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Brazil Finally Cleans Up Its Act with the Clean Company Act: The Story of a Nation's Long-Overdue Fight Against Corruption

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BRAZIL FINALLY CLEANS UP ITS ACT WITH THE CLEAN COMPANY ACT: THE STORY OF A NATION'S LONG-OVERDUE FIGHT AGAINST CORRUPTION

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"The Portuguese, more than any other people, adhere to that rule of Scripture, that a gift maketh room for a man, and it is incredible how a present smooths the difficulties of a solicitation; they even expect it, and though the presents necessary are not considerable, since a few dozen bottles of foreign wine, or a few yards of fine cloth will suffice, this often repeated amounts to money."[1]

—Lord Tyrawley, 1738

"So rarely has political corruption led to punishment in Brazil that there is an expression for the way scandals peter out. They 'end in pizza,' with roughly the same convivial implication as settling differences over a drink."[2]

—The Economist, 2012

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1. C.R. BOXER, THE GOLDEN AGE OF BRAZIL, 1695-1750: GROWING PAINS OF A COLONIAL SOCIETY 209 (1964) (citing The Portugal State Papers 89/40, Dispatch from Lord Tyrawley to Newcastle, dated Feb. 14, 1738).
2. *Corruption in Brazil: A Healthier Menu*, ECONOMIST (Dec. 22, 2012), http://www.economist.com/news/americas/21568722-historic-trial-those-guilty-legislative-votes-cash-scheme-draws-close.

I. INTRODUCTION

IT is no secret that Brazil's history has long been marred by an endemic culture of political and corporate corruption. As noted in a 2015 U.S. Department of State report, "[c]orruption scandals are a regular feature of Brazilian political life."[3] But Brazil is not alone, as this socially and economically self-destructive environment permeates much of Latin America. With a GDP of roughly $1.8 trillion USD, Brazil is the world's ninth wealthiest economy according to the World Bank.[4] And while Brazil's recent and prolific economic growth is indeed promising in terms of its position in the global economy, there is another important ranking on which Brazil's leaders may not be so eager to hang their chapéu.[5] Brazil ranked 79th on Transparency International's 2016 Corruption Perception Index,[6] which measures the prevalence and perceived effects of "public sector corruption," defined as "the misuse of public power for private benefit."[7] Luiz Navarro, Brazil's former Deputy Minister of State and Inspector General of the Comptroller-General's Office (CGU), has confessed, "[a]s to the causes of corruption, we must say it is a bit cultural. Still, we just can't wait for a solution to fall down from heaven. We must invest in instruments . . . to prevent and punish corruption."[8] Enter Brazilian Law No. 12.846, otherwise known as the "Clean Company Act" (CCA).[9]

The CCA was passed by the Brazilian Congress on August 1, 2013 and went into effect on January 29, 2014.[10] The government's new anti-corruption legislation is both comprehensive and unprecedented in Brazil. It imposes strict civil and administrative liability on domestic and foreign companies for engaging in corrupt practices against either the Brazilian government or foreign officials.[11] In light of the fact that bribery has become a common, if not socially acceptable, way of conducting business

3. U.S. Dep't of State, Bureau of Econ. & Bus. Affs., 2015 Investment Climate Statement – Brazil, at 18 (2015).
4. World Bank, *GDP Ranking: Gross Domestic Product 2015*, http://databank.worldbank.org/data/download/GDP.pdf (last updated Feb. 1, 2017).
5. "*Chapéu*" is the Portuguese term for "hat."
6. Transparency Int'l, *Corruption Perception Index 2016* (Jan. 25, 2017), http://www.transparency.org/news/feature/corruption_perceptions_index_2016.
7. Transparency Int'l, *Corruption Perception Index 2010: Long Methodological Brief*, at 2 (2010), http://transparency.ee/cm/files/cpi2010_long_methodology_en.pdf.
8. Carlos Tautz, *Brazil: The Cynical Code*, *in* THE CORRUPTION NOTEBOOKS 2006 37 (Jonathan Werve & Global Integrity eds., 2007).
9. Lei No. 12.846, de 1 de Agosto de 2013, Diario Oficial da Uniao [D.O.U] de 2.8.2013 (Braz.) [hereinafter "Clean Company Act"]. In writing this Comment, the author has referred to the official English translation of Law No. 12.846, https://www.cov.com/files/upload/E-Alert_Attachment_Brazilian_Clean_Companies_Act_English.pdf.
10. *Id.* at art. 31 (per art. 31, CCA "t[ook] effect 180 days after the date of its publication.").
11. Anthony Boadle & Dan Grebler, *Brazil enacts tough anti-bribery law required by OECD*, REUTERS (Aug. 2, 2013), http://www.reuters.com/article/2013/08/02/us-brazil-bribery-idUSBRE97111A20130802.

and politics in Brazil, the CCA embodies a momentous anti-corruption effort for Brazil. Its enactment exemplifies the growing public enthusiasm and political will in both Brazil and the region to seriously regulate, diminish, and prosecute corporate and political corruption.[12] And while the CCA reinforces the ongoing global trend of implementing robust anti-corruption measures, its scope, severity, and far-reaching legal force are unparalleled among Latin American countries.[13] With Brazil's undoubted status as a "significant political and economic power in Latin America and an emerging global leader,"[14] the CCA, though still in its early stages, will likely carry important global ramifications.

This article will begin with an historical analysis of Brazil's innate culture of corruption that has evolved throughout the country's history, and will identify the underlying causes that have facilitated this detrimental social norm. It will then describe the deficient anti-corruption framework that existed under Brazilian law prior to the CCA. The analysis will then explain the culmination of factors that ultimately drove the Brazilian government to finally enact the tough anti-corruption regulations embodied in the CCA. The article will also provide an overview of the CCA's key rules and provisions, as well as the subsequent legislative measures that amended and supplemented the original CCA provisions. After summarizing the CCA's defining features, the article will discuss the current state of the CCA with respect to compliance and enforcement. The focus will then turn to an examination of the CCA's strengths and weaknesses, from which the author concludes that the new law's promising aspects outweigh the concerns voiced by its critics. It will then discuss the author's proposed focus areas for future developments and improvements to the CCA. This article will also provide a CCA practice guide for companies operating in Brazil. Lastly, the article will conclude with a prescription of what will be required of Brazil's government, businesses, and citizens in order for the CCA to bring about meaningful change to the country's longstanding corruption problem.

II. HISTORY OF BRAZIL'S INTRINSIC CULTURE OF CORRUPTION

A. JEITINHO BRASILEIRO: "THE BRAZILIAN WAY OF DOING THINGS"[15]

The widespread corruption that pervades Brazil's business and political communities does not stem from a few bad apples. On the contrary, it is

12. *See* Nicholas Berg, David Peet & Deanna Foster, *What Happens In Latin America Doesn't Stay In Latin America*, LAW360 (Nov. 30, 2015, 11:35 AM), http://www.law360.com/articles/732135/what-happens-in-latin-america-doesn-t-stay-in-latin-america.
13. *See id.*
14. Peter J. Meyer, Cong. Research Serv., RL 33456, Brazil-U.S. Relations 1 (Mar. 5, 2010).
15. In Juliana Mello, *The Brazilian Way of Doing Things*, THE BRAZ. BUS. (Mar. 26, 2012), http://thebrazilbusiness.com/article/the-brazilian-way-of-doing-things, the

a systemic norm rooted in distinctive social and cultural dynamics that have been a part of Brazilian life for quite some time. Brazil's history of corruption is grounded in a unique cultural paradigm called "jeitinho brasileiro" ("jeito" or "jeitinho" for short).[16] "Jeitinho is a social influence strategy that is widely regarded as a component of Brazilian culture . . . [it] is an innovative problem-solving strategy in which the individual uses social influence [or] cunning tricks to achieve goals, despite the fact that it breaks formal rules."[17] The word "jeitinho" comes from the Portuguese phrase "dar um jeito," which literally means "to find some way."[18] As one scholar put it, "the gap between the law on the books and actual practice is notoriously large" in Latin American countries, "[b]ut what is striking about Brazil is that the practice of bending legal norms to expediency has been elevated into a highly prized paralegal institution called *jeito*."[19] Social scientists and legal scholars have variously described "jeitinho" as: a "process for resolving difficulties despite the content of legal norms, codes, and laws";[20] "the way to grease the wheels of government . . . so as to obtain a favor or to bypass rules or regulations";[21] and a strategy to deal with excessive formalism, overcome bureaucratic systems, or "us[e] resources, sometimes illegal, in favor of [one's] own benefit."[22] In the context of business culture, it has been observed that "Brazilians have a sense of pride [about] finding ways around the regulatory costs [of doing business]," and thus, jeitinho has been characterized as a competitive process that rewards those who can most effectively and discretely evade legal rules and regulations.[23]

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author explains that the term "jeitinho brasileiro" is loosely translated to mean "the Brazilian way of doing things."

16. Keith S. Rosenn, *The Jeito: Brazil's Institutional Bypass of the Formal Legal System and Its Developmental Implications*, 19 AM. J. COMP. L. 514, 515 (1971).
17. Maria C. Ferreira et al., *Brazilian Jeitinho: Understanding and Explaining an Indigenous Psychological Construct*, 45 REV. INTERAM. DE PSICOL. [INTERAM. J. OF PSYCHOL.] 27 (2011).
18. FLOYD MERRELL, COMPLEMENTING LATIN AMERICAN BORDERS 68 (2004).
19. Rosenn, *supra* note 16, at 515. Regarding parallel cultural norms in other Latin American countries, "jeitinho brasileiro" is a similar concept to Argentina's and Uruguay's "viveza criolla" ("creoles' cunning") and Colombia's "la malicia indigena" ("indigenous malice"). *See "Viveza Criolla" in Argentina*, LATIN AM. STUDIES, http://www.latinamericanstudies.org/argentina/viveza.htm (last visited Feb. 7, 2016); Mauricio García Villegas, *Disobeying the Law: The Culture of Non-Compliance with Rules in Latin America*, 29 WIS. INT'L L.J. 263, 278 (2011).
20. Rosenn, *supra* note 16, at 515.
21. ROBERT M. LEVINE, BRAZILIAN LEGACIES 81 (1997) (also noting that favors *(i.e.*, "jeitos") "imply a measure of reciprocity, a courtesy to be returned . . . by a tip or [ ] larger payoff.").
22. Ferreira et al., *supra* note 17, at 28.
23. Enrique R. Carrasco & Sean Williams, *Emerging Economies After the Global Financial Crisis: The Case of Brazil*, 33 NW. J. INT'L L. & BUS. 81, 113 n. 225 (2012) (citing *Business: The Brazilian Model*, ECONOMIST: SCHUMPETER BLOG (Nov. 18, 2010), http://www.economist.com/node/17522484).

