FIGHTING CORRUPTION IN BRAZIL: A COMPARATIVE STUDY BETWEEN THE MEASURES AGAINST INVESTMENT-RELATED CORRUPTION ADOPTED IN BRAZIL AND THE INTERNATIONAL FRAMEWORK

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RESUMO
O presente artigo trata das principais medidas adotadas no Brasil no combate à corrupção relacionada ao investimento, buscando compará-las com a regulação internacional nesse sentido, assim como com os dois principais marcos legais no ambiente doméstico – o Bribery Act, do Reino Unido, e o Foreign Corrupt Practices Act, dos Estados Unidos.

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ABSTRACT
This paper sets forth the main measures adopted in Brazil in its fight against investment-related corruption, in order to compare them to the international legal framework, as well as to the two main regulatory landmarks in this field on the domestic level – the United Kingdom Bribery Act and the United States Foreign Corrupt Practices Act.

KEYWORDS

1 Introduction
Corruption, as defined by the World Bank, is “the abuse of public office for private gain”\(^1\). Having defined the term corruption, the first relevant question that arises is how corruption affects investment and why it is important to care about it. Given the highly controversial nature of this issue and given the limited scope of this paper, the position advocating that corruption is believed to decrease investment will be taken as a premise – being disclaimed, nevertheless, that this is not a conclusive answer to this important debate.

The argument supporting that corruption is bad and, therefore, should be fought goes as follows\(^3\): in an increasingly global environment, countries seek to raise their competitiveness as a way to attract foreign investment and, thus, expand their potential for economic growth. Competitiveness is reached when production is more efficient and production is more efficient when it is possible to take full advantage of all the available resources in the economy, reducing costs and exploring investment opportunities that may be interesting.

It is from this perspective that corruption becomes a pernicious factor, as it negatively affects investment decisions, undermining
the legitimacy and confidence in the government and in the investment environment. By affecting confidence in local institutions, corruption increases the cost of productive investment and affects the stability of the business environment, thus, weakening the competitiveness of a country as a potential locus of investment.

Accordingly an empirical study by the International Monetary Fund (IMF) reached the same conclusion, stating that: “Regression analysis indicates that the amount of corruption is negatively linked to the level of investment and economic growth, that is to say, the more corruption, the less investment and the less economic growth”.

Having demonstrated the relevance of corruption in the context of investment, this paper will first focus on the analysis of the international framework related to corruption, pointing out the main legal provisions adopted in order to fight corruption of foreign public officials in international business transactions; secondly, the analysis will focus on the example of Brazil in order to evaluate the efficiency of its legal tools designed to address corruption, followed by a reflection of what might be the weaknesses of the country’s response to this issue.

2 INTERNATIONAL CONTEXT
The fight against corruption has as one of its landmarks the Foreign Corrupt Practices Act (FCPA), an act passed by the United States’ Congress in response to the Security and Exchange Commission’s investigations in the mid-1970 over 400 U.S. companies allegedly engaged in questionable or illegal payments amounting to US$ 300 million to foreign officials. The basic prohibition established by this Act makes it unlawful to bribe foreign public officials in order to “obtain or retain business”. The Act also provides for criminal and civil penalties and establishes recordkeeping and internal control obligations on public companies. Importantly, the act excludes “facilitation payments” from the scope of its prohibition, which is defined as payments to facilitate or expedite performance of a “routine governmental action”, as opposed to payments meant to influence the decision.

Following the enactment of the FCPA, the Congress was concerned about the competitiveness of the US firms compared to other countries that did not impose the same restrictions. As a result, in 1988, the Congress commenced negotiations in the Organization
of Economic Cooperation and Development (OECD) seeking the agreement of other countries to pass similar legislations. As a result, thirty-four countries, including the U.S., signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, thus ensuring that FCPA’s provisions would be implemented worldwide.

The United Kingdom recently joined the campaign against corruption, through the enactment of the UK Bribery Act, which came into force on July 1st 2011. Such act is relevant since it is claimed to be the most comprehensive and stringent anti-bribery legislation in the world today. The UK Bribery Act sets forth the offenses of active bribery; passive bribery; bribery of foreign public officials; as well as the failure of commercial organizations to prevent bribery by an associated person (corporate offence). It should be noted that, in contrast to the US FCPA, the UK Bribery Act does not allow facilitation payments, being, thus, a more strict approach to corruption.

