that were not delivered, and substitution of products or services -- particularly those of an inferior quality -- occur.<sup>71</sup> These various stages of corruption risk have been addressed in various Brazilian laws.

The first piece in Brazil's Olympic procurement regime is the Concessions and Public Private Partnerships (PPPs), which are both ways the government can award contracts to private entities to provide a public service.<sup>72</sup> Concessions are governed by law 8987/95 (Concession Law) and PPPs are governed by law 11.079/04, passed in 1995 and 2004 respectively.<sup>73</sup> With both concessions and PPPs, the government will delegate the provision of a public service during a

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65. *Id.* at 25.

66. *See generally id.*

67. *See generally id.* at 24.

68. For further discussion on these forms of bid rigging, *see* OFF. OF THE INSPECTOR GEN., *supra* note 59, at 15.

69. *Id.*

70. *Id.* at 21.

71. *Id.* at 17-22.

72. *See generally* Brazil's Public-Private Partnership Law, BRASIL: A NATION FOR ALL [https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/ppp\\_testdumb/documents/brazilppplaw.pdf](https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/ppp_testdumb/documents/brazilppplaw.pdf) (last visited May 16, 2017).

73. Lei 8.987, de 13 de Fevereiro de 1995, PRESIDENCY OF THE REPUBLIC CIV. HOUSE: SUB-OFFICE FOR LEGAL AFF., Agosto 1995 (Braz.); Lei 11.079, de 30 de Dezembro de 2004, PRESIDENCY OF THE REPUBLIC CIV. HOUSE: SUB-OFFICE FOR LEGAL AFF., Dezembro 2004 (Braz.); *see also* Henrique Frizzo & Pedro Oliveira, *Public Procurement in Brazil: Overview*, WESTLAW (Oct. 1, 2014), <https://content.next.westlaw.com/Document/12ef12a181ed511e38578f7ccc38dcbee/View/FullText.html?originationContext=knowHow&transitionType=KnowHowItem&contextData=%28sc.Default%29>.

fixed period of time.<sup>74</sup> Practically, there is little difference between the operation of the concession or the PPP; the main difference is the source of funding for the project. When the government awards concessions, the investment for the project comes from the private entity.<sup>75</sup> Conversely, when a PPP is awarded, the cost of the investment is shared by the private entity and the public.<sup>76</sup> A common example would be the awarding of a company to construct and manage a toll-road on behalf of the government. Both Concessions and PPPs have been granted in relation to the Olympic Games.

The second piece of the traditional Brazilian procurement regime is the Brazilian Procurement Law 8666/93, which established the rules and regulations for public procurement.<sup>77</sup> The law applies to general government procurement of services, goods, and construction, and requires a two-step bidding process to complete a procurement project.<sup>78</sup> In the first step, the government extends a request for proposal (RFP) for the creation of a technical project.<sup>79</sup> A technical project in this sense is a project that addresses the needs assessment, planning, and budgeting phase of the Pre-Bidding stage of the procurement project.<sup>80</sup> This request is subjected to public bidding and the best bid is given the award for the creation of the technical project.<sup>81</sup>

After the technical project is completed, the government then moves to the second step of bidding which is again open to the public and uses the technical project from the first step to determine the needs, budget and other planning of the remainder of the procurement project. In the case of the Procurement Law, bidding is open and transparent, allowing others to see what bids have been in the past and see the bids of their competitors once the bidding process has opened.<sup>82</sup> Adding up

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74. Frizzo & Oliveira, *supra* note 73.

75. INT'L L. OFF., *Infrastructure Project and Feasibility Studies: Opportunities* (July 14, 2015), <http://www.internationallawoffice.com/Newsletters/Projects-Procurement/Brazil/TozziniFreire-Advogados/Infrastructure-projects-and-feasibility-studies-opportunities#>

76. Frizzo & Oliveira, *supra* note 73.

77. Lei 8.666, de 21 de Junho de 1993, PRESIDENCY OF THE REPUBLIC CIV. HOUSE: SUB-OFFICE FOR LEGAL AFF., Junho 1993 (Braz.); *see also* Frizzo & Oliveira, *supra* note 73.

78. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 22 (Braz.); *Government Procurement Law and Policy: Brazil*, LIBR. OF CONGRESS (2015), [https://www.loc.gov/law/help/govt-procurement-law/brazil.php#Constitutional Principles](https://www.loc.gov/law/help/govt-procurement-law/brazil.php#Constitutional%20Principles); *see also* lei 8.666, *supra* note 86.

79. Frizzo & Oliveira, *supra* note 73.

80. *See generally* OECD, *supra* note 71, at 21.

81. Frizzo & Oliveira, *supra* note 73.

82. Bids that have been made are submitted to the public in the Official Gazette. Lei

the time limits for all of these different procedures, before the project is even started, the time it may take can be between 180 days and 285 days, if the time limits are not exceeded due to legal disputes.<sup>83</sup>

The traditional Procurement Law has two features that, at first glance, may appear to promote efficiency and accountability, but that have created new and serious problems. The first concerned the pre-bidding and bidding stages. Under the Procurement Law, these bids are solicited separately, and awarded to separate companies.<sup>84</sup> The company that is helping the government to design the project is thus different from the company that builds the project. Though four eyes are often better than two, the difficulty arises when the construction phase encounters a problem. If the project, as designed and thus far built, proves inadequate, and requires additional time and money to complete, neither the firm that won the bid for the technical project nor the firm that won the construction project wishes to accept the blame.<sup>85</sup> Instead, each will point the finger at the other: the construction firm will claim that the problem lies with the design, while the design firm will attribute the problem to poor execution of a blameless plan. Unable to settle, the two companies will proceed to litigate, obviously causing delays and increased costs. Ultimately, the problem is that the interests of the design firm, and the interests of the construction firm, are not aligned; when trouble arises, each blames the other, and allocating fault is slow, costly, and imprecise.