B. Drivers Underlying Brazil's Corporate and Political Corruption

One corporate construct that underlies the prevalence of corrupt activity in Brazil is the fact that its "business culture is predicated upon personal relationships" to a much greater extent than in most countries.[24] Inevitably, this cultural understanding facilitates not only the offering of bribes by those whose personal network affords an inside track to special treatment or more profitable opportunities, but also the solicitation thereof. To be sure, Brazil's preference-seeking business culture is significant for reasons beyond the ethical dilemmas that such widespread corruption represents. The pervasiveness of this corrupt dynamic has had an exclusionary effect on companies that may have otherwise pursued business or investment opportunities in Brazil.[25] To that end, the World Bank's 2009 Enterprise Surveys revealed that nearly seventy percent of businesses consider corruption to be a major impediment to doing business in Brazil, as measured by companies' "rating of the obstacle as a potential constraint to [its] operations."[26] When comparing that figure to the international average of thirty-three percent,[27] it is evident that Brazil's corrupt environment is not just a potential or theoretical constraint, but rather a real, identifiable deterrent in the eyes of foreign enterprises. To be clear, this article does not argue that the underlying causes of Brazil's corruption problem are strictly cultural. There are distinct aspects of Brazil's regulatory and governmental systems that also drive both individuals and entities to commit bribery and other acts of corruption.

Among the primary causes of political corruption in Brazil are the seductive incentives created by the nature and role of political finance in the country's electoral process.[28] One attorney general involved in the prosecution of a recent corruption scandal explained the recurring pattern that occurs in Brazil's corruption cases: first, a company donates to a political party or candidate in exchange for future advantages in the public bidding process for government contracts.[29] In turn, if and when

24. Lindsay B. Arrieta, *Taking the Jeitinho Out of Brazilian Procurement: The Impact of Brazil's Anti-Bribery Law*, 44 Pub. Cont. L.J. 157, 164 (2014).

25. *See generally* Sidney Vianna, *Anti-corruption and Doing Business in Brazil*, Ethic Intelligence (Jan. 10, 2012), http://ethic-intelligence.com/experts/89-brazil-anti-corruption-trends (noting that "corruption affects Brazil's competitiveness and its ability to attract foreign investments.").

26. World Bank, *Enterprises Survey: Brazil Data 2009*, http://www.enterprisesurveys.org/data/exploreeconomies/2009/brazil#2 (last visited Feb. 8, 2016).

27. *Id.*

28. Maíra Martini, *Brazil: Overview of Corruption and Anti-Corruption* 2, Transparency Int'l (Nov. 25, 2014), http://www.transparency.org/files/content/corruptionqas/Country_profile_Brazil_2014.pdf (noting that the high price of election campaigns is related to the fact that "the winners are usually those who outspend their competitors. . . . [thus] politicians and political parties have strong incentives to fundraise for their political campaigns and, once in office, gain access to a wide range of benefits and resources.").

29. *Id.* at 2-3 (citing Beatriz Bulla, *Para procuradora, nova operação da PF mostra 'padrão de corrupção' no País*. Estadão (Nov. 20, 2014, 3:58 PM), http://polit-

elected, the politician will then receive "kickbacks" or "overpriced contracts for their personal enrichment [or] to create a slush fund for the next election campaign."[30] And the extent of this political manipulation has not been well hidden, as many perceive "[p]olitical parties in Brazil . . . as institutions that breed corruption."[31]

Another driving force behind corrupt deal-making in Brazil is the excessive regulatory and administrative requirements imposed upon businesses operating in Brazil.[32] This contention has been duly corroborated by multiple global reports. In the World Bank's 2015 Ease of Doing Business Index, which examines how conducive countries' regulatory environments are to starting and operating a business, placed Brazil 116th out of 189 countries.[33] With respect to the ease of creating a business, dealing with construction permits, paying taxes, and trading across borders, all of which require interaction with a public body, Brazil's global rankings were an abysmal 174th, 169th, 178th, and 145th, respectively.[34] According to TMF Group's 2015 Global Benchmark Complexity Index,[35] which ranks countries based on how difficult it is to do business from a regulatory and compliance perspective, Brazil is the "10th most complex nation in the world for multinational companies to stay compliant with corporate regulation and legislation."[36]

The byproduct of such excessive bureaucracy is the "leverage [of public officials] to solicit illegal payments . . . to facilitate or hinder administrative processes."[37] This arguably unnecessary degree of bureaucracy has led at least some scholars to assert that Brazil's leaders have deliberately and continuously regenerated this cycle in order to sustain the incentives for businesses to offer bribes to public officials. As one law journal article explains, "[o]fficials accustomed to corrupt systems will be likely to enact more regulations in an effort to increase their opportunities to collect bribes while further hindering the development of ethical busi-

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ica.estadao.com.br/noticias/geral,para-procuradora-nova-operacao-da-pf-mostra-padrao-de-corrupcao-no-pais,1595635).

30. *Id.* at 3.
31. *Corporate Ties to Political Parties: Implications of the Clean Companies Act*, TRACE INT'L (Sept. 29, 2015), http://www.traceinternational.org/blog/164/Corporate_Ties_to_Political_Parties_Implications_of_the_Clean_Companies_Act.
32. BRIAN P. LOUGHMAN & RICHARD A. SIBERY, BRIBERY AND CORRUPTION: NAVIGATING THE GLOBAL RISKS 278 (2012) (arguing that "[c]orruption stems from dealing with local-level governments and a wide-range of regulatory agencies in order to do business, increasing the likelihood of bribery.").
33. World Bank, *Doing Business: Economy Rankings*, http://www.doingbusiness.org/rankings (last updated June 2015).
34. *Id.*
35. *Global Benchmark Complexity Index 2015: A Global Study of Corporate Secretarial Governance*, TMF GROUP (Feb. 2016), http://tmf.foxps.com/wp-content/uploads/2016/02/Global-Benchmark-Complexity-Index-2015-small.pdf.
36. TMF Grp., *Brazil Ranked Among The World's 10 Most Complex Countries For Business Compliance*, MONDAQ (Mar. 2, 2016), http://www.mondaq.com/brazil/x/470562/Compliance/Brazil+Ranked+Among+The+Worlds+10+Most+Complex+Countries+For+Business+Compliance. The problem is so bad that this was actually an improvement – Brazil ranked 2nd in 2014.
37. Martini, *supra* note 28.

nesses."[38] Given the immense burdens of complying with gratuitous regulatory obligations, perhaps we should be less surprised that so many Brazilian businesses are willing to offer a few inside payments to cut through some of the red tape and expedite these cumbersome processes.

An additional factor underlying Brazil's corruption problem is the government's broad decentralization of authority combined with its weak federal oversight of municipalities' extensive discretionary powers. This dynamic is problematic because "levels of corruption are higher at the state and local level, in comparison to federal levels in Brazil."[39] Thus, the generous resources and broad decision-making power that Brazil's government bestows upon local officials, though well-intended, ultimately facilitates more opportunities for corruption to go undetected.

III. BRAZIL'S PRE-CCA LEGAL FRAMEWORK FOR CORRUPTION REGULATION

Brazil's criminal code has prohibited bribery and other acts of corruption since the 18th century.[40] But despite having in place criminal anti-corruption laws on the books, Brazil has had a notorious record of not using them. Historically, "[o]ccasionally, a few egregious cases of corruption were prosecuted, but after lengthy court proceedings cluttered by procedural appeals, they had meaningless outcomes and entailed no punishment, exhibiting the unwritten principle captured in a popular saying: 'For friends, everything; for enemies, the law.'"[41]

Throughout the 1990s, Brazil finally began to "demonstrate a serious commitment to combat the bribery of public officials," passing various "penal laws to combat corruption, including legislation against bribery-related money laundering, securities fraud, concealment of assets, and economic power abuse."[42] However, while bribery has always been a crimi-

38. Leah M. Trzcinski, *The Impact of the Foreign Corrupt Practices Act on Emerging Markets: Company Decision-Making in A Regulated World*, 45 N.Y.U. J. INT'L L. & POL. 1201, 1279 (2013) (citing Cyavash N. Ahmadi, *Regulating the Regulators: A Solution to Foreign Corrupt Practices Act Woes*, 11 J. INT'L BUS. & L. 351, 363 (2012) (describing bribery in heavily regulated bureaucracies as an "eco-cycle")).

39. Lindsey Carson & Marian M. Prado, *Mapping Corruption and its Institutional Determinants in Brazil* 34 (Int'l Res. Initiative on Braz. & Afr. (IRIBA), Working Paper No. 08, 2014), http://www.brazil4africa.org/wp-content/uploads/publications/working_papers/IRIBA_WP08_Mapping_Corruption_and_its_Institutional_Derminants_in_Brazil.pdf.

40. Antenor Madruga, Ana Belotto & Mariana Tumbiolo, *Client Alert Brazil: The Brazilian Clean Companies Act*, ROXIN ALL. (Sept. 2015), http://www.roxin-alliance.org/uploads/media/ROXINClientAlert_Brazil.pdf.

41. Paulo Sotero, *Scandals Have Made Brazilians Less Tolerant of Corruption on High Places*, WILSON CTR. – BRAZ. INST. (Mar. 9, 2016), https://www.wilsoncenter.org/article/scandals-have-made-brazilians-less-tolerant-corruption-high-places-0.

42. Geida D. Sanlate, Daniela Sedes & Juan C. Varela, *Brazil's New Anti-Corruption Law: What Every Multinational Employer Should Know*, LITTLER MENDELSON P.C. (Aug. 22, 2013), https://www.littler.com/files/press/pdf/2013_08_ASAP_Brazil_Anti-Corruption_Law_What_Every_Multinational_Employer_Should_Know.pdf. *See also* Org. for Econ Co-operation & Dev. [OECD], Report, *Steps Taken by State Parties to Implement and Enforce the Convention on Combating Bribery of*

nal offense in Brazil, entities, by legal definition, cannot act with the requisite intent necessary to establish criminal liability, which means Brazilian courts are legally unable to convict corporations of crimes.[43] Hence, under Brazilian law as it existed before the CCA, only individuals could be held liable for bribing public officials; the companies that benefitted from the corrupt conduct, however, were immune from any and all punishment, civil or criminal.[44]

Moreover, while individuals could be criminally prosecuted in Brazil for corruption committed domestically, Brazilian laws lacked any legal mechanism to address or establish liability, personal or corporate, for the bribery of foreign officials.[45] It was against this backdrop that the Organisation for Economic Co-operation and Development (OECD) insisted that Brazil take some legislative action to address this shortcoming, specifically with respect to corporate liability for corrupt practices in international business dealings.[46] That is, after Brazil officially adopted the OECD Convention on Combating Bribery of Foreign Public Offices in International Business Transactions (the "OECD Anti-Bribery Convention") in 2000, the OECD Working Group on Bribery made clear in a 2007 Review that Brazil needed to "take urgent steps to establish the direct liability of legal persons for the bribery of a foreign public official."[47] In sum, it had become clear in the years leading up to the CCA that whatever Brazil was doing to combat corruption was simply not getting the job done. Put simply, Brazil's "anti-bribery legislation was weak by international standards, and failed to deter corrupt acts."[48]

IV. THE CCA'S CATALYSTS

The mounting pressure on Brazil's leaders to adopt meaningful legislation to address the nation's rampant corruption problem was driven largely by two key forces: the Brazilian people and the OECD. In June of 2013, the people of Brazil finally rallied together and took to the streets in massive fashion to send a clear message to their historically corrupt political leaders. It was reported that over a million people took part in the 2013 protests, and their efforts spanned more than one hun-

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Foreign Public Officials in International Business Transactions, at 17-18 (Sept. 2014), http://www.oecd.org/daf/anti-bribery/WGB-Steps-Taken-Update.pdf.