In addition to the OECD, another important player amid this field on the international level is the nongovernmental organization Transparency International, which lobbied for the adoption of several anti-corruption laws all over the world, as well as often lobbies at G8 meetings for the enforcement of anti-corruption conventions.

Focusing on the global international level, it is worth mentioning the anti-corruption policies adopted by international financial institutions such as the International Monetary Fund, the World Bank and regional development banks. Such institutions usually insert anti-corruption provisions in their lending agreements, providing, therefore, important incentives to the countries to engage in non-corruptive practices. For instance, all standard bidding documents and standard contracts of the World Bank contain clauses and provisions aimed at preventing corruption, which were made mandatory for Bank operations and are currently being introduced in the regional development banks. In addition, such financial institutions are relevant as well as they can also provide assistance in strengthening countries’ capacity to combat corruption by advising on appropriate anti-corruption legal frameworks.

The international community impetus in fighting corruption led toward the adoption of the United Nations Convention against Corruption, in 2003, which is deemed to be one of the most important international agreements explicitly aimed at preventing corruption. The Convention’s highlights are the measures directed
to prevent corruption – both to the private and public sectors; the criminalization of acts of corruption; the agreement between the signatory countries to promote international cooperation, as well as the mechanism of asset-recovery, which aims at redressing the worst effects of corruption⁹.

Advances in the regional level can also be noticed, notably in the form of anti-corruption conventions, such as the African Union, the Organization of American States, the Council of Europe, the Asian Development Bank/OECD Anti-Corruption Action Plan for Asia and the Pacific, among others.

Concerning the concrete measures to be taken against investment-related corruption, it is important to mention that the OECD Convention, as well as most of the other anti-corruption conventions – including those in the regional level –, were inspired by the US FCPA. Therefore, a non-exhaustive list setting forth the main tools designed to fight corruption and bribery that can be pointed out, based on the main landmarks aforementioned, is presented below¹⁰:

(i) General prohibition on bribery of foreign officials;
(ii) Prohibition on laundering of the proceeds of transnational bribery;
(iii) Determination that bribes are non-tax deductible;
(iv) Cooperation with foreign governments in the investigation and prosecution of bribery;
(v) Preventive measures, such as transparency and codes of conduct for civil servants;
(vi) Measures aiming at the competitiveness and accountability of public procurement and bidding processes;
(vii) Criminalization of bribery (both focused on bribe-payers and on foreign public officials);
(viii) Termination of agreements with firms or governments if funds are used for corrupt purposes;
(ix) Administrative penalties;
(x) Record-keeping and reporting obligations on potential payers of bribes; and

(xii) Extradition of suspected bribe-payers.

Keeping such measures in mind, this paper will now focus on where Brazil is placed when corruption is concerned, through an analysis of the main measures adopted against investment-related corruption.

3 Brazilian context

Before discussing the Brazilian context, it is important to point out the position occupied by Brazil in the corruption ranking in comparison to other countries. To that extent, the World Bank has, since 1996, six Governance Indicators, including the Control of Corruption Index (CCI)\textsuperscript{11}, according to which Brazil ranks the 59.8 percentile (which is a range from 0, indicating the lowest levels of corruption, to 100, indicating the highest levels of corruption). The chart\textsuperscript{12} bellow shows the comparison between the largest 10 countries by Gross Domestic Product (GDP), which includes Brazil.

Figure 1 - Control of Corruption Levels
In addition to this index, the non-governmental organization Transparency International, a global civil society organization leading the fight against corruption, calculates the Corruption Perception Indicator (CPI), another important index, for more than 100 countries, ranking the countries in a range that goes from zero (highly corrupt country) to 10 (highly clean). With a CPI of 3.70 in 2010, Brazil occupied the 69th place (out of 178 countries) in the ranking of Corruption Perception\(^{13}\), which, together with the CCI, indicates that the perception of corruption in Brazil is above the other countries’ average.

As evidenced in the map below, the country’s color is also an indicator of the significant perception of corruption in the country – its color is more towards the red than the yellow, the latter being the color of the less corrupt countries.