The second problem concerned the ironic tension between transparency and inflation. The traditional Procurement Law followed the practice of “open bidding,” in which the government publicly announced the project’s budget before issuing its RFP.<sup>86</sup> Open bidding reflected the default assumption that transparency tends to limit

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8,666, *supra* note 86; see also *Government Procurement Law and Policy: Brazil*, LIBR. OF CONGRESS (2015), [https://www.loc.gov/law/help/govt-procurement-law/brazil.php#Constitutional Principles](https://www.loc.gov/law/help/govt-procurement-law/brazil.php#Constitutional%20Principles) (stating that “Article 21 of Law No. 8,666 mandates that all notices with a summary of the public tenders must be published in the Official Gazette and in newspapers with a large circulation”).

83. See generally Frizzo & Oliveira, *supra* note 73.

84. See generally Bruno Werneck et al., *Construction and Projects in Brazil: Overview*, WESTLAW (Oct. 1, 2016), [https://content.next.westlaw.com/4-502-3377?\\_lrTS=20170409042129047&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://content.next.westlaw.com/4-502-3377?_lrTS=20170409042129047&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

85. See generally Mohd Nasrun Mohd Nawi et al., *Impact of Fragmentation Issue in Construction Industry: An Overview*, MATEC WEB OF CONFERENCES 1, 1 (2014), [http://www.matec-conferences.org/articles/mateconf/pdf/2014/06/mateconf\\_bsfmec2014\\_01009.pdf](http://www.matec-conferences.org/articles/mateconf/pdf/2014/06/mateconf_bsfmec2014_01009.pdf).

86. See generally OECD, *supra* note 62.

corruption and costs.<sup>87</sup> However, Brazilian experience proved the opposite to be sometimes true. A bidder that is capable of bidding substantially under the government's budget might inflate the bid to more closely approximate the available government funding.<sup>88</sup> In this way, open bidding tended to drive up costs.

The Regime Diferenciado de Contratações, law No. 12462/11 and locally known as the RDC, is Brazil's experiment with addressing the inefficiencies with traditional procurement.<sup>89</sup> So too was the law passed to specifically address the procurement needs of the 2014 World Cup and 2016 Olympic Games.<sup>90</sup> The law is designed to expedite the public procurement process because of massive infrastructure projects that were undertaken and that are still underway in Brazil.<sup>91</sup> Put another way, Brazil's hosting of the World Cup and Olympics provided a catalyst to experiment with an alternative procurement regime.

The law modifies the usual procurement process under the Procurement Law in two ways relevant to this study. First, it allows the government to conduct a single, integrated bidding process for both the design and construction, combining the pre-bidding and bidding phases.<sup>92</sup> The construction bidding no longer depends on the existence of an elaborate design already prepared by a separate design company (who had won the bid in a prior bidding process). Instead, the government will provide a general description of what it needs from the project, and companies will simultaneously bid for the design and

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87. See generally *id.*

88. Joseph Burns, *Will Price Transparency Drive up Health Care Costs?*, ASS'N OF HEALTH CARE JOURNALISTS (Dec. 9, 2013), <http://healthjournalism.org/blog/2013/12/will-price-transparency-drive-up-health-care-costs/comment-page-1/> (speaking to the debate around driving up costs in health care through price transparency; “[o]nce lower-paid physicians see what higher-paid doctors are charging, lower-cost doctors will demand higher rates from health insurers,” thereby driving up premiums” (citing David Pittman, *Transparency: Big Data Sexy and Pricey*, MEDPAGE TODAY (Dec. 3, 2013), <http://www.medpagetoday.com/PracticeManagement/Reimbursement/43236>)).

89. Wagner Rosa da Silva, *The Use of Sealed Bidding and Competitive Negotiation in Brazil and Worldwide*, GEO. WASH.: THE INST. OF BRAZILIAN BUS. & PUB. MGMT. ISSUES 1, 36 (Spring 2013), [https://www2.gwu.edu/~ibi/minerva/Spring2013/Wagner\\_Rosa\\_da\\_Silva.pdf](https://www2.gwu.edu/~ibi/minerva/Spring2013/Wagner_Rosa_da_Silva.pdf).

90. Lei 12462, de 4 de Agosto de 2011, PRESIDENCY OF THE REPUBLIC CIV. HOUSE: SUB-OFFICE FOR LEGAL AFF., Agosto 2011 (Braz.).

91. Rosa Da Silva, *supra* note 89, at 9-10 (stating that the RDC included infrastructural development for the 2014 Olympics, such as public security and sports facilities, in addition to current infrastructural projects, such as engineering services within the public school and unified health systems).

92. See generally *id.*



construction of the project.

Second, the RDC eliminates the requirement for open bidding. It does not require the government to make its budget publicly available before issuing the RFP.<sup>93</sup> The government has the option of conducting closed bidding, and not disclosing the budget, although the government has to justify doing so.<sup>94</sup> Many believe that this process will produce better financial results for the government because the lowest bidder will not allow its bid to creep up to be as close to the budget as possible.

However, skeptics of the RDC are quick to point out that this financial benefit comes at the apparent cost of transparency.<sup>95</sup> The instinct that transparency limits corruption, and secrecy exacerbates it, is immediately triggered. Moreover, some critics believe that the most powerful companies can use inappropriate influence to find out the budget amount anyway; if this were true, secrecy would indeed be compounding corruption. But research suggested that companies can no longer expect to obtain that non-public information in closed-door private meetings. The mores of Brazilian government are changing.

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

#### *B. The Second Pillar: Freedom of Information Law*

Law No. 12.527/2011, widely known as the freedom of information (FOI) law or information access law (its more common moniker in Brazil), was perhaps the first major signal of the government's intention to enact meaningful anti-corruption law.<sup>96</sup>

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93. *Id.* at 9.

94. Lei 12462, *supra* note 99.

95. Rosa da Silva, *supra* note 89, at 39 (stating that those who prefer open bidding take into consideration anti-corruption measures—implying that the RDC trades efficiency for transparency).

96. Lei 12527, de 18 de Novembro de 2011, PRESIDENCY OF THE REPUBLIC CIV. HOUSE: SUB-OFFICE FOR LEGAL AFF., Novembro 2011 (Braz.); Miriam Ventura, *The Law on Access to Information, Privacy, and Health Research in Brazil* 636, 636 PERSPECTIVES (2013), [http://www.scielo.br/pdf/csp/v29n4/en\\_02.pdf](http://www.scielo.br/pdf/csp/v29n4/en_02.pdf).