43. *See* Kierstan L. Carlson & Shawn M. Wright, *Brazil's New Anti-Bribery Act Goes Into Effect in January 2014—Is Your Company Ready?*, BLANK ROME LLP (Dec. 2013), https://www.blankrome.com/index.cfm?contentID=37&itemID=3224.

44. *Id.*

45. *See* Sanlate et al., *supra* note 42.

46. *See* Org. for Econ Co-operation & Dev. [OECD], OECD Working Grp. on Bribery in Int'l Bus. Transactions, *Brazil: Phase 2 – Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Transactions*, at 65 (Dec. 7, 2007), http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/39801089.pdf.

47. *Id.*

48. Arrieta, *supra* note 24, at 170.

dred cities throughout Brazil.[49] In the protestors' words, their rally cries were aimed at "ending the [ ] impunity and lack of accountability of political leaders"; Brazilians had grown "so disgusted with the system, so fed up that now [they were] demanding change."[50] These demands and the anger from which they stemmed were undoubtedly justified – a 2012 study by the Federation of Industries of São Paulo revealed that corruption costs Brazil somewhere between 1.4% to 2.3% of its GDP each year, which amounts to roughly $146 billion USD.[51] Given the success Brazil had been experiencing in the global economy and the pronounced increases in its national income, Brazilians rightfully expected the nation's recent economic gains to translate into improved public goods and enhanced welfare, but they took to the streets precisely because this was not the case.[52]

As briefly discussed in Part III above, the second driving force behind Brazil's ultimate passage of the CCA was a not-so-subtle directive from the OECD. It is important to note that Brazil is a signatory to three different international anti-corruption conventions: the OECD Anti-Bribery Convention,[53] the Inter-American Convention Against Corruption,[54] and the U.N. Convention Against Corruption (UNCAC).[55] Like all nations that have ratified such treaties, Brazil agreed to honor and fulfill their shared commitment to impose liability on legal entities for corrupt acts.[56] In 2010, a full ten years after Brazil adopted the OECD Convention, the OECD Working Group on Bribery noted yet again that, despite the OECD's insistence in its previous 2007 review of Brazil's anti-bribery laws, "Brazil ha[d] still not implemented effective liability of legal persons [i.e., business entities] for foreign bribery."[57] Due to Brazil's

49. *Brazil Unrest: 'Million' Join Protests in 100 Cities*, BBC NEWS (June 21, 2013, 12:17 AM), http://www.bbc.co.uk/news/world-latin-america-22992410.
50. *Id.*; Michelle A. Winters, *Too Many Cooks in the Kitchen: Battling Corporate Corruption in Brazil and the Problems with A Decentralized Enforcement Model*, 13 RICH. J. GLOBAL L. & BUS. 681, 682 (2015).
51. *12th Global Fraud Survey, Growing Beyond: A Place for Integrity – Regional Insights: Brazil*, ERNST & YOUNG (2012), http://www.ey.com/GL/en/Services/Assurance/Fraud-Investigation—-Dispute-Services/Global-Fraud-Survey—-a-place-for-integrity—-Brazil (last visited Feb. 10, 2016).
52. Nathaniel P. Flannery, *Are Brazil's Protests a Sign of Deeper Economic Imbalance?*, FORBES (June 24, 2013, 10:26 AM), http://www.forbes.com/sites/nathanielparishflannery/2013/06/24/are-brazils-protests-a-sign-of-deeper-economic-imbalances/#4b5fb8b5386a.
53. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. 1 (1998) (ratified by Brazil in 2000).
54. Org. of Am. States (OAS), Inter-American Convention Against Corruption (IACAC), Mar. 29, 1996, 35 I.L.M. 724 (1997) (ratified in Brazil in 2002).
55. U.N. Convention Against Corruption (UNCAC), Oct. 31, 2003, 2349 U.N.T.S. 41, 43 I.L.M. 37 (2004) (ratified in Brazil in 2005).
56. Lindsey Carson, Izabela Correa & Mariana Prado, *The Brazilian Clean Company Act: Using Institutional Multiplicity for Effective Punishment*, 12 OSGOODE HALL L. J. (Osgoode Legal Stud. Research Paper No. 48/2015, 2016), https://ssrn.com/abstract=2673799.
57. Org. for Econ Co-operation & Dev. [OECD], OECD Working Grp. on Bribery in Int'l Bus. Transactions, *Brazil Phase 2: Follow-Up Report on the Implementation of*

continuing failure to institute legislative measures for establishing corporate liability, the OECD demanded in no uncertain terms that Brazil "pass this legislation promptly."[58] In other words, the OECD was unequivocally telling Brazilian officials to clean up their act and abide by their international legal obligation to enact and enforce regulatory measures to hold companies liable for corrupt conduct.

As a result of the accumulating pressure brought on by these converging forces,[59] Brazil officials finally proposed and approved a new anti-corruption law of unprecedented magnitude—the CCA—and embarked on its long-overdue mission to mend Brazil's global image and fulfill "the country's commitment to curb palm-greasing under the OECD's anti-bribery convention."[60]

V. THE CCA AND ITS AMENDMENTS: LAW NO. 12.846, DECREE NO. 8.420, PROVISIONAL MEASURE NO. 703, AND CGU REGULATIONS

A. Overview

The CCA was officially enacted in January of 2014. Characterized as "[t]he 'next big thing' in global anti-corruption,"[61] the new law embodies a regulatory scheme where, for the first time in Brazil's history, corporations will be held liable for the corrupt conduct of their directors, officers, and agents.[62] The CCA applies to incorporated and unincorporated "legal persons," "whether foreign or domiciled in Brazil, and whether the unlawful act is committed within or outside of Brazil."[63] Among the CCA's fundamental principles, perhaps most significant is its imposition of strict civil and administrative liability "for conduct against the Brazilian or foreign governments, which includes promising, offering or giving, directly or indirectly, any 'improper advantage' to a public official or related third person."[64] While the CCA achieves its intended purpose of holding corporate entities legally accountable, it is worth emphasizing that the new law contemplates only civil and administrative liability; the

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the Phase 2 Recommendations, at 4 (2010), http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/45518279.pdf.

58. *Id.*
59. *See* Arrieta, *supra* note 24, at 159.
60. *Brazil's New Anti-Corruption Law: Hard to Read*, Economist (Jan. 29, 2014, 9:40PM), http://www.economist.com/blogs/schumpeter/2014/01/brazil-s-new-anti-corruption-law.
61. T. Markus Funk & Mikhail Reider-Gordon, *The 'Next Big Thing' in Global Anti-Corruption: The Brazil Clean Companies Act*, 27 Westlaw J. Gov't Cont. 1, 1 (2014).
62. Michelle Richard, *Brazil's Landmark Anti-Corruption Law*, 20 L. & Bus. Rev. Am. 357, 360 (2014).
63. Michael Diaz, Jr. & Marcela C. Blanco, *Fighting Corruption in International Transactions*, Diaz, Reus & Targ LLP (Dec. 15, 2015), http://diazreus.com/fighting-corruption-in-international-transactions/.
64. Adria Perez, *Parallel Lives: How Brazil and the United States Consider Leniency Agreements and Compliance Programs*, 33 N.Y.S.B.A. Inside 20, 20 (2015) (citing CCA, art. 5(I)).

CCA does not change Brazil's legal tradition of immunizing corporations and legal entities from criminal liability.[65]

It is undeniable that the passage of the CCA was a monumental moment in Brazil's anti-corruption movement. But soon after its enactment, many believed the law's initial parameters were too ambiguous with respect to its intended methods of implementation and enforcement.[66] As a result, supplemental legislation was enacted in 2015 to further refine the CCA and provide greater legal clarity surrounding its implementation.[67] Such measures included Decree No. 8.420 (the "Decree") (passed on March 18, 2015),[68] Ordinance Nos. 909 and 910 (passed in April of 2015), and Provisional Measure No. 703 (MP 703) (provisionally enacted on December 21, 2015).[69] Collectively, these regulations clarified the process for imposing administrative liability, set guidelines for calculating fines, updated the rules governing leniency agreements, and provided specific criteria for the government's assessment of companies' internal compliance programs.[70]

65. In Sonia Zaheer, *Brazil's Landmark Clean Company Act: Comparison to the OECD Anti-Bribery Convention and Issues*, 28 PAC. MCGEORGE GLOBAL BUS. & DEV. L. J. 457, 468 (2015), the author noted that the sole exception to this long-held rule of exempting corporations from criminal liability is a provision in Brazil's Constitution for "Crimes Against the Environment," but as of 2012, this exception, which permits criminal punishment for entities' acts "injurious to the environment," has only been asserted once in Brazil's history. *See also* Org. for Econ Co-operation & Dev. [OECD], OECD Working Grp. on Bribery in Int'l Bus. Transactions, *Brazil: Phase 1 Review of Implementation of the Convention and 1997 Recommendation*, at 2 (2004), http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/33742137.pdf.

66. *See* Debevoise & Plimpton LLP, *The Year 2015 in Anti-Bribery Enforcement: Are Companies in the Eye of an Enforcement Storm?*, 7 FCPA UPDATE (Jan. 2016), http://www.debevoise.com/~/media/files/insights/publications/2016/01/fcpa_update_january_2016.pdf.

67. Esther Flesch et al., *Brazil Amends Leniency Agreement Rules Under the BCCA*, FCPAMERICAS (Jan. 11, 2016), http://fcpamericas.com/english/brazil/brazil-amends-leniency-agreement-rules-bcca/.

68. Decreto No. 8.420, de 18 de Março de 2015, Diário Oficial da União [D.O.U.] de 3.19.2015 (Braz.). Per the Decree's stated purpose of "govern[ing] the administrative liability of legal persons," it amended certain CCA articles regarding penalties and procedures. In writing this article, the author has utilized an English translation of the Decree, which can be found at http://www.merrillbrink.com/translation-of-Brazil-decree-Clean-Company-Act-04062015.htm.

69. The President's stated goal in submitting MP 703 to the Legislature was to "decreas[e] uncertainty and preserv[e] jobs." Brazil President Dilma Rousseff, Speech on the Occasion of MP 703's Signature (Dec. 18, 2015). *See also* Debevoise & Plimpton, *supra* note 66, at 37 (noting that MP 703 provides for prosecutors' enhanced participation in negotiating leniency agreements, grants the possibility for multiple companies to seek leniency in connection with the same facts or events, and reinforces the requirement that a company have a legally adequate compliance program in order to apply for leniency).

70. *See* Debevoise & Plimpton, *supra* note 66, at 37-41.