**Figure 2 – Map of Corruption**

![Map of Corruption](image)


Having such rankings in mind, this article will analyze the Brazilian framework designed to fight investment-related corruption. On the international level, Brazil has signed the three most important conventions against corruption: The United Nations Convention against Corruption; The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and The Inter-American Convention against Corruption.
Brazil's commitment on the international level is relevant, especially concerning the OECD Convention, which was ratified as of June 15th 2000 and enacted by Decree 3,678 of November 30th 2000. The incorporation of the OECD Convention to the Brazilian legislation was through Law 10,467, June 11th 2002, which added Chapter II–A to Section XI of Brazilian Criminal Code, as well as added a provision to Law 9,613, March 3rd 1998, which establishes provisions regarding the crimes of money-laundering or hiding of assets, rights and securities, together with the creation of the Council for Financial Activities Control. The sanctioning of the implementing legislation was on June 10th 2002 and it came into force as of June 11th 2002.

On the national level, there is, first of all, the Brazilian Constitution. The main constitutional provisions that can be pointed out relating to that matter are: Article 74, establishing the duties of internal control in the three Branches; Article 129, prescribing competencies of the Public Prosecutor's Office; Article 37, XXII, establishing the penalties for acts of official misconduct in the Public Administration; and Articles 85 and 86, setting forth the so-called “responsibility crimes” committed by the President of the Republic.

In the criminal field, Brazilian Criminal Code, which incorporated the norms and measures provided by the OECD Convention, specifically addresses corruption in a number of its articles, providing penalties for those who engage in corruption, bribery, embezzlement, among others. The main articles that can be pointed out are: Article 333, criminalizing active corruption of domestic officials; Article 317, designed against passive corruption of domestic officials; Article 337 – B, focusing on active bribery in international business transaction; and Article 337-C, aimed at the traffic of influence in international business transaction.

Notwithstanding the provisions found in the Constitution and in the Criminal Code other local measures are also found in sparse legislation.

Law 8,429 of 1992 establishes penalties for officials who have committed acts of improper conduct, which, among others, include bribery. Although such law provides for the accountability of non-officials, these are in small measure, being the law most significantly addressed to officials. It is important to note that such Law allows for penalties in addition to the civil, administrative and criminal sanctions on that matter. Therefore, it should be regarded as a
complement to the other existing penalties, as it establishes a special type of procedure, as well as of punishment, specifically addressed to public agents.

Law 8,666 of 1993, which is one of the most important national laws concerning contracts entered into with the Executive Branch, provides for the accountability of both private parties and officials for illegal acts performed in public bids and in contracts entered into with the Executive Branch. Moreover, such Law shall be observed by the Judicial and Legislative Branches, as well as by the Federal Court of Accounts and the Prosecutor’s Office. According to such law, the infringing party is subject to penalties for (i) unjustified refusal to enter into a contract; (ii) undue delay in performing its obligations; (iii) nonperformance of the contract; and (iv) illicit behavior in order to frustrate the objectives of the tender (in the case of public bids). It is important to note that, in contrast to Law 8,429, this Law provides for the accountability of both private parties and of officials. The legislative framework of the country also provides for a number of laws directly or indirectly related to corruption.

Another important measure on that matter is Resolution 62, of August 17th 2010, by the Council of Ministers of the Chamber of Foreign Trade (CAMEX). Such resolution establishes the following condition:

“Article 1. Condition the official Brazilian support to exportation through financing or refinancing for exports, interest rate equalization, export credit insurance or any other combination of these modalities, to the signature of the Statement of Commitment for Exporters annexed to this Resolution, in attendance to the commitments assumed by Brazil as signatory of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, ratified June 15th 2000 and enacted by Decree 3,678 of November 30th 2000”.

Through the Statement of Commitment for Exporters, the exporter shall declare, among others, its awareness of Brazil’s adhesion of the OECD Convention.