While perhaps the least prominent of the four pillars, it would prove a precursor to the extraordinarily impactful statutes of 2013.

Based on the principle, “publicity as the general precept, and secrecy as the exception,”<sup>97</sup> the FOI law moves to an era of active transparency, in which the government is obligated to publish certain forms of information without a request.<sup>98</sup> It brings an end to what Brazilians called the “eternal secrecy,” in which public documents had an indefinite period of confidentiality<sup>99</sup> because highly classified documents could see their classification renewed indefinitely.<sup>100</sup> Indeed, when the FOI law was under consideration in Congress, some lawmakers had pushed for keeping the “eternal” classification for certain categories of documents – including nuclear and aerospace technology, national defense, and diplomatic relations – but the provision was ultimately defeated.<sup>101</sup> So too did the bill create controversy about the potential disclosure of military intelligence concerning human rights violations during the military dictatorship.<sup>102</sup>

The FOI law has three core components. First, it obligates the federal, state, and municipal governments, and all branches thereof, as well as state-owned companies and even non-profits receiving government funds, to publish various kinds of information, including documents on government spending, without a request.<sup>103</sup> These so-called “active transparency” obligations extend to the official contact details of all employees, financial operations, spending, procurement contracts, and answers to frequently asked questions.<sup>104</sup> Second, the law empowers any citizen to request information from the government

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97. Greg Michener, *Analyzing Brazil's New Freedom of Information Law*, OBSERVING BRAZIL (Dec. 13, 2011), <http://www.observingbrazil.com/2011/12/13/analyzing-brazils-new-freedom-of-information-law/>.

98. Marcelo Sarkis, *Access to Public Information in Brazil: What Will Change with Law No. 12.527/2011?*, FREEDOMINFO.ORG (May 14, 2012), <http://www.freedominfo.org/2012/05/access-to-public-information-in-brazil-what-will-change-with-law-no-12-5272011/>.

99. *Id.*

100. *Id.*

101. Rachel Glickhouse, *Week in Review: Brazil's Senate Passes Landmark Transparency Laws*, BRAZIL PORTAL (Oct. 31, 2011), <https://brazilportal.wordpress.com/tag/freedom-of-information-law/>.

102. Fabrizio Rigout & Camila Cirillo, *Evaluating Readiness for the Implementation of Open Government Systems: The Brazilian Case in Comparative Perspective*, PLAN, [http://www.planbrasil.com/repositorio/arquivo/artigo/Rigout&Cirillo\\_EvaluatingReadinessForImplementation.pdf](http://www.planbrasil.com/repositorio/arquivo/artigo/Rigout&Cirillo_EvaluatingReadinessForImplementation.pdf).

103. Sarkis, *supra* note 98.

104. Michener, *supra* note 97.

and obliges the government to provide any such documents that are not classified.<sup>105</sup> Third, it reduces the terms of confidentiality of documents designated as top secret, secret, and undisclosed for twenty-five, fifteen, and five years respectively, and ends the possibility of renewal of these periods.<sup>106</sup>

Preliminary data suggest that the Brazilian government is starting to comply with the law, although patterns and attitudes will take time to reform. According to one 2014 study, of all valid requests for information under the new law, 40% were unanswered, 18% were partially answered, and 31% received full responses.<sup>107</sup> Of the partial or full responses, 51% were deemed of good quality.<sup>108</sup> Of eight jurisdictions, Sao Paulo and the Federal Government had the best response rates.<sup>109</sup> Notably, the two worst jurisdictions were the city and state of Rio de Janeiro.<sup>110</sup>

### *C. The Third Pillar: the Clean Companies Act*

While the FOI law targets the public sector, the corporate sector is the target of another statute. Passed in 2013, Brazil's Anti-Corruption Law, also referred to as the Clean Companies Act ("CCA"),<sup>111</sup> adopts a number of measures to increase corporate liability and accountability, and to incentivize the growth of a compliance industry and culture.

Brazil had a law on the books before the World Cup and Olympic Games that prohibited official corruption; all governments do. But it failed to create the corporate compliance culture that has proven in other countries to be so critical to anti-corruption enforcement. Enacted in 1992,<sup>112</sup> the Administrative Improbity Law prohibits illicit enrichment that arises from acts of administrative misconduct.<sup>113</sup> Both public officials and private individuals or entities that are a party to the

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105. Glickhouse, *supra* note 101.

106. Rigout & Cirillo, *supra* note 102, at 4.

107. Gregory Muchener, *Audit Indicates Weaknesses in Some Brazil Jurisdictions*, FREEDOMINFO.ORG (July 18, 2014), <http://www.freedominfo.org/2014/07/brazil-must-champion-foi-audit-indicates/>.

108. *Id.*

109. *Id.*

110. *Id.*

111. Lei 12846, de 1 de Agosto de 2013, LOBO & IBEAS ADVOGADOS, Agosto 2013 (Braz.).

112. COLIN NICHOLLS ET AL., CORRUPTION AND MISUSE OF PUBLIC OFFICE 652-53 (2d ed. 2011).

113. *Id.*

illegal act may be subject to penalties under the law.<sup>114</sup> The prohibited acts include a wide variety of behavior that captures “any kind of patrimonial advantage by reason of holding public positions,” including direct or indirect economic advantages to act or not act in the position’s official capacity.<sup>115</sup> Public officials can also violate the law by hindering or entering into a public contract without due process.<sup>116</sup> While the Administrative Improbability law apparently covers any corrupt acts of public officials, and places liability on both the government agent and any private entity that was a party to the act, there remained a gaping fundamental weakness: the statute created no corporate liability.<sup>117</sup> Because sporting events, such as the World Cup and Olympic Games, involve corporations, this piece proves critical.

Accordingly, in response to the Mensalão scandal and public protests, Brazil adopted the CCA.<sup>118</sup> Indeed, the law marks an important milestone in Brazil’s fight against corruption and was intended by President Dilma’s administration to send a strong message that the corruption tides have turned in Brazil.