B. Important Rules and Provisions

1. *Strict Liability*

One of the core components of the CCA is its strict liability framework. Article 2 of the CCA provides that a legal entity "shall be held strictly liable, administratively and civilly, for the injurious acts stipulated herein performed in their interest or benefit."[71] As such, the CCA makes companies strictly liable for bribes or other prohibited acts committed by their employees, officers, or agents for the company's benefit, regardless of the potential absence of any corrupt intent on the part of the its managers or directors.[72] That is, so long as a prosecutor can show that the illegal act occurred, then she need not prove any negligent or willful conduct by the corporation.[73] As with any strict liability regime, the consequence of such a severe standard is that a company may be liable for any infraction by its employees or agents, even if the company had instituted all necessary internal compliance programs, and "even [if] it had no knowledge of such violation."[74]

2. *Prohibited Conduct: "Acts Harmful to the National or Foreign Public Administration"*

Aiming to prohibit more than just bribery in its basic, traditional sense, article 5 of the CCA proscribes a deliberately broad range of practices to encapsulate what the law will regard as "corrupt" acts.[75] In this respect, the CCA appears to embody a genuine attempt by Brazilian officials to tackle corruption on an extensive scale. To achieve this end, the CCA forbids "not only the actual payment or provision of any undue advantage to any public official or third party, but also the acts of offering, promising, sponsoring or otherwise supporting such activity."[76] The new law likewise casts a wide net regarding the process of procuring government contracts, prohibiting any "conduct that gives an unfair advantage" or that may in any way jeopardize the competitive nature inherent to public bidding.[77] Specifically, the CCA provides that the following acts constitute bribery of domestic or foreign officials: (i) promoting, offering,

71. Clean Company Act, art. 2.
72. *See* Carson et al., *supra* note 56.
73. *See* Michael Volkov, *Brazil and Its Commitment to Anti-Corruption Enforcement*, Volkov L. Grp.: Corruption, Crime & Compliance (Sept. 4, 2013), http://corruptioncrimecompliance.com/2013/09/brazil-and-its-commitment-to-anti-corruption-enforcement/.
74. William M. Sullivan, Jr. et al., *Preparing for Brazil's New Anti-Corruption Law: What In-House Counsel Should Know* 2, Pillsbury Winthrop Shaw Pittman LLP (Oct. 31, 2013), http://www.pillsburylaw.com/siteFiles/Publications/Alert20131031LitigationPreparingforBrazilsNewAntiCorruption.pdf.
75. *See* Richard, *supra* note 62, at 360.
76. Marcelo Santos B. Correia, Myles Bartley & Regina Freitas, *A Comparison of the New Brazilian Anticorruption Law, the FCPA, and the UK Bribery Act*, Assoc. of Corp. Counsel (Sept. 24, 2013), http://www.acc.com/legalresources/quickcounsel/cnbalfuba.cfm?makepdf=1.
77. *See* Richard, *supra* note 62, at 360.

or giving, directly or indirectly, "an improper benefit to a public agent" or to a third person related to a public official; (ii) financing, funding, sponsoring, or subsidizing in any way the performance of illegal acts prohibited by the CCA; (iii) using a third party, whether an individual or legal entity, to hide or cover up an offense, its perpetrators, or the beneficiaries of illegal acts; (iv) hindering or defrauding, in any manner, the "competitive nature" of public bidding for government contracts;[78] and (v) hindering or interfering with the investigation or supervisory work of public bodies and regulatory agencies.[79]

3. *Joint and Several Liability and Successor Liability Following Corporate Transactions*

Article 4 of the CCA imposes joint and several liability on the parent, subsidiaries, and other related affiliates of a company that violates the Act.[80] Additionally, pursuant to the CCA's application of successor liability, an entity's liability will remain attached even after its organizational structure undergoes contractual changes, and/or following corporate transactions, such as mergers, acquisitions, transfers of ownership, or amendments to the articles of incorporation.[81] To limit the potential risk of forcing companies to inherit unreasonably broad liability, the CCA restricts a successor's liability to fines and restitution only up to the value of assets transferred in the corporate transaction, and only for actual damages caused.[82]

4. *Sanctions*

Commentators have agreed on at least one thing about the CCA: it imposes upon its offenders a particularly harsh menu of potential fines and penalties.[83] In fact, when the CCA was being debated and finalized by the legislature, then-President Rousseff vetoed proposed provisions that sought to cap penalties at the value of the contract or bid at issue, signifying just how little tolerance Brazilian officials are expected to have in their efforts to punish corrupt actors under the CCA.[84] This also demonstrated that the severely punitive nature of the CCA was by no

78. Under Clean Company Act, art. 5(IV)(a)-(g), the CCA sets forth a more specific and comprehensive list of prohibited acts in the context of public requests for bids and contracts.
79. *Id.* arts. 5(I)-(V). *See also* Zaheer, *supra* note 65, at 466.
80. Clean Company Act, art. 4.
81. *Id.*
82. *Id.* art. 4(1); Timothy W. Blakely et al., *Brazil's New Clean Companies Act Continues Global Fight Against Corruption*, MORRISON & FOERSTER LLP (Aug. 6, 2013), http://media.mofo.com/files/Uploads/Images/130806-Brazils-New-Clean-Companies-Act.pdf.
83. *See* Carlson & Wright, *supra* note 43; Julie DiMauro, *Brazil's Clean Companies Act—best practices for your supply chain*, FCPA BLOG (May 2, 2014, 7:08 AM), http://www.fcpablog.com/blog/2014/5/2/brazils-clean-companies-act-best-practices-for-your-supply-c.html (noting that violations can result in fines of up to twenty percent of company revenue).
84. *See* Arrieta, *supra* note 24, at 172.

means unintended. Companies that violate the CCA will be subject to the following range of administrative and legal punishments.[85]

a. Administrative Penalties

The administrative penalties available under the CCA include: (1) fines, and (2) publication of the company's administrative sanctions in a local or national newspaper, on the main page of its website, and on notices viewable by the public at the company's offices.[86] Regarding possible monetary penalties, depending upon the presence or absence of aggravating or mitigating factors specified in the CCA, companies may incur fines of up to twenty percent of the business's gross revenue "from the fiscal year prior to the initiation of administrative proceedings," or up to "three times the value of the benefit sought or achieved."[87] In the event that gross revenue cannot be calculated, the Decree provides that fines are to be calculated at a minimum value of either 0.1% of gross revenues or R$6,000 ($3,000 USD), up to a maximum value of R$60 million (roughly $30 million USD).[88] Article 7 of the CCA, in conjunction with articles 17 and 18 of the Decree, enumerates various factors that the prosecuting body will take into account when determining the severity of the fine.[89] The CCA's institution of these factors as a means for companies to receive mitigated penalties purports to "encourage companies to self-regulate and incentivize [them] to cooperate with authorities in their anti-corruption efforts."[90] Moreover, as discussed in greater detail below, companies that ultimately enter into a leniency agreement with the relevant authority may be able to receive an exemption or reduction of fines that would have otherwise been imposed.[91]

b. Legal Penalties

On top of the administrative penalties outlined above, companies that violate the CCA may also receive severe judicial sanctions from a federal, state, or municipal body.[92] Such legal punishments may include disgorgement of the benefits improperly obtained by the company, directly or indirectly, as a result of the illegal act;[93] suspension or partial interruption of the company's operations;[94] debarment from receiving any government funding or assistance for up to five years (i.e., exclusion from "incentives, subsidies, grants, donations, or loans from public bodies or . . .

85. Clean Company Act, arts. 6, 18.
86. *Id.* art. 6(I)-(II); Decreto No. 8.420, arts. 17-22, 24.
87. Clean Company Act, art. 6(I); Decreto No. 8.420, art. 20(II).
88. Decreto No. 8.420, arts. 19-20.
89. Clean Company Act, art. 7; *Id.* arts. 17-18.
90. Blakely et al., *supra* note 82.
91. *See* Debevoise & Plimpton, *supra* note 66, at 39.
92. *See* Carson et al., *supra* note 56.
93. Clean Company Act, art. 19(I) (providing for the "loss of assets, rights, or amounts that represent a benefit or profit directly or indirectly obtained from the violation, without prejudice to the rights of the injured or good-faith third party.").
94. *Id.* art. 19(II).

financial institutions [ ] controlled by the public authorities");[95] and worst of all, "compulsory dissolution" of the entity.[96] The drastic penalty of mandatory dissolution is generally reserved for "extreme cases"[97] in which the entity was regularly used to facilitate illegal acts, or where the entity was created for the purpose of hiding either the corrupt activity or the identity of its beneficiaries.[98]

In addition to its distinct punitive function, another key goal of the CCA is to serve as a preventative measure by integrating specific incentives which, ideally, will motivate companies to detect and deter corrupt acts before they occur.[99] To this end, the CCA incentivizes businesses to invest in comprehensive compliance and prevention programs by allowing courts to consider the content and effectiveness of a company's internal "integrity program" as a factor that can mitigate its punishment.[100] These factors are discussed in detail below, but the important takeaway is that legal penalties may be reduced where a company had in place a legitimate compliance program that measured up to CCA standards.

5. *Leniency Agreements and the Possibility of Mitigated Sanctions*

Article 16 of the CCA allows a company facing corruption charges to negotiate and enter into a leniency agreement with the appropriate enforcement authority as a means of mitigating its ultimate punishment.[101] An offending company's eligibility for reduced penalties under a leniency agreement, however, depends on its fulfillment of certain requirements. On December 21, 2015, the Brazilian government enacted Provisional Measure 703, which modified the CCA's pre-existing leniency agreement requirements and finalized the other rules governing such agreements.[102]

First, under MP 703, companies facing charges under the CCA are no longer required to be the first to state their interest in cooperating with the government's investigation in order to be eligible for a leniency agreement, nor are they required to admit that they knew of or participated in the violating activity alleged to have been committed.[103] In justifying the elimination of this prerequisite to leniency agreement eligibility, the new legislation logically points out that it is needless to require an

95. *Id.* art. 19(IV); Carson et al., *supra* note 56.
96. Clean Company Act, art. 19(II).
97. Carson et al., *supra* note 56.
98. Clean Company Act, art. 19(IV)(1).
99. *See* Felipe Rocha dos Santos, *New Anti-Corruption Regulation Reaffirms Brazil's Focus on Prevention*, FCPA BLOG (Apr. 8, 2015, 7:33AM), http://www.fcpablog.com/blog/2015/4/8/new-anti-corruption-regulation-reaffirms-brazils-focus-on-pr.html.
100. *See id.*
101. Clean Company Act, art. 16.
102. Provisional Measure No. 703, de 18 de Dezembro de 2015, Diario Oficial da Uniao [D.O.U] de 12.21.2015 (Braz.) [hereinafter "MP 703"].
103. *See* Flesch et al., *supra* note 67.

entity to admit guilt when the CCA already imposes strict liability.[104]

Second, MP 703 provides that a "leniency agreement can be performed with more than one legal entity in cases of collusion."[105] In such multi-party cases, only the first implicated company to self-report may obtain complete immunity from financial sanctions, whereas companies that subsequently self-disclose and later enter into a related leniency agreement will only be eligible for a reduction of up to two-thirds of applicable fines (which originally was the allowance for all companies).[106] Third, any entity that enters a leniency agreement may also receive a full exemption from any "debarment-like" legal penalties, such as bans or limitations on the right to bid and contract with the government.[107] Fourth, MP 703 opens the door for leniency agreements to be made even after an action under the CCA has already commenced.[108] The Measure also reaffirmed the requirement that, in order to receive leniency, a company must "undertake to implement or improve [its] internal mechanisms for integrity, auditing, [and] encouraging complaints," and must establish effective codes of ethics and conduct.[109]

Lastly, and perhaps most critically, MP 703 incorporated an important solution to a widely criticized inequity that existed under the CCA's original framework for leniency agreements and voluntary disclosures. Before MP 703, a company could unwittingly incur additional liability if its disclosed actions violated other areas of Brazilian law outside of the CCA.[110] That is, a company could hypothetically have settled a violation under the CCA, only to expose itself to ensuing legal actions brought under different laws or by other authorities.[111] This risk would have deterred companies from utilizing the CCA's leniency agreement provisions entirely. To address this concern, MP 703 created a new rule which provides that, where the Public Prosecutor's Office and the applicable administrative authority jointly enter a leniency agreement with a company facing CCA charges, other government agencies and officials are thereby prohibited from filing separate actions or continuing pending actions re-

104. Luis A.S. de Souza & Fabíola C. de Abreu, *Brazil: Anticorruption Leniency Agreements*, INT'L FIN. L. REV. (Mar. 21, 2016), http://www.iflr.com/Article/3539336/Home/Brazil-Anti-corruption-leniency-agreements.html (also noting that this amendment may serve to benefit the government's investigation, "to the extent that individuals can contribute information and depositions without having to admit any wrongdoing.").