In addition to the current legal framework, there is a draft bill, designated as draft bill No. 6,826/2010, which establishes civil and administrative liability for corporations for corrupt acts relating to Brazil’s national and foreign public administration. Although the
draft bill does not provide for criminal penalties (which is already addressed in Brazilian Criminal Code), it is relevant for a number of reasons. First of all, because it embraces the respondeat-superior notion, through which the legal entities will be held liable for acts committed by any of its agents. Such provision is relevant in the Brazilian context, since under Brazilian law, with the exception of environment-related offenses, criminal liability cannot be imposed for the acts and omissions of corporations’ agents. Moreover, the legislation provides that the cooperation with investigation of infractions will be taken into consideration when determining the sanction to be applied, being, thus, an incentive for the parties to cooperate in the fight against corruption.

The proposed legislation is another indication that the Brazilian framework is closing ranks in the international effort against corruption. Moreover, efforts of the civil society in order to pass the bill can also be observed as a strong indicator of the willingness of the Brazilian society to engage in the fight against bribery and corruption.

Concerning the implementation measures, it is important to mention that the federal government’s agency in charge of formulating proposals to improve the legal framework as well as to adopt measures aiming at the prevention of corruption is the Office of the Comptroller General, having within its structure the Secretariat for prevention of Corruption and Strategic Information.

The Federal Police Department is responsible for the enforcement of the criminal offenses legislation, adopting the pertinent measures with regards to the prevention and repression of such criminal offenses.

The Department of Asset Recovery and International Legal Cooperation, of the Ministry of Justice, is responsible for defining policies with regards to money laundering, as well as for identifying threats on that matter. This Department has also the function of providing international legal cooperation, both in the penal and civil fields.

The Council of Control of Financial Activities has basically the purpose of enforcing the administrative penalties with regards to money laundering.

The Legislative Branch is also an important player in the fight against corruption, both by enacting laws and through the Parliamentary Inquiry Commissions – CPI. The CPIs have the purpose of investigating a certain fact, being its conclusions forwarded to
the Prosecutor’s Office, which may determine the civil or criminal liability of the offenders, if applicable.

The Federal Court of Accounts is in charge of the external control, being responsible for the judgment of the accounts of people responsible for public moneys, values and property of the direct and indirect administration.

Amongst the main policies to fight corruption that have been implemented in the country are: (i) transparency policies – such as the Transparency Portal, which provides information on public expenditures; (ii) the country’s e-procurement system, which enables the users to find information on all Federal Government purchases of goods and services; and (iii) the List of Ineligible Firms – CEIS, which is a database with information provided by Brazilian federal institutions, states, and municipalities on suppliers punished for irregularities in tenders or public contracts.

Another important initiative is the National Strategy to Combat Corruption and Money Laundering – ENCCLA, created in 2003, an initiative firstly addressed to money laundering which in 2006 included the fight against corruption amongst its objectives. It has formulated some measures such as the National Training Program for the Fight Against Corruption and Money Laundering, among others.

As can be noticed, a lot of measures were taken, including the commitment on the international level – through the already mentioned ratification of the most important conventions related to that matter and the incorporation of the OECD terms into the Criminal Code –, as well a proposed legislation, which is very likely to be enacted soon.

The measures adopted on the international level are, thus, similar to those observed in the national level. Using the same non-exhaustive list setting forth the main tools designed to fight corruption and bribery that was used for the international context, Brazil’s framework provides for:

(i) General prohibition on bribery of foreign officials;

(ii) Prohibition on laundering of the proceeds of transnational bribery;

(iii) **Determination that bribes are non-tax deductible**: Brazil has an exhaustive list of all tax deductible circumstances, which does not include bribes;
(iv) Cooperation with foreign governments in the investigation and prosecution of bribery;

(v) Preventive measures, such as transparency and codes of conduct for civil servants;

(vi) Measures aiming at the competitiveness and accountability of public procurement and bidding processes;

(vii) Criminalization of bribery (both focused on bribe-payers and on foreign public officials);

(viii) Termination of agreements with firms or governments if funds are used for corrupt purposes;

(ix) Administrative penalties;

(x) Record-keeping and reporting obligations on potential payers of bribes: There are no rules specifically addressed to potential payers of bribes, just general rules on obligations of transparency; and

(xi) Extradition of suspected bribe-payers: Brazilians cannot be extradited according to the Federal Constitution.

Therefore, despite some fragilities, the Brazilian framework is aligned with the international effort against corruption.