The CCA’s essential prohibition is the promising, offering, or giving of an “undue advantage” to a public official or third person related to the public official.<sup>119</sup> This provision mirrors the bribery prohibition in the Organization for Economic Cooperation and Development’s Anti-Bribery Convention, to which Brazil is a party.<sup>120</sup> The statute also prohibits a number of other forms of corporate corruption concerning public tenders, shell companies, and obstructing public investigations of companies suspected of corporate wrongdoing.<sup>121</sup>

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114. Lei 8249, de 2 de Junho de 1992, art. 3., PRESIDENCY OF THE REPUBLIC CIV. HOUSE: SUB-OFFICE FOR LEGAL AFF., Junho 1992 (Braz.).

115. COLIN NICHOLLS ET AL., CORRUPTION AND MISUSE OF PUBLIC OFFICE 652-53 (2d ed. 2011).

116. Lei 8249, de 2 de Junho de 1992, art. 10., PRESIDENCY OF THE REPUBLIC CIV. HOUSE: SUB-OFFICE FOR LEGAL AFF., Junho 1992 (Braz.).

117. Z Scott & Elizabeth Pozolo, *Brazil’s New Anti-Corruption Law: What you Need to Know*, INSIDE COUNSEL (Feb. 12. 2014), <http://www.insidecounsel.com/2014/02/12/brazils-new-anti-corruption-law-what-you-need-to-k> (stating that the implementation of Law 12846 led the development of corporate liability in Brazil).

118. See generally Kevin Roberts et al., *The Brazilian Clean Companies Act – What You Need to Know*, LEXOLOGY (Dec. 6, 2013), <http://www.lexology.com/library/detail.aspx?g=183a9d32-0131-4f62-b72d-df28eb30eb5e>.

119. Scott & Pozolo, *supra* note 117.

120. Lei 12846 de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 2.8.2013 (Braz.) at Ch. 11, Art. 5.1.

121. See generally *id.* at Ch. II, Art. 5.

In comparison to the Administrative Improbity Act, and to comparable anti-corruption laws in other countries, the CCA has a number of noteworthy provisions. First, it moves beyond the Improbity Act by prohibiting not just the bribing, but the solicitation or offer of a bribe.<sup>122</sup> This brings the act into conformity with the OECD Anti-Bribery Convention<sup>123</sup> and obviously serves to prohibit a much broader swath of conduct.

Second, the act imposes strict liability on corporations for the acts of employees.<sup>124</sup> That is, when an employee commits a violation, the company automatically becomes liable; the prosecutor need not prove that the company intended, authorized, or even had knowledge of the bribe independently of the employee.<sup>125</sup> This is similar to the U.S. model, but different from the U.K. In the U.S. owing to a long-established principle of *respondeat superior*, the company is liable for the acts of its employee as long as the employee was acting in the course of employment (defined very broadly) and intended at least in part to benefit the company.<sup>126</sup> The U.S. statute, like Brazil's CCA, does not require proof that the company was also liable, independently of whatever the employee did; if the employee did it while acting as an employee, the company is also liable.<sup>127</sup> Similarly, under the CCA a company will be liable "for the wrongful acts . . . performed in their interest or for their benefit."<sup>128</sup> The U.K., by contrast, has recently provided companies a defense to liability for the acts of its employees. If the company can prove that it had a good faith compliance program in place – that is, that it took appropriate measures to prevent the violation – but the violation occurred nonetheless, the company will not be liable.<sup>129</sup> Brazil's CCA eschews the British approach,

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122. *GAN Business Anti-Corruption Portal, Anti-Corruption Legislation: Brazilian Clean Company Act*, GAN INTEGRITY (Nov. 2015), <http://www.business-anti-corruption.com/anti-corruption-legislation/brazil>.

123. See generally OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> (last visited June 15, 2017).

124. Lei 12846 de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 2.8.2013 (Braz.) at Ch. I, Arts. 1 & 2.

125. *Id.*

126. THE CRIMINAL DIV. OF THE DEP'T OF JUSTICE & THE ENF'T DIV. OF THE SEC, A RES. GUIDE TO THE FED. CORRUPT PRACTICES ACT 1, 27 (NOV. 14, 2012), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>.

127. *Id.*

128. Lei 12846 de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 2.8.2013 (Braz.) at Ch. I, Art. 2.

129. Bribery Act 2010, c. 23 (Eng.); see also Geoffrey Gauci & Jessica Fisher-Bristows, *The UK Bribery Act and the US FCPA: The Key Differences*, ASS'N OF CORP. COUNS. (June 1,

containing an explicit provision holding companies strictly liable.<sup>130</sup> Though time will tell, this will likely mean that a company is liable no matter what the company did or did not do, apart from the employee.

Thirdly, the statute makes clear that companies owned by the government – typically called state-owned enterprises (“SOEs”) - are deemed an extension of the government, such that these companies’ employees are public officials.<sup>131</sup> In the U.S. context, for example, whether employees of SOEs are foreign officials was a matter of much dispute, as the statute did not explicitly address the question. Only in 2011 did the U.S. courts resolve the question, holding just as the CCA now does that SOE employees are to be treated as officials.<sup>132</sup>

Finally, and perhaps most importantly, the statute imposes two forms of liability on companies: civil and administrative.<sup>133</sup> Notably, the statute does not impose criminal liability on companies, but this is not inappropriately lenient, much less scandalous. Though the U.S., U.K., and many other jurisdictions around the world hold companies criminally liable, many (such as Germany) do not.<sup>134</sup> And indeed, corporate criminal liability is a relatively new phenomenon in the history of law. International conventions such as the OECD Anti-Bribery Convention require signatory states to hold companies liable in accordance with their underlying principles of law, recognizing that some jurisdictions simply do not recognize the criminal liability of corporations.<sup>135</sup> The CCA should not be thought as somehow less effective in this regard.

The CCA’s penalty provisions are especially strong; companies may even say severe. The penalty is to be calculated as a percentage, up to 20%, of the gross earnings in the company’s most recent fiscal year preceding the onset of enforcement proceedings.<sup>136</sup> Note what the

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2011), <http://www.acc.com/legalresources/quickcounsel/UKBAFCPA.cfm?makepdf=1>.