105. Exposição de Motivos Interministerial [Explanatory Memorandum] (EMI) No. 00207/2015, Advocacia Geral da União (AGU) [Attorney General of the Union] & Corregedoria Geral da União (CGU) [Comptroller General of the Union], de 18 de Dezembro de 2015, Portal da Presidência da República [P.P.R.] de 12.21.2015 (Braz.).

106. MP 703, art. 16; Clean Company Act, art. 16. *See also* Flesch et al., *supra* note 67.

107. MP 703, art. 16; Clean Company Act, art. 16. *See also* Flesch et al., *supra* note 67.

108. MP 703, art. 20; Clean Company Act, art. 20. *See also* Flesch et al., *supra* note 67.

109. MP 703, art. 16(1)(IV).

110. *See* Arrieta, *supra* note 24, at 173.

111. *See* Carlos Ayres, *Factors to Consider Before Entering into leniency Agreements in Brazil*, FCPAMERICAS (July 2, 2014), http://fcpamericas.com/english/brazil/factors-entering-leniency-agreements-brazil/.

lated to the activities at issue.[112]

6. Compliance Program Requirements

As defined by the Decree, a company's compliance program, also known as an "integrity program," should cultivate "mechanisms and internal procedures on integrity, auditability, and incentivized reporting of irregularities, as well as effective application of codes of ethics and conduct, policies, and directives, aimed at detecting and correcting deviations, fraudulent acts, irregularities, and illicit acts [ ] against the [Brazilian] or a foreign government."[113] In addition, the Decree requires that companies' integrity programs be customized "in accordance with the current characteristics and risks [of] each legal person" and be "constantly improved and adapted in order to guarantee its effectiveness."[114] Pursuant to the 2015 regulations, Brazilian regulators are to consider the following factors when assessing whether an investigated entity's compliance program is effective enough to warrant mitigated sanctions: (1) commitment of senior management, "as evidenced by their visible and unequivocal support for the program"; (2) standards of conduct and codes of ethics for employees and third parties; (3) periodic compliance training; (4) "periodic analysis of risks to make any necessary adaptations"; (5) accurate accounting records of company transactions; (6) "specific procedures to prevent fraud and illicit acts within the context of . . . [government] contracts, or in any interaction with the public sector"; (7) independence and authority of the internal body charged with enforcing the program; (8) protections and channels for whistleblowers; (9) disciplinary measures for internal program violations; (10) procedures for immediately ceasing violations and "timely remediation of any damages caused"; and (11) transparency of the company's political donations.[115]

Under Ordinance No. 909, corporate entities must provide the CGU with a corporate profile report[116] and a report on internal compliance with their program policies.[117] In addition to laying out the structure of its integrity program, a company must demonstrate: (1) that its program incorporates the requirements mandated by Decree 8.420, (2) that it has been integrated into daily operations, substantiated by actual data and

112. *See* Flesch et al., *supra* note 67.
113. Decreto No. 8.420, art. 41.
114. *Id.*
115. *Id.* art. 42(I)-(XVI).
116. The entity's profile report must specify: (i) the industries and countries in which it does business; (ii) its organizational structure and internal decision making processes; (iii) its number of employees; (iv) the nature of its interactions with domestic and foreign administration (*e.g.*, number of government contracts and its percentage of revenue therefrom, use of third party intermediaries to deal with public sector); (v) its corporate structure; and (vi) whether it is a small size company. Carlos Ayres, *Brazil Issues New Regulations on the Clean Companies Act*, FCPAMERICAS (Apr. 21, 2015), http://fcpamericas.com/english/anti-corruption-compliance/brazil-issues-regulations-clean-companies-act/.
117. Portaria No. 909, de 7 de Abril de 2015, Diário Oficial da União [D.O.U.] de 4.8.2015 (Braz.).

statistics, and (3) the extent to which the program succeeded in preventing, detecting, or mitigating the violations under investigation.[118]

7. Enforcement Authority and Administrative and Judicial Procedures

A company's liability under the CCA is assessed through an Administrative Liability Proceeding (PAR), which must be concluded within 180 days after publication of the fact that proceedings have been initiated against the entity.[119] With respect to the particular government authority responsible for adjudicating CCA violations in a given case, the first contingency is whether the conduct at issue involves corrupt acts directed at foreign or domestic officials. In cases involving the alleged bribery of foreign, non-Brazilian officials, the federal CGU has exclusive authority to enforce the CCA.[120] For cases of domestic bribery, the power to prosecute CCA violations generally lies with the highest authority of the relevant government body against which the alleged acts were committed.[121] But, under certain circumstances, the CGU may also exercise concurrent jurisdiction over such cases.[122] As this article will discuss, it is this feature—the CCA's wide dispersion of authority among all levels of government—that has drawn perhaps the most concern and opposition.

VI. HOW THE CCA IS HOLDING UP TODAY: CURRENT STATUS OF COMPLIANCE AND ENFORCEMENT

One year after the CCA went into effect, Control Risks' global compliance experts published a data-backed report showing that Brazil's corruption landscape has been improving ever since the CCA was enacted, thus evidencing that a positive impact is already being effected by the new law.[123] According to the report, "[a] geographical breakdown shows that Brazil-based companies are [now] the most likely to investigate an employee" regarding bribe payments or other corrupt conduct, and as for why this is so – "[it] is no doubt a response to the tighter compliance environment in the wake of Brazil's Clean Company Act."[124] In expounding their anticipation that the CCA will effectively deter corruption and enhance compliance, "a great many leading corporate lawyers . . .

118. *CGU Approves New Regulations in Connection with the Anti-Corruption Law*, MATTOS FILHO (Apr. 13, 2014), http://www.mattosfilho.com.br/EscritorioMidia/memocomp130415en.pdf.
119. Decreto No. 8.420, arts. 2, 9.
120. *Id.* art. 14.
121. *Id.* art. 3.
122. *Id.* art. 13. *See also* Carson et al., *supra* note 56 (explaining that art. 13 of the Decree permits the CGU to exercise discretionary jurisdiction over claims of domestic bribery where the relevant public entity "lacks objective conditions to conduct the PAR proceeding, the issues involved are highly complex, the public contracts at issue involve a high amount, or the situation involves more than one agency or entity of the federal government.").
123. *See generally International Business Attitudes to Corruption Survey 2014 – 2015*, CONTROL RISKS GRP. (2015), https://www.controlrisks.com/~/media/Public%20Site/Files/Reports/corruptionsurvey2015.pdf.
124. *Id.* at 11.

expect that Brazilian companies will increasingly see that compliance is a good investment. It's a long-term process, but . . . one that Brazil has begun in good faith."[125] In fact, many legal professionals are already witnessing the fruition of this outcome. Because the CCA and its subsequent decrees culminated in "one of the most aggressive pieces of anti-corruption legislation among the world's major economies," as of mid-2016, "[l]awyers are already noting that compliance . . . is [ ] embedding itself into the culture of Brazilian companies."[126]

Although Brazil's compliance culture may already be improving as a result of the CCA's early presence, actual enforcement actions under the new law have not been quite as swift. Brazil's National Registry of Punished Companies (CNEP), a database that compiles information about companies punished under the CCA, reported that only seven companies had received CCA sanctions as of early 2017, four of which were related to the same enforcement action.[127] With that said, however, Brazilian officials have confirmed that "there are dozens of [CCA] proceedings in the pipeline that should be resolved during 2017."[128] Regarding these pending actions, one source reported that, as of January of 2017, the CGU had commenced liability proceedings under the CCA against twenty-nine firms and is presently negotiating at least twelve leniency agreements.[129] By way of example, in May of 2015, the German firm Bilfinger SE became the first company to seek a leniency agreement under the CCA when it voluntarily disclosed that it paid bribes in connection with the 2014 World Cup.[130] Additionally, several companies sought leniency deals in connection with the rigorous investigations of the state-run Petrobras (Petroleo Brasileiro SA) oil firm, which many have deemed "Brazil's largest-ever corruption scandal."[131] Although the massive Petrobras scandal has dominated the headlines, there are a number of other CCA-related investigations under way against some of Brazil's

125. Andy Spalding, *Andy Spalding on Brazil's Third Pillar: The Clean Companies Act*, FCPA BLOG (July 25, 2016, 7:28 AM), http://www.fcpablog.com/blog/2016/7/25/andy-spalding-on-brazils-third-pillar-the-clean-companies-ac.html [hereinafter Spalding, *Brazil's Third Pillar*].

126. George Croft, *Countdown to the Olympics: What's being done to combat the Brazilian corruption crisis?*, LEGAL CHEEK (June 17, 2016, 12:39 PM), http://www.legalcheek.com/lc-journal-posts/countdown-to-the-olympics-whats-being-done-to-combat-the-brazilian-corruption-crisis/.

127. *See* Carlos Ayres, *Anti-Bribery in Brazil: 2016 Year in Review (Part II)*, FCPAMERICAS (Mar. 3, 2017), http://fcpamericas.com/english/anti-corruption-compliance/anti-bribery-brazil-2016-year-review-part-ii/#.

128. *Id.*

129. Domingos Paiva, PhD, *The Historic Odebrecht Settlement*, ETHIC INTELLIGENCE (Jan. 2017), http://www.ethic-intelligence.com/experts/17671-historic-odebrecht-settlement/.

130. Caroline Stauffer, *Brazil Comptroller Says Germany's Bilfinger Seeking Leniency Deal*, REUTERS (May 7, 2015), http://www.reuters.com/article/brazil-corruption-bilfinger-idUSL1N0XY1XY20150507.