4 Conclusion

In spite of all the measures adopted in Brazil, which in general seem to meet the international standards in the fight against corruption, Brazil is nonetheless ranked 69th in the ranking of corruption. Therefore, this paper argues that the reason for this ranking might not be the defective design of the rules, since they seem to be aligned with the international level, but rather on their enforcement.

In this sense, the Transparency International conducted an analysis on the enforcement of the OECD Convention among all the countries that have ratified the Convention. Such analysis reached the important conclusion that Brazil was among a group of 21 countries
(out of 37) that, although have ratified the Convention, presents little or no enforcement of it. Such classification indicates that by failing to enforce the Convention, Brazil is allowing corruption to flourish, despite all of its commitment on the legislative level.

Important to notice, however, that this study refers only to the enforcement of the OECD Convention, and does not address the enforcement of the overall Brazilian framework on that matter. Nevertheless, it should be seen as an important indicator, given the importance of the OECD Convention as a landmark in this field. As a result, such indicator, together with the analysis of the current Brazilian framework in comparison to the international standards, is a suggestive data about an important implementation issue in Brazil, which can be better explored in further researches, rather than a defective design in its mechanisms related to this issue.
NOTAS

1 Graduanda em Direito pela Escola de Direito de São Paulo da Fundação Getulio Vargas (DIREITO GV) e em Administração de Empresas pela Escola de Administração de Empresas de São Paulo da Fundação Getulio Vargas (EAESP-FGV).


6 The enforcement of such provision can be noted through the letter about facilitation payments Mr. McCarthy – Chief Investigator of Serious Fraud Office – has sent to all desk officers in Foreign & Commonwealth Office missions overseas, whereby it declared that: “As of 1st July 2011, the UK Bribery Act has made it a clearly defined criminal offence for any individual or company with a UK presence to give or receive a bribe. This includes so-called ‘facilitation payments’ – a form of bribery made to improperly expedite or facilitate the performance of a routine governmental function by a public official. The Serious Fraud Office (SFO), as the lead agency for the enforcement of the Bribery Act, promotes a zero-tolerance approach towards facilitation payments”. Letter by Keith McCarth, about the Enforcement of the UK Bribery Act (informação repetida) – Facilitation Payments. Disponível em: <http://www.bryancave.com/files/Publication/6457e3e5-0d71-4e00-af9b-b72f47683b9/Presentation/PublicationAttachment/6efa15b9-c82b-447f-a807-bb32fbaea3b/Bribery_Act_Facilitation_Payments_October201.pdf>.


For instance, under the instructions to bidders, there is, among others, (i) the Eligibility Clause, which specifies that “that a bidder who is under a declaration of ineligibility issued by the Bank as a consequence of engaging in corrupt or fraudulent practices shall not be permitted to participate in World Bank contracts”; (ii) the Commissions and Gratuities clause, which requires the bidder to provide information on commissions and gratuities paid or to be paid. Under the General Conditions of Contract, there is the (i) Bank Audits clause, which specifies that the Contractor shall allow the Bank to inspect its records related to a World Bank Contract; and the (ii) Termination for Corruption Clause, which “specifies that the engaging of a contractor or supplier in corrupt or fraudulent practices will be an event of default as a result of which the Borrower may terminate the contract”.

8 OECD, Recommendation on Anti-Corruption Proposals for Aid-Funded Procurement: Follow-up report, Disponível em: <http://www.oecd.org/document/30/0,3746,en_2649_34855_2394526_1_1_1_1,00.html>.

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11 According to the World Bank: The control of corruption “captures perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as “capture” of the state by elites and private interests.”


18 As the manifesto by the association Business Pact for Integrity and Against Corruption, a pact aiming at fighting the corruption promoted by the Ethos Institute.
– Business and Social Responsibility; Patri – Government Relations and Public Policy; the United Nations Development Program/UNDP; the United Nations Office on Drugs and Crime/UNODC; and the Global Compact Brazilian Committee.


20 69th place (out of 178 countries) in the ranking of Corruption Perception, which indicates that the Corruption Perception in Brazil is quite high and above the other countries’ average.


OECD, Recommendation on Anti-Corruption Proposals for Aid-Funded Procurement: Follow-up report, <http://www.oecd.org/document/30/0,3746,en_2649_34855_2394526_1_1_1_1,00.html>.