130. Lei 12846 de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 2.8.2013 (Braz.) at Ch. 2, Art. 5.

131. *Id.*

132. *United States v. Esquenazi*, 752 F.3d 912, 931–32 (11th Cir. 2014), *superseded by statute on other grounds*, 18 U.S.C. § 1956(c)(9).

133. See Lei 12846 de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 2.8.2013 (Braz.) at Chs. III & IV.

134. Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 Am. Crim. L. Rev. 1481, 1493–94 (2009).

135. Organization for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 3, Dec. 17, 1997, 105 UST 1997.

136. Lei 12846 de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 2.8.2013

statutory penalty is not. First, it is not calculated based on the amount of the bribe, as some might assume; a bribe of relatively modest proportions could give rise to a substantial penalty. Second, it is not a function of the earnings that resulted from the bribe. In the U.S., for example, a company's financial penalty for foreign bribery is calculated based on the profits made possible by the bribe(s).<sup>137</sup> The CCA, by contrast, disregards both the size of the bribe and the size of the profits made possible by the bribe. Finally, note that this statute does not calculate profits based on annual profits, but rather, annual gross earnings. Accordingly, a company that is losing money – that is, one that has no annual profits – can still be fined. Where the bribes proved to be bad business, and became a losing proposition, the company may nonetheless be fined. So too may the company be debarred, or prohibited from conducting further business with the government, and in some circumstances may even be dissolved.<sup>138</sup>

#### 1. Overview of the U.S. System – to Understand the CCA

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

Federal anti-corruption laws in the U.S., particularly anti-bribery laws, are enforced by the U.S. Department of Justice and, to a lesser extent, the U.S. Securities and Exchange Commission.<sup>139</sup> These agencies out of necessity have limited budgets. The principal aim of public anti-corruption enforcement is to maximize general deterrence – to prevent persons within their jurisdiction from committing similar acts. While specific deterrence refers to preventing recidivism – the defendant's repeated violation – general deterrence refers to preventing persons other than the defendant from committing similar violations. Accordingly, the U.S. enforcement agencies seek to maximize general deterrence while operating on a fixed budget. It might be said that they are looking for the maximum general deterrence return on the dollar.

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(Braz.) at Ch. 3, art 6.1.

137. Criminal Div. of the U.S. Dep't of Justice & Enf't Div. of U.S. Sec. and Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 69 (2012).

138. Lei 12846 de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 2.8.2013 (Braz.) at Ch. 6, art 19.

139. Criminal Div. of the U.S. Dep't of Justice & Enf't Div. of U.S. Sec. and Exch. Comm'n, *supra* note 137, at 2.

One way – the traditional way -- to achieve both specific and general deterrence is to bring wrongdoers to trial. If convicted, the defendant company would face a stiff penalty and considerable reputational damage through the negative press. However, trials present two challenges for the enforcement agencies. First, they are extremely resource-intensive, as the gathering of evidence (discovery) and resulting trials are notoriously drawn-out and expensive, consuming vast amounts of the enforcement agencies' time, money, and personnel. Second, because they are so resource intensive, the agency can try a relatively small number of companies. As a matter of simple math, because each company requires so much time to investigate and try, and assuming fixed resources, the agencies cannot try as many companies as they could if the trial process were substantially shorter than various legal and practical circumstances presently permit. Finally, a trial is unpredictable; the government can rarely be sure that, after all the time and money spent on trying a company, it will actually get a conviction. Accordingly, the U.S. Department of Justice realized that trials are no way to maximize the general deterrence “bang for the buck.”<sup>140</sup> They would get relatively few companies, with unpredictable results.

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

Accordingly, as U.S. anti-corruption enforcement has increased over the last decade, so too has the use of alternatives to trial.<sup>141</sup> Increasingly, U.S. enforcement authorities are proposing, and companies are accepting, an alternative form of investigation and settlement. Indeed, in the U.S., with anti-bribery law in particular,

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140. *Id.* at 52.

141. See *Anti-Corruption Enforcement: What to Watch in 2016*, Covington, Global Anti-Corruption Group (Covington, D.C.), Feb. 2016, at 1. See also Steven A. Tyrell et al., *Anti-Corruption Enforcement Review: Emerging Issues and Developments*, Litigation Department (Weil, Gotshal & Manges LLP, New York, N.Y.), June 30, 2015 at 1.



trials against corporate defendants are nearly unheard of.<sup>142</sup> Rather, the U.S. Department of Justice and the corporate defendants agree to resolve the allegations by a different route.

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

The second core feature of modern U.S. anti-bribery enforcement concerns what happens next – that is, what happens with the report. The company has now spent millions, or tens of millions, on an investigation into its own wrongdoing, and possesses a comprehensive report with supporting documentation. Needless to say, the U.S. Department of Justice would like to get its hands on the report. Accordingly, it offers to the company “cooperation credit.”<sup>143</sup> By the terms of this deal, if the company hands over the investigation’s

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142. See *Corporate Bribery: The Anti-Bribery Business*, THE ECONOMIST May 9, 2015 (stating that more than four-fifths of FCPA cases have been settled since 2010, and only one trial has been commenced against a public company in 38 years).

143. Dep’t of Justice, *Principles of Federal Prosecution of Business Organizations* (2015), <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>.

findings, and makes its employees available to further interviewing, and otherwise cooperates with the government, the government will offer a penalty that, it claims, is substantially less than what the defendant would likely get if convicted at trial.<sup>144</sup> The company now must make a decision. It can risk the unpredictability of a trial, with its exorbitant costs, substantial drain on company resources, and undoubtedly negative press. Or, it can accept the government's offer of cooperation credit and turn over to the government the results of its investigation, buying itself a reduced penalty, predictability of outcome, reduced lawyer's fees, and reduced negative press.

Invariably, companies select the latter route: they choose to cooperate.<sup>145</sup> The turning over of its investigation conclusions is widely referred to as "voluntary disclosure:" the company voluntarily discloses the results of its findings.<sup>146</sup> The return for voluntary disclosure is the cooperation credit. Notably, the government cannot force companies to accept this deal, and yet the companies invariably do. It is perceived to be in the interests of both parties.