131. *Id.*; Roger M. Witten et al., *Global Anti-Bribery Year-in-Review: 2015 Developments and Predictions for 2016*, WILMERHALE (Feb. 2, 2016), http://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDfs/2016-02-02-FCPA-Year-in-Review.pdf.

most powerful corporations and politicians.[132]

Based on the history surrounding other countries' adoption of new anti-corruption regimes, this seemingly slow enforcement timeline should not be seen as a cause for concern. For the first twenty-three years after the U.S. government enacted the 1977 Foreign Corrupt Practices Act (FCPA), there were only nine total enforcement actions brought under the FCPA, but "since [2000], there have been 139."[133] Thus, "the lack of corporate enforcement of the [CCA] in the three years since the law's passage does not mean that enforcement isn't coming."[134] Having only been in force since 2014, "Brazilian law enforcement priorities are still developing" and "[c]hanges to the scope and implementation of the CCA are ongoing."[135] As one expert explained, "we should not be surprised to hear our friends in Brazilian enforcement report that it may take some time for this new paradigm to really take hold in Brazil. We should all be patient in the meantime."[136] This is all to say that, in the world of legislation, particularly in the anti-corruption arena, the CCA is still "a very new law,"[137] so it is simply too early to realistically measure its success or evaluate its enforcement.

VII. THE PROMISE OF BRAZIL'S UNPRECEDENTED ANTI-CORRUPTION MOVEMENT TRUMPS THE CONCERNS OF THE CCA'S CRITICS

A. THE CCA'S STATUTORY STRENGTHS AND OTHER REASONS FOR OPTIMISM

While Brazil's corporate environment of voluntary compliance and the public sector's resolve to enforce anti-corruption laws will indefinitely be vulnerable to a multitude of political and cultural factors, the government's continuous execution of legislation aimed at bolstering the CCA is "proof that Brazil is taking clear steps to implement strong anticorruption

132. The details surrounding Brazil's many ongoing corruption cases is beyond the scope of this article. For a more comprehensive list and summary of such cases, see Ryan E. Bonistalli & Alex J. Brackett, *Anti-Corruption Enforcement in Brazil is in High Gear*, MCGUIREWOODS – SUBJECT TO INQUIRY (Sept. 2, 2015), http://www.subjecttoinquiry.com/compliance/anti-corruption-enforcement-in-brazil-is-in-high-gear/; *Brazil Ramps Up Anti-Corruption Efforts*, SIDLEY AUSTIN LLP, ANTI-CORRUPTION Q. 1Q/2015, at 6-7 (Apr. 2015), http://www.sidley.com/~/media/update-pdfs/2015/05/anticorruption-quarterly-1st-quarter-2015.pdf.

133. Laura Tulchin, *Crisis in Brazil: where does corporate compliance go from here?*, COMPLIANCE WEEK (Aug. 16, 2016), https://www.complianceweek.com/blogs/global-glimpses/crisis-in-brazil-where-does-corporate-compliance-go-from-here#.WNHcvRIrKF0.

134. *Id.*

135. Jason Jones et al., *Uptick In Coordinated US-Brazil Anti-Corruption Enforcement*, LAW360 (Mar. 10, 2017, 12:14 PM), https://www.law360.com/articles/894350/uptick-in-coordinated-us-brazil-anti-corruption-enforcement.

136. Spalding, *Brazil's Third Pillar*, *supra* note 125.

137. Amy Greenstein, *2017 Q1 SME Update: Global Anti-bribery, Anti-corruption – Latin America Increases Regulation*, POLARIS MGMT. (Mar. 14, 2017), http://www.polarismanagement.com/2017-q1-sme-update-global-anti-bribery-anti-corruption-latin-america-increases-regulation/.

laws."[138] And there are additional reasons to be optimistic about the imminent impact of the CCA, some of which even predate its enactment.

1. *Brazil's Increasing Effort and Demonstrated Intent to Punish Corruption*

Before the CCA arrived on Brazil's anti-corruption scene, it appeared that the Brazilian government had already begun to amp up its efforts to eradicate corruption. From 2008 to 2012, the number of individuals convicted for corruption-related crime increased by 133%.[139] And in 2012, Brazil's Supreme Court sent a powerful message when, in the high-profile "Mensalao" case, it sentenced José Dirceu, former chief of staff to President Luiz Inácio Lula da Silva and thus "the second most powerful man in Brazil,"[140] to over ten years in prison for corruption in a vote buying scandal.[141] In 2013, the year leading up to the CCA, Brazil's "federal police conducted 296 special operations to combat corruption, money laundering, and related crimes," which resulted in the arrest of 1,785 individuals, including ninety-six public employees.[142] In total, "[a]s of the end of February 2016, 84 notable politicians, business executives, and associates had been convicted in federal courts of embezzlement of public funds, conspiracy, and money laundering, and had served or were serving hard time."[143] These likely unexpected convictions symbolized a warning that Brazil courts would no longer allow the nation's corporate and political leaders to believe that they are above the law. Not only has Brazil's highest court proved that the judiciary can and will act independently,[144] but it has also demonstrated the government's increasing resolve to lock up even the most powerful Brazilian figures. If Brazil's recent history suggests anything, it is that "the passivity that was once expected of law enforcement officials in the face of revelations of wrongdoing is a thing of the past."[145]

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138. Andrew M. Levine et al., *Brazil Issues Long-Awaited Decree Implementing the Clean Company Act*, DEBEVOISE & PLIMPTON LLP (Mar. 23, 2015), http://www.debevoise.com/~/media/files/insights/publications/2015/03/client_updatebrazil_issues_longawaited_decree_implementing_the_clean_company_act.pdf.

139. Esther M. Flesch et al., *Brazil's Clean Company Act: How U.S., U.K., and Global Models May Influence Enforcement* 8, BAKER & MCKENZIE LLP (July 2014), http://insights.ethisphere.com/wp-content/uploads/CLIENT-ALERT-Brazil-Anti-Bribery-Comparative-July-2014.pdf.

140. *Jailed at Last*, ECONOMIST (Nov. 23, 2013), http://www.economist.com/news/americas/21590560-landmark-justice-jailed-last.

141. *Brazil Mensalao Trial: Former Chief of Staff Jailed*, BBC NEWS (Nov. 16, 2013), http://www.bbc.com/news/world-latin-america-24967116 (reporting that the Court found Dirceu devised a scheme to use public funds to buy support from opposition parties in Congress.).

142. Flesch et al., *supra* note 139.

143. Sotero, *supra* note 41.

144. *Brazil's World Cup Corruption Challenge*, TRANSPARENCY INT'L (June 11, 2014), http://www.transparency.org/news/feature/brazils_world_cup_corruption_challenge [hereinafter Transparency Int'l, *Brazil's World Cup Corruption Challenge*].

145. Sotero, *supra* note 41.

Before Brazil's legislative and judicial branches started cultivating a stricter stance on corruption, studies conducted by Transparency International found that, historically, Brazil's biggest problem was a lack of punishment by the courts.[146] That is, Brazilian officials "caught corruption in the past and there were massive scandals, but [courts] rarely managed to punish anybody. This new law changes the dynamic."[147] While the country's fight against corruption faces a long and difficult road, "2015 sent a strong warning to the corrupt," as Brazilians finally saw the people who looked "untouchable" for so many years being investigated for corruption.[148] Many who have weighed in on the CCA are optimistic that the undeniably severe penalties imposed by the new law will act as "a wake-up call for the management and shareholders of Brazilian companies and will help ensure that businesses do not bribe their way to contracts."[149] In fact, corrupt businesses are already being hunted down at a rate that almost certainly could not have been expected at such a young stage of the CCA's existence.[150] In hopefully describing the foreseeable impact of this national shift toward stricter policing of Brazil's politicians and business leaders, one commentator explained how exactly these changes could facilitate an improved compliance culture: "You now have senior politicians . . . who got into the game of extracting personal wealth—and they're being flushed out. That will have a sobering effect on those who are tasked with taking their places. The next generation [will] say, 'We don't want to go down that road.'"[151]

Perhaps equally important is the fact that Brazilian law firms are also beginning to make concerted efforts to facilitate and contribute to the positive changes in Brazil's legal environment with respect to corruption. Firms are rapidly expanding their compliance practice groups for three important and promising reasons: (1) to "ensur[e] corporate clients strictly follow Brazilian [CCA] legislation," (2) because they "believe the number of judicial and administrative cases is going to increase" due to the CCA's unprecedented vigor, and (3) because they "want to be part of this movement" – a factor that is essential to the CCA's success.[152]

Ever since the CCA's passage, Brazil's headlines have been dominated by what seems like a never-ending deluge of large-scale corruption scan-

146. *See* Stefan Dubowski, *Brazil's Corruption Crackdown*, CANADIAN LAWYER (Feb. 29, 2016), http://www.canadianlawyermag.com/5949/Brazil-s-corruption-crackdown.html.
147. *Id.*
148. Alejandro Salas, *The Americas: How 2015 Was a Warning to the Corrupt*, TRANSPARENCY INT'L (Jan. 27, 2016), http://blog.transparency.org/2016/01/27/the-americas-how-2015-was-a-warning-to-the-corrupt/.
149. Leo Torresan, *Finally, Companies in Brazil Can Be Prosecuted for Corruption*, TRANSPARENCY INT'L (July 8, 2013), http://blog.transparency.org/2013/07/08/finally-companies-in-brazil-can-be-prosecuted-for-corruption/.
150. Caroline Stauffer, *Brazil Graft Crackdown Spurs Work for Lawyers, Corporate Change*, REUTERS (Mar. 24, 2016, 11:51AM), http://www.reuters.com/article/us-brazil-corruption-compliance-insight-idUSKCN0WQ1G1.
151. Dubowski, *supra* note 146.
152. Stauffer, *supra* note 150.

dals. That Brazil's corruption probes have garnered such massive and frequent attention can point to two contrasting conclusions about the CCA's initial efficacy. On the one hand, some say, "in cleaning up [Brazil's] much-maligned public image as a corruption-littered country, the CCA's positive effects have been [ ] overshadowed by . . . daily news reports of widespread corruption."[153] The more optimistic view, however, perceives a more convincing inference: the fact that Brazil's escalation in corruption investigations is garnering so much attention does not imply that the rate of corruption has risen since the CCA, but instead, that it is being better regulated.[154] This school of thought takes the position that "more news coverage is evidence of better policing and improving transparency."[155] As one proponent of this view explained, the media, which "seemingly thrives on a sky-is-falling narrative,"[156] are "failing to grasp the true meaning of this Brazilian moment. Even the most sophisticated news sources paint a picture of unmitigated chaos, crisis, and collapse. . . . But that narrative [ ] misses the bigger point."[157] The real questions should be "why are we talking about this now? . . . Why all the investigations . . . What changed?"[158] As for why "the maelstrom of Brazilian corruption erupted today, and not a few years ago" and why the world seems to be hearing much more about high-profile corruption investigations, it is because "those once subject to little more than resentment are now held accountable under the law. . . . Brazil is not what it once was. Impunity is no longer the order of the day; neither the rich nor the powerful are above the law."[159]