This deal culminates in the third core feature of the U.S. anti-corruption settlement process: the deferred prosecution agreement (DPA) or nonprosecution agreement (NPA).<sup>147</sup> DPAs and NPAs are forms of settlement, in which the government agrees to either defer prosecution or to forego prosecution altogether in exchange for the company accepting certain terms of settlement. The terms will include a penalty and might also include disgorged profits, the termination of various personnel, the withdrawal of business from the problematic markets, or acceptance of a government-imposed monitor.<sup>148</sup> Under a DPA, the government in effect gives the company a trial period in which to demonstrate its compliance with the law and the settlement terms; DPAs are agreements between the enforcement agency and the defendant; they do not involve judicial oversight.<sup>149</sup> With a NPA, by contrast, a judge will sign off on the agreement, but with minimal oversight.<sup>150</sup> The difference does not prove terribly important. DPAs

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144. *Id.*

145. *Corporate Bribery: The Anti-Bribery Business*, *supra* note 142 (analyzing the costs of FCPA litigation for companies and the number of companies that choose to cooperate with federal authorities).

146. Dep't of Justice, *supra* note 143.

147. *Id.*

148. *Id.*

149. Criminal Div. of the U.S. Dep't of Justice & Enf't Div. of U.S. Sec. and Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 74 (2012).

150. *Id.* at 75.

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and NPAs are two minor variations of the basic negotiated settlement.

The fourth unique component of this enforcement procedure concerns the role of compliance programs. Compliance programs are designed to prevent violations of given laws through training, monitoring, and the maintenance of an appropriate company culture.<sup>151</sup> With respect to a given area of federal law – be it environmental, health care, or in our case, anti-corruption – a company that knows itself to be at risk may invest in compliance to varying degrees. Of course, it may not invest at all, liking its chances that it will not violate the law or, at least, will not get caught. It may create a mediocre compliance program, and may or may not work to support that program by creating a culture within the company that values compliance. Or, the company may take compliance seriously, investing in a first-rate program and taking substantial effort to back up those programs with company culture.

The U.S. Department of Justice wishes to incentivize the growth of compliance programs, and will therefore reward companies for quality programs in several different stages of enforcement. First, the government may decide not to investigate a company at all.<sup>152</sup> Though these decisions are not public, practitioners take for granted that, given the Department of Justice's limited resources, one factor it may consider in deciding whether to investigate a company at all is whether it had a quality compliance program in place at all. Second, the Department of Justice may investigate a company but then decide not to penalize it. That is, the DOJ does not find sufficient reason to penalize the company. A formal decision not to penalize a company is called a declination, and while these too are rarely public, the government has recently publicly declined to penalize a small number of companies based at least in part on the quality of the company's compliance program.<sup>153</sup> Finally, when the DOJ does find sufficient evidence of culpability to enter into a DPA or NPA with the company, a quality compliance program can lead to a penalty reduction, as

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151. Dep't of Justice, *supra* note 143.

152. Criminal Div. of the U.S. Dep't of Justice & Enf't Div. of U.S. Sec. and Exch. Comm'n, *supra* note 149, at 55.

153. See Dep't of Justice, *supra* note 161; see also Press Release, Dep't of Justice, Former Chief Executive Officer of Oil Services Company Pleads Guilty to Foreign Bribery Charge (June 15, 2015) (on file with author); see also Press Release, Dep't of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (April 25, 2012) (on file with author).

authorized by the U.S. Sentencing Guidelines.<sup>154</sup>

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

First, the CCA contains a list of enumerated factors that the government will consider when determining appropriate sanctions.<sup>155</sup> The first six provisions of Chapter III, Article 7 are predictable and rather unremarkable: (1) the seriousness of the offense, (2) the advantage gained by the illicit conduct, (3) whether the illicit act was completed, (4) the degree or risk of damage, (5) the adverse effect of the conduct, and (6) the offending company's economic circumstances.<sup>156</sup> However, the next two provisions are harbingers of a new enforcement era. Article 7.VII provides that penalties will be determined in part based on the "cooperation of the legal entity in the investigation" of the wrongdoing.<sup>157</sup> This is cooperation credit. The next provision, Article 7.VIII, provides that penalties will also be based on the existence of internal procedures designed to promote integrity, including but not limited to auditing, whistleblowing, and self-enforcement of the codes of ethics and conduct.<sup>158</sup> These are all features of what the west (or north, as it were) calls a compliance program.

Additionally, the CCA authorizes the relevant enforcement agency to enter into what the statute calls "leniency agreements."<sup>159</sup> These agreements are analogous to the U.S.-style DPAs and NPAs, but perhaps more aptly named. Unlike the U.S. terminology, the term "leniency agreement" makes its purpose more explicit: to be lenient on the defendant in exchange for the defendant's cooperation. The CCA establishes several requirements that a defendant company must meet if it is to be entitled to a leniency agreement; these requirements are much more specific, and perhaps more exacting, than anything seen

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154. Dep't of Justice, *supra* note 143.

155. Lei 12846 de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 2.8.2013 (Braz.) at Ch. 3, art 7.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at Ch. V.

in the U.S. system.<sup>160</sup> Requirements companies must meet include: collaboration must result in identification of the guilty individuals; the rapid exchange of information; the legal entity must have initiated the cooperation; the entity must completely discontinue its involvement in the investigated wrongdoing; the entity must fully admit its participation in the wrongdoing; and fully and completely cooperate with the investigation until its conclusion.<sup>161</sup>

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

*D. The Fourth Pillar: The Organized Crime Law*

Of the four pillars, Brazil's new organized crime statute, passed in August 2013, is perhaps most remarkable, both for its impact and for the circumstances that led to its enactment. The statute provides a definition of organized crime and authorizes a number of law enforcement methods to investigate and prosecute organized crime. The federal prosecutors' use of these tools led to the Petrobras scandal, discussed in this section.

The bill was supposedly proposed to go after organized crime (e.g. drug trafficking, etc.) generally and specifically to target a group of violent protestors known as the Black Bloc.<sup>162</sup> During the early stages of congressional consideration of the bill, there was no mention that these enforcement tools could, or would, be used to go after high-level officials and businesspersons engaged in graft; but, word on the street is that advocates pushing for adoption of this bill may well have understood its potential to convict the very politicians who would vote to support the bill.<sup>163</sup>

Of the organized crime laws various enforcement tools, two have

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160. *Id.*

161. Lei 12846 de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 2.8.2013 (Braz.).

162. Wearing black disguises, the Black Bloc became more organized and visible in the 2013 anti-corruption protests, engaging in vandalism and theft. *See generally* Lulu Garcia-Navarro, *Brazil's Black Bloc Activists: Criminals or People Power?*, NPR (Oct. 22, 2013), <http://www.npr.org/2013/10/22/239860341/brazils-black-block-activists-criminals-or-people-power> (discussing how the Black Bloc became more organized and visible in the 2013 anti-corruption protests, engaging in vandalism and theft).

163. Spalding, *supra* note 45.

proven of particular significance to anti-corruption enforcement. First, the law provides an obstruction of justice charge; specifically, a person who obstructs investigations is subject to the same punishment range as one who promotes, constitutes, or finances a criminal organization.<sup>164</sup>

Second is the expanded plea bargain. Though plea bargaining previously existed under Brazilian law, it was much more restricted and thus a much less effective tool in the prosecutor's arsenal. Under the previous regime, judges could only reduce the penalty by one to two thirds, or grant a pardon post-conviction if the judge determined that the defendant's cooperation was useful to the conviction.<sup>165</sup> A defendant could thus not be sure, at the time of confession, of the plea bargain's effects on his or her conviction and sentence. Laws that previously governed plea bargains include the Heinous Crimes Law (8.072/1990),<sup>166</sup> the Law on Economic and Tax Crimes, and Against Consumer Relations (8.137/1990),<sup>167</sup> the Law on Crimes Against the Financial System (7.492/1986, as amended by Law 9.080/1995),<sup>168</sup> Law 9.269/1996, which altered Article 159 of the Penal Code (on extortion with kidnapping),<sup>169</sup> the Money-Laundering Law (9.613/1998),<sup>170</sup> the Cooperation and Witness Protection Law (9.807/1999),<sup>171</sup> and the Law on Combating Drug Misuse (11.343/2006).<sup>172</sup>

The new organized crime law goes significantly further. It does

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164. Lei 12850 de 2 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.8.2013 (Braz.).

165. Delmanto Advocacia Criminal, *Introducing Plea Bargaining: A Uniquely Brazilian Approach*, International Law Office (Dec. 16, 2013), <http://www.internationallawoffice.com/Newsletters/White-Collar-Crime/Brazil/Delmanto-Advocacia-Criminal/Introducing-plea-bargaining-a-uniquely-Brazilian-approach>.

166. Lei No. 8.072 de 25 de Julho de 1990, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 7.26.1990 (Braz.).

167. Lei No. 8.137 de 27 de Dezembro de 1980, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 12.28.1990 (Braz.).

168. Lei No. 7.492 de 16 de Junho de 1986, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 6.18.2013 (Braz.) (amended Lei No. 9.080 de 19 de Junho de 1995, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 7.20.1995).

169. Lei No. 9.269 de 2 de Abril de 1996, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 4.3.1996 (Braz.).

170. Lei No. 9.613 de 3 de Marco de 1998, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 3.4.2013 (Braz.).

171. Lei No. 9.807 de 13 de Julho de 1999, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 7.14.2013 (Braz.).

172. Lei No. 11.343 de 23 de Agosto de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 8.24.2006 (Braz.).

not merely provide for a sentence reduction or eventual pardon. Rather, it allows the prosecutor to not bring charges at all under certain circumstances.<sup>173</sup> Specifically, a prosecutor or judge may grant complete impunity, or reduce a penalty by up to two thirds, for a defendant who has effectively and voluntarily cooperated with the investigation, provided that the cooperation produces one of five results: (1) the identification of other participants in the crime; (2) information on the structure and control of the criminal organization; (3) the prevention of additional criminal activity by the organization; (4) the complete or partial recovery of the criminal proceeds; or (5) the location of the victim.<sup>174</sup> So too may the prosecutor dismiss the complaint against the defendant if he or she is not the leader of the criminal organization and is the first member of that organization to enter into a plea agreement with the enforcement authorities.<sup>175</sup>

#### 1. A Corruption Investigation that Reaches the Olympics

The obstruction of justice charge and the enhanced plea bargain under Brazil's new organized crime law made possible what may be the largest anti-corruption prosecution in history: Petrobras.<sup>176</sup> Former Petrobras executive Paulo Roberto Costa, who was arrested in March 2014 for involvement in a separate money-laundering probe, accused more than forty politicians of participating in a vast kickback scheme designed to benefit the Brazilian oil giant between 2004 and 2012.<sup>177</sup> He alleged that the participants received as much as 3% of the value of contracts signed between Petrobras and the Brazilian government in exchange for favorable votes in the legislature.<sup>178</sup> Prosecutors would eventually uncover a scheme of money laundering, drug trafficking, tax evasion, foreign exchange evasion, and smuggling valued at \$3 billion USD.

This author's interviews with Brazilian prosecutors disclosed that the organized crime law of 2013 made this prosecution possible.<sup>179</sup> Costa was at first questioned about a minor violation, and was

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173. Lei No. 12.850 de 2 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.8.2013 (Braz.).

174. *Id.*

175. *Id.*

176. Joe Leahy, *What is the Petrobras Scandal that is Engulfing Brazil?*, FIN. TIMES (March 31, 2016), <https://www.ft.com/content/6e8b0e28-f728-11e5-803c-d27c7117d132>.