To couch all of these promising signs into a broader context, "Brazil is changing. Culturally, legally, and institutionally, the country is no longer tolerating corruption. The so-called jeitinho Brasileiro has lost its charm."[160] Indeed, the recent surge in corruption scandals at the highest levels of government and business "should be seen not as a crisis, but as a triumph for the rule of law."[161] With the help of both the CCA and Brazilian's recent revolt against the corrupt, Brazil is "[a]rmed with new legal tools, [and] enforcement officials have ushered in a new era in Brazilian

153. George M. Melo, *Brazil's Clean Companies Act: One Year Later, is it Finally Getting Teeth?*, WILSON ELSER LLP (Apr. 8, 2015), http://www.wilsonelser.com/news_and_insights/client_alerts/2248-brazils_clean_companies_act_one_year_later_is_it.
154. *See* Dubowski, *supra* note 146.
155. *Id.*
156. Spalding, *Brazil's Third Pillar*, *supra* note 125.
157. ANDY SPALDING, OLYMPIC ANTI-CORRUPTION REPORT: BRAZIL AND THE RIO 2016 SUMMER GAMES Preface, 1 (2016) (ebook), http://law.richmond.edu/olympics/chapters/brazil-preface.pdf [hereinafter SPALDING, BRAZIL AND THE RIO 2016 SUMMER GAMES].
158. Andy Spalding, *Brazil's Untold Success Story*, FCPA BLOG (May 5, 2016, 7:18 AM), http://www.fcpablog.com/blog/2016/5/5/andy-spalding-brazils-untold-success-story.html.
159. SPALDING, BRAZIL AND THE RIO 2016 SUMMER GAMES, *supra* note 157.
160. Andy Spalding, *Dilma's Removal and the New Rule of Law in Brazil*, FCPA BLOG (May 12, 2016, 9:08 AM), http://www.fcpablog.com/blog/2016/5/12/andy-spalding-dilmas-removal-and-the-new-rule-of-law-in-braz.html.
161. *Id.*

government, founded on a new set of cultural assumptions."[162] If this momentum is able to sustain itself, Brazil is poised to rid itself of the jeitinho Brasilerio ethos.

2. *Pre-CCA Legislation Aimed at Improving Transparency and Preventing Corruption*

Another factor that bodes well for the CCA's prospective impact is that, in the years leading up to the CCA, Brazil had already been accumulating targeted legislation aimed at changing Brazil's compliance culture, disenabling corruption, and increasing transparency in the public sector.[163] In 2009, the Brazil Legislature passed a Transparency Law that strengthened the rules under its 2000 Fiscal Responsibility Law.[164] Specifically, the law obligates public entities at every level, from the executive branch down to municipal governments, "to publish detailed budget data online in real time," and imposes penalties for state entities that fail to do so.[165] The Transparency Law also enhanced the controls on public spending and debt levels, increased managerial accountability, and improved the transparency of public accounts.[166]

One year later, at the behest of a petition signed by nearly three million Brazilians insisting that its leaders do something about the nation's rampant electoral corruption,[167] Brazil enacted the 2010 Clean Record Law.[168] The law "bars candidates from running for public office for eight years if they have been convicted of a serious crime, are facing pending criminal charges, lost their political positions due to corruption, or resigned to avoid impeachment."[169]

Implemented in 2011, Brazil's Access to Information Law expanded citizens' right and ability to demand and obtain information about public spending.[170] Under this law, all federal, state, and municipal bodies must "publish information regarding public finance, including documents on

162. Andy Spalding, *Corruption is Not Cultural: The Jeitinho Brasileiro in Decline*, FCPA BLOG (May 11, 2016, 7:28 AM), http://www.fcpablog.com/blog/2016/5/11/corruption-is-not-cultural-the-jeitinho-brasileiro-in-declin.html.

163. *See* Transparency Int'l, *Brazil's World Cup Corruption Challenge*, *supra* note 144.

164. Lei Complementar No. 131, de 27 de Maio de 2009, Diario Oficial da Uniao [D.O.U] de 5.28.2009 (Braz.).

165. Gisele Craveiro, *The Internet and Corruption 2012: Transparency and Accountability Online – Brazil: Where Does the Money Go? The Challenge of Transparency in State Spending*, GLOBAL INFO. SOC'Y WATCH (GISWATCH) (2012), https://www.giswatch.org/en/country-report/transparency-and-accountability-online/brazil#sdfootnote5sym.

166. *See* Transparency Int'l, *Brazil's World Cup Corruption Challenge*, *supra* note 144.

167. Rachel Glickhouse & Luisa Leme, *Explainer: Brazil's Clean Record Law*, AMS. SOC'Y / COUNCIL OF THE AMS. (Aug. 26, 2014), http://www.as-coa.org/articles/explainer-brazils-clean-record-law.

168. Lei Complementar No. 135, de 4 de Junho de 2010, Diario Oficial da Uniao [D.O.U] de 6.7.2010 (Braz.).

169. Glickhouse & Leme, *supra* note 167.

170. Lei No. 12.527, de 18 de Novembro de 2011, Diario Oficial da Uniao [D.O.U] de 11.18.2011 (Braz.).

government spending and administration."[171] Specifically, the law affords citizens the right "to request information from all levels of government, the legislature, and the judiciary."[172] As part of this legislation, Brazil created a "Transparency Portal," and the public's utilization thereof has already proven to be instrumental.[173] As illustrated by the largescale protests in 2013, the portal has aided citizens' efforts to hold its leaders accountable by monitoring how public funds are being spent and publicly denouncing corrupt transactions.

All of this is to say that, despite the historic perception to the contrary, Brazil's political will to defeat corruption has been gaining momentum in recent years. Against the backdrop of these various anti-corruption measures being put in place, the CCA should be well-supported and well-positioned to deliver a legitimate blow to Brazil's toxic corruption culture.

3. *Strict Liability*

The CCA's strict liability regime would not have been possible under a criminal law framework, as penal laws require proof of intent, a mental state that cannot be attributed to a legal entity.[174] Because Brazil's previous anti-corruption laws had existed exclusively within its criminal code, the government could only target and prosecute individuals for corrupt acts, which unfortunately "saved companies from the kind of punishment that could threaten their operations."[175] Indeed, Brazil's prior anti-corruption framework created "a dangerous regulatory gap" in the form of a loophole that protected entities from punishment for corrupt practices. But under the CCA's new regulatory system, companies in Brazil will no longer be able to hide under this shield, as the government, for the first time, will be able to hold companies legally accountable for the corrupt acts from which they benefit. Additionally, because the CCA's strict liability scheme means "a company is still liable even if it can prove that it took steps to prevent corruption," businesses will likely be far less tolerant of fraudulent conduct than ever before, knowing that the "entire organization could be held responsible for the underhanded activities of even a few bad apples."[176] A less obvious advantage of the CCA's imposition of strict liability is that, procedurally, it is uniquely suited to over-

171. Rachel Glickhouse, *Brazil's Senate Passes Landmark Transparency Laws*, AMS. SOC'Y / COUNCIL OF THE AMS. (Oct. 28, 2011), http://www.as-coa.org/articles/brazils-senate-passes-landmark-transparency-laws.

172. Transparency Int'l, *Brazil's World Cup Corruption Challenge*, *supra* note 144.

173. *The U.N. Convention Against Corruption: A Strategy for Safeguarding against Corruption in Major Public Events*, U.N. OFF. ON DRUGS & CRIME (UNODC) (Sept. 2013), https://www.unodc.org/documents/corruption/Publications/2013/13-84527_Ebook.pdf.

174. Org. for Econ Co-operation & Dev. [OECD], OECD Working Grp. on Bribery in Int'l Bus. Transactions, *Phase 3 Report on Implementing the OECD Convention on Bribery in Brazil*, at 17 (2014), http://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf.

175. Torresan, *supra* note 149.

176. Dubowski, *supra* note 146.

come the historic inefficiency of Brazil's judicial system.[177] The CCA's administrative enforcement process may too serve as an additional deterrent of corrupt practices, as it allows for companies to face charges significantly quicker than they would in the more drawn out course of Brazil's civil procedures.[178]

4. Decentralized Enforcement

The wide allocation of power under the CCA's system of decentralized enforcement has received both praise and criticism. Advocates of the CCA's multi-level enforcement structure, which has been characterized as one of "institutional multiplicity," argue that "the overlap of anti-corruption functions among various governmental entities . . . strengthen[s] outcomes by allowing institutions to compete, to collaborate, to complement one another, or to compensate for one another's deficiencies or oversights."[179] According to this line of reasoning, where a country's "judicial institutions face severe problems of rigidity and overall inefficiency" (as history has shown to be true of Brazil), it is more effective to apply a broad and flexible institutional approach that "reli[es] on administrative processes and sanctions as an alternative way to investigate and punish corporations [without] relying uniquely on the Judiciary."[180] In this respect, having various levels of government investigate and enforce the CCA may well be the most promising approach "to overcome [Brazil's] longstanding barriers to an effective accountability system."[181] Brazil's Executive Branch emphasized this very notion in its original proposal of the CCA bill to Congress, offering the following rationale for the law's decentralized enforcement structure: "The administrative process [was chosen] because it has revealed to be speedy and effective in deterring mismanagement in administrative contracts and procurement procedures, proving to be more able to provide fast responses to society."[182]

B. THE CCA'S PERCEIVED WEAKNESSES

1. Lack of Centralized Enforcement and Questionable Reliance on Municipal Governments

Many commentators have criticized the CCA for being implemented without an adequately integrated framework for uniform national enforcement. Such critics contend that "what exists now is a fragmented enforcement regime consisting of autonomous entities that compete both

177. *See* Arrieta, *supra* note 24, at 172.
178. *See id.*
179. Carson et al., *supra* note 56, at 6.
180. *Id.* at 7.
181. *Id.* at 8.
182. Mensagem No. 52 Executive a Congresso Nacional (Message 52 from Executive to National Congress), de 8 de fevereiro de 2010, EMI No. 00011/2009 – CGU/MJ/AGU (Braz.).

within and between the federal, state, and municipal levels."[183] With that in mind, some have expressed concerns about the CCA's allocation of essentially equal enforcement power to both the CGU/federal officers and to municipalities/local low-level officials.[184]

Critics argue that because the CCA does not assign a specific government agency exclusive authority to enforce the new law, such decentralized enforcement "is likely to lead to inconsistent rulings and standards."[185] As a report published by the World Bank explained, "[d]ue to the Brazilian federation model, there are 5,589 [public] entities empowered to enforce sanctions against corrupt acts . . . the abundant number of colegitimates empowered to apply the [CCA] and its penalties could lead to inconveniently conflicting decisions."[186] Having a system that tasks such a diverse and voluminous range of public bodies to enforce the CCA inherently runs the risk of facilitating inconsistent interpretations of the new law.

Second, given the unfortunate reality that Brazil's "many municipalities [ ] have a deficient or incipient administrative structure, a lack of resources, or an insufficiently trained staff,"[187] some are both concerned and skeptical as to whether local officials will truly be capable of effectively enforcing a law as complex as the CCA.[188] Aside from municipalities' practical (in)ability to enforce the CCA, the greater concern is whether local officials will have the willpower to even attempt to do so. Bearing in mind the historically corrupt proclivities of Brazilian leaders at every level of government, the question becomes "whether such multilevel enforcement will actually create more possibilities for illegal conduct in light of competing [ ] interests and Brazil's culture."[189] In other words, knowing what we do about Brazil's culturally intimate relationship with treating corruption as the status quo, is it not fair to question whether "[m]unicipal governments [will] use their investigative authority as leverage to extort companies by threatening to bring actions under the CCA"?[190] Putting all of this together, the central question underlying this critique is whether or not the CCA's decentralized enforcement

183. Andy Spalding et al., *Rio 2016 and the Birth of Brazilian Transparency*, in GLOBAL CORRUPTION REPORT: SPORT 212 (Transparency Int'l ed., 2015).

184. *See* Arrieta, *supra* note 24, at 174; Christiana Sciaudone, *Siemens Sees Abuse Risk in Brazil Anti-Graft Law*, GULF TIMES (Jan. 9, 2014, 10:32 PM), http://www.gulf-times.com/story/377293/Siemens-sees-abuse-risk-in-Brazil-anti-graft-law/.

185. Carlson & Wright, *supra* note 43.

186. William Coelho & Leticia Barbabela, *The New Brazilian Anticorruption Law: Federation Challenges and Institutional Roles*, *in* 6 THE WORLD BANK LEGAL REVIEW: IMPROVING DELIVERY IN DEVELOPMENT 365, 380 (Jan Wouters et al. eds., World Bank Grp. 2015).

187. *Id.* at 388.

188. *See* Arrieta, *supra* note 24, at 174; Sciaudone, *supra* note 184.

189. Ryan E. Bonistalli, *Brazil's Clean Companies Act Comes into Effect*, MCGUIREWOODS – SUBJECT TO INQUIRY (Feb. 6, 2014), http://www.subjecttoinquiry.com/compliance/brazils-clean-companies-act-comes-into-effect/.

190. Arrieta, *supra* note 24, at 174.

structure will ultimately enable the very corruption it was designed to extinguish.

2. *The Potential Pitfalls of Leniency Agreements*

Another criticism of the CCA involves the potentially negative consequences that may be borne by its encouragement of companies to negotiate and enter into leniency agreements. Much of the controversy and resistance surrounding leniency agreements has come from Brazilian prosecutors.[191] First, they argue that "such agreements may hinder ongoing criminal investigations by allowing corporations to resolve allegations without providing any new evidence."[192] Second, prosecutors reasonably conceive this facilitation of reduced punishment as "yet another loophole for well-connected parties to avoid meaningful penalties."[193] The hope, however, is that Decree No. 8,420 will succeed in its aim to clarify these concerns surrounding enforcement, but only time will tell if this measure was sufficient to cure the CCA's purported enforcement defects.

VIII. MOVING FORWARD: PROPOSED FOCUS AREAS FOR FUTURE CCA DEVELOPMENTS

A cultural obstacle that continues to impede Brazil's efforts to diminish corruption and improve its compliance culture is the reality that the nation's elites have proliferated a social dynamic wherein "whistleblowers are considered traitors and are victims of threats and persecution."[194] As it stands today, one who reports corruption often does so with the understanding that he or she will potentially face retaliatory repercussions. But this type of courage should not be a prerequisite for uncovering and reporting graft. The significant practical effects of such intimidation should not be overlooked from the legislative or judicial perspective, as evidence proffered by "people that speak-up about corruption in Brazil . . . is essential for uncovering corruption in all sectors and levels of society. That is why it is so important to guarantee their protection."[195] Otherwise, fewer people will be willing to come forward to expose corruption that may have otherwise been investigated and weeded out. It is doubtful that the CGU's mere insistence that companies implement internal whistleblower protections will be enough. Protective legislation for whistleblowers may prove to be a necessity.

A majority of the corrupt practices that take place in Brazil are driven by manipulation and pressure at the hands of local officials. As such, to address the historically valid uncertainty regarding both the sheer capa-

191. *See* Witten et al., *supra* note 131.
192. *Id.*
193. *Id.*
194. Luciana Torchiaro, *Brazil Needs Effective Protection for Witnesses and Victims of Corruption*, TRANSPARENCY INT'L (Nov. 12, 2015), http://blog.transparency.org/2015/11/12/brazil-needs-effective-protection-for-witnesses-and-victims-of-corruption/.
195. *Id.*

bility and ethical willpower of municipal officials to enforce the CCA, the Brazil government should grant the federal CGU new powers and resources to oversee local CCA proceedings, regulate the propriety of local-level enforcement, and ensure proper implementation. Additionally, although it may require new legislation outside the scope of the CCA's coverage, Brazil should consider efforts to curb the role of private entities in the country's campaign finance system. Limiting business contributions to political campaigns, requiring candidates to provide complete disclosure of donations, and instituting a lower ceiling on campaign spending at every level may limit the opportunities for politicians and wealthy business leaders to engage in the type of corruption that has long been facilitated by Brazil's electoral process.

IX. CCA PRACTICE GUIDE FOR COMPANIES OPERATING IN BRAZIL

Companies that conduct business in Brazil would be wise to take a hard look at how they monitor and prevent their employees, third-party agents, subsidiaries, and any other related affiliates from engaging in corrupt practices. Meaningful self-reflection, however, is just the beginning of what is necessary to avoid the risk of corporate catastrophe at the hands of the CCA. Indeed, because the CCA differs from the FCPA and other anti-corruption laws around the world, it is vital that international companies doing business in Brazil actively adjust their internal compliance systems to reflect and accommodate the CCA's new demands.[196] Specifically, to protect against any oversights that could lead to liability under the CCA, businesses should: (1) train all employees, especially those who interact with public officials, on the types of payments and conduct prohibited by the CCA, (2) perform an in-depth self-risk assessment, and (3) update their existing corruption-related policies to align with the CCA.[197] Because the CCA holds companies jointly and severally liable for the conduct of its agents, firms should also extensively vet and regulate any third parties who deal with public officials on their behalf (*e.g.*, distributors, local contractors, etc.).[198] Lastly, the CCA's strict liability framework should inspire companies to begin fostering a strict, zero-tolerance compliance policy.

Companies in Brazil must realize that effective prevention will not only improve the country's welfare, but will also yield a direct pay-off for their business. The CCA was intentionally designed so that firms would benefit from choosing the carrot instead of the stick; it "leave[s] room for leniency if a company maintains good controls and cooperates in an

196. *See generally* Carlson & Wright, *supra* note 43.
197. *See* Jonathan R. Barr et al., *The FCPA on Steroids: Brazil Ups the Ante in Fighting Corporate Corruption*, BAKER & HOSTETLER LLP (Aug. 12, 2013), http://www.bakerlaw.com/alerts/The-FCPA-on-Steroids-Brazil-Ups-the-Ante-in-Fighting-Corporate-Corruption-8-12-2013.
198. *See* Berg et al., *supra* note 12.

investigation . . . [companies] can protect themselves by performing regular risk assessments regarding their [local] operations, and solidifying a compliance program to mitigate identified risks."[199] From a broader perspective, companies' executives, managers, and third-party agents simply must overhaul the ways in which they get things done, especially when certain aspects of their operation require interaction with a public office. Aside from the now-statutory obligation to intensify their compliance programs, companies must earnestly confront corrupt officials by pushing back against improper solicitations. As a partner at a prominent Brazilian law firm has suggested, "companies will have to adopt a tougher posture with government officials - not only refusing to pay bribes but reporting corrupt officials and taking legal action against them."[200]

X. CONCLUSION

There is no doubt that Brazil and its Latin American neighbors are in the midst of an historic "anti-corruption moment."[201] The region is finally "see[ing] bribery and corruption [ ] transition from being 'business as usual' to being very risky business," and Brazil is "among the countries that are taking the lead to develop new and enhanced [ ] anti-corruption enforcement regimes."[202] And the persistent anti-corruption activism going on in Brazil is spreading rapidly, as protestors are "taking to the streets in Argentina, Mexico, Guatemala, and Honduras to challenge the status quo and demand accountability from their political leaders."[203] Following the lead of Mexico and Colombia, Brazil's enactment of the CCA makes it the third Latin American country to have passed comprehensive anti-corruption laws in recent years.[204]

As for who and what will be most critical to Brazil's success in employing the CCA, the reality is that companies themselves bear a tremendous and unavoidable responsibility. Although it is too early to tell whether they will remain faithful to the anti-corruption movement or whether their dedication will only come if and when they are caught, corporate players are at least pledging to do their part. For example, Odebrecht SA, a company implicated in the Petrobras scandal, has vowed to overhaul its transparency and anti-corruption mechanisms, and its executives have publically acknowledged their responsibility to "collaborate with prosecutors to help 'build a better Brazil.'"[205] If the CCA is to bring about meaningful change, this sentiment must find its way into the corporate mentality of all companies operating in Brazil.

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199. Deloitte Forensic, *Brazil's Clean Companies Act: Friend or Foe for Multinationals?*, DELOITTE (2014), http://news.acc.com/accwm/downloads/8426913%20AFA%20Brazil%20Anti-corruption%20POV_Deloitte%20Forensic_FINAL.pdf.
200. Stauffer, *supra* note 150.
201. Berg et al., *supra* note 12.
202. Greenstein, *supra* note 137.
203. Berg et al., *supra* note 12.
204. *See* Blakely et al., *supra* note 82.
205. Stauffer, *supra* note 150.

As commendable and promising as the CCA may seem, it is only the starting point for Brazil's newfound rejuvenation in the fight against corruption. It is one thing for laws to be in place, but it is quite another for them to be respected. Without question, "[t]his moment in Brazilian history is a beautiful and astonishing success story for anti-corruption reforms, the rule of law, and even democracy itself."[206] But for Brazil to effectively sever the grip of corruption, it will require more than political will and legislative measures. Instituting the CCA was undoubtedly a necessary and promising first step, but Brazil's mission to tackle its historically debilitating tolerance for corruption will require a unified effort from not only every level of government, but also from every level of society. Perhaps most vital is the onus that Brazilian people and business leaders must take upon themselves to break free from the country's unwritten social law of "jeitinho brasileiro," and to reverse the longstanding culture of corruption to which they have grown so accustomed.[207] The CCA, if truly honored and enforced, has the potential to repair Brazil's global image and put an end to the corruption by which it has long been plagued. Make no mistake, Brazil's passage of such a punitive and extensive anti-corruption law was an improbable achievement, and this unprecedented opportunity is one that the people of Brazil simply cannot afford to waste.

206. SPALDING, BRAZIL AND THE RIO 2016 SUMMER GAMES, *supra* note 157, at 2.

207. Mark Vasconcellos, *Lei Anticorrupção Pode Frear Rerceirização no Brasil [Anticorruption Law Can Curb Outsourcing in Brazil]*, CONSULTOR JURÍDICO [LEGAL ADVISER] (Feb. 7, 2014, 3:35 PM), http://www.conjur.com.br/2014-fev-07/lei-anticorrupcao-frear-terceirizacao-areas-lidam-governo (noting the challenge of changing Brazil's "jeitinho" culture).

Updates