177. *Id.*

178. *Id.*

179. Interview with Brazilian Prosecutors, Public Prosecutor's Office, in Porto Alegre, Brazil. These interviews were conducted by the author (Interview notes on file with author).

reportedly revealing little of what he seemed to know. Prosecutors then used their new tool – an obstruction of justice charge – which they threatened against both Costa and his family if he did not disclose further information. The threatened obstruction charge flipped Costa and broke open “Operation Car Wash.”<sup>180</sup> Prosecutors have also made liberal use of their new plea bargaining authority, again authorized by the organized crime bill; as of March 2017, sixty-five plea deals had been signed.<sup>181</sup>

Most significant for the Olympics is the central role of Brazil’s major construction companies, which obviously figured prominently in preparations for the World Cup and Olympics. These construction companies were funding the political parties’ campaigns in exchange for illicit benefits in the bidding of construction projects, including but not limited to World Cup and Olympic venues.<sup>182</sup> At the time of publication, well over a hundred persons had been convicted and over sixty had signed plea deals with the Ministério da Justiça.<sup>183</sup>

Most of the people who signed the plea deals are executives or former executives and former directors of big construction companies.<sup>184</sup> For example, Clóvis Peixoto Primo, former president of the construction company Andrade Gutierrez, said in his deposition that he paid bribes to the former Rio de Janeiro governor, Sergio Cabral, and the owner of the Delta construction company, relating to the Maracanã Stadium renovation.<sup>185</sup> Augusto Mendonça, Toyo Setal executive, said in his deposition that between 2008 and 2011, he paid around \$15 million USD to the former Services Director of Petrobras.<sup>186</sup> Claudio Melo Filho, former director of institutional relations of Odebrecht, showed in his depositions the values that were given to fifty-one politicians of eleven political parties for the purpose of getting illicit benefits to the construction company.<sup>187</sup> These politicians included the president of the Senate, Renan Calheiros and

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180. *Id.*

181. *Delatores da lava jato*, POLITICA (April 4, 2017), <http://especiais.g1.globo.com/politica/2015/lava-jato/delatores-da-lava-jato/>.

182. Adriano Belisario, *Documento da Lava Jato sugere cartel na Olimpíada*, PUBLICA (April 29, 2016), <http://apublica.org/2016/04/documento-da-lava-jato-sugere-cartel-na-olimpiada/>.

183. *Delatores da lava jato*, *supra* note 181.

184. *Id.*

185. *Delatores da lava jato*, *supra* note 181.

186. *Id.*

187. *Id.*



current Brazilian President, Michel Temer.<sup>188</sup> Other executives or former executives and former directors of large construction companies that signed plea deals, include Eduardo Hermelino Leite, former Vice President of Camargo Correia;<sup>189</sup> Hamylton Pinheiro Padilha Junior, former representative of Vantage Drilling Corp;<sup>190</sup> and João Carlos de Medeiros Ferraz, former President Director of Sete Brasil.<sup>191</sup> As an example of how impactful these plea deals became, Odebrecht would eventually enter into a \$3.5 billion USD settlement with authorities in Brazil, the U.S., and Switzerland for paying bribes around the world.<sup>192</sup>

“Operation Car Wash” would eventually bring the Olympic Games within its snare. The most expensive construction project undertaken for the Games was the \$2.5 billion USD revitalization of the port region of Rio de Janeiro, known as “Port Maravilha.”<sup>193</sup> The Car Wash investigation has uncovered a suspicious payment of \$300,000 to a code name “Turquesa 2.”<sup>194</sup> The Engenharia and OAS construction firms are also implicated and under investigation for participation in the project.<sup>195</sup> This particular scheme allegedly involved then-President of the Brazilian House of Representatives, Eduardo Cunha, who received around \$700,000 USD to provide the construction companies special tax breaks in relation to the Olympic construction.<sup>196</sup>

Not surprisingly, on the eve of the Games, 63% of Brazilians surveyed thought hosting the Olympics would hurt the country.<sup>197</sup>

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188. *Id.*

189. *Id.*

190. *Id.*

191. *Delatores da lava jato, supra* note 181.

192. Richard L. Cassin, *DOJ and SEC Take Small Slice of Odebrecht-Braskem \$3.5 Billion Global Settlement*, FCPA BLOG (December 21, 2016, 1:18PM), <http://www.fcpcbog.com/blog/2016/12/21/doj-and-sec-take-small-slice-of-odebrecht-braskem-35-billion.html>.

193. Guilherme Costa & Vinicius Konchinski, *Lava Jato aponta propina em 2ª obra mais cara da Olimpíada*, UOL (March 22, 2016), <https://olimpiadas.uol.com.br/noticias/2016/03/22/lava-jato-aponta-propina-em-2-obra-mais-cara-da-olimpiada-de-2016.htm>.

194. *Id.*

195. *Id.*

196. *Id.*

197. Paulo Roberto Conde, *Para 63% dos brasileiros, Olimpíada vai trazer mais prejuizos do que beneficios*, UOL (July 19, 2016), <http://www1.folha.uol.com.br/esporte/olimpiada-norio/2016/07/1793059-para-63-dos-brasileiros-jogos-vaio-trazer-mais-prejuizos-do-que-beneficios.shtml>.

There is some evidence to suggest they were right. Six months later, the *New York Times* would run a jarring article entitled “Legacy of Rio Olympics So Far is Series of Unkept Promises,”<sup>198</sup> detailing the economic waste and incomplete projects left in the Olympics’ wake.

#### CONCLUSION

The promises of the Olympic Games’ economic benefits may well have been unkept. But the Olympics delivered, perhaps inadvertently, a different sort of good. As the public decried the mega-event’s waste, Brazil’s democratic institutions would respond most remarkably. With four new statutes and a dramatic enforcement action, corruption would be identified and prosecuted to a degree unseen in the history of Brazil and, quite possibly, the world. It was the Games’ unintended benefits, rather than anything predicted or planned, that may constitute Brazil’s Olympic legacy.

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198. Anna Jean Kaiser, *Legacy of Rio Olympics So Far Is Series of Unkept Promises*, N.Y. TIMES (Feb. 15, 2017), [https://www.nytimes.com/2017/02/15/sports/olympics/rio-stadiums-summer-games.html?\\_r=0](https://www.nytimes.com/2017/02/15/sports/olympics/rio-stadiums-summer-games.html?_r=0).