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BRAZIL'S LANDMARK ANTI-CORRUPTION LAW

*Michelle Richard**

LATIN America has constantly battled with corruption, especially corruption in transactions with public officials. But, within the last two decades, Brazil has taken a firm stance against corruption by passing new laws aimed at combating corruption in business transactions.¹ Brazil just passed a monumental anti-corruption law, the Brazilian Clean Companies Act (BCCA), enacted on August 1, 2013, which now makes companies and individuals liable for bribing public officials.² The law is the first of its kind in Latin America and has been likened to the U.S. Foreign Corrupt Practices Act and the U.K. Bribery Act, although it actually imposes more severe penalties than either its U.S. or U.K. counterparts.³ The law represents a new anti-corruption precedent in Latin America that will expectantly change perceptions concerning corruption in business transactions in Brazil and should severely curtail corruption if effectively enforced.⁴

I. HISTORY OF CORRUPTION IN BRAZIL

Brazil has a fast-growing economic market with many incentives for multinational companies; yet, the perception of corruption within the Brazilian market has posed a significant obstacle for Brazil's continued growth.⁵ On a scale measuring the degree of corruption perceived in the public sector, Brazil scored 3.7, with zero being very corrupt and ten be-

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1. Juan Carlos Varela, Geida D. Sanlate & Daniela Sedes, *Brazil's New Anti-Corruption Law: What Every Multinational Employer Should Know*, LITTLER (Aug. 22, 2013), <http://www.littler.com/publication-press/publication/brazils-new-anti-corruption-law-what-every-multinational-employer-shou>.

2. *Id.*

3. Jaclyn Jaeger, *Brazil Passes Landmark Anti-Bribery Law*, COMPLIANCE WEEK (July 9, 2013), <http://www.complianceweek.com/brazil-passes-landmark-anti-bribery-law/article/302203/>.

4. 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>.

5. KELLIE T. CURRIE, GABRIEL AVES DA COSTA & CARLO DE LIMA VERONA, CROWELL MORING, *ANTI-CORRUPTION COMPLIANCE IN BRAZIL: TOP TEN CONSIDERATIONS* (2011), available at <http://www.crowell.com/files/2011-anti-corruption-compliance-in-brazil-top-ten-considerations.pdf>.

ing very clean.⁶ Moreover, while Brazil's anti-corruption laws may be exemplary compared with many developing countries, great concern exists over Brazil's enforcement of these laws.⁷

Brazil's most recent corruption case exemplifies Brazil's continuing struggle to enforce anti-corruption measures and portray Brazil as dedicated to fighting corruption so as to attract investors. Brazil's largest and most highly publicized corruption trial has recently been reopened; the *Mensalao* case deals with public funds that were paid to parties for political support, essentially members of coalition parties received monthly payments in consideration for their support of the minority government under the former President Luiz Inacio Lula da Silva.⁸ Twenty-five people out of thirty-seven people charged received convictions, including some key political figures.⁹ Most notably, Jose Dirceu, considered a likely Presidential candidate to replace former President Lula, received almost eleven years incarceration on counts of conspiracy and bribery.¹⁰ The convictions of powerful political figures brought hope to many Brazilians, but this hope was short lived when the Supreme Court agreed to reopen the cases of twelve of the convicted defendants.¹¹ Now Brazil must wait and see whether the convictions are upheld; if the court overturns these convictions it will reflect very negatively on Brazil's new anti-corruption position and considerably hamper their efforts to reduce perceptions of corruption.

Another corruption scandal involved Munich-based Siemens' alleged participation in a cartel that fixed prices during the bidding for the subway line in Sao Paulo and Brasilia.¹² In 2008, a member of parliament and a former Siemens employee reported that Siemens had fixed prices with multiple global companies and employed the use of bribes to raise the price of the contracts.¹³ Siemens actually self-reported their involvement in the alleged cartel to Brazilian officials in exchange for leniency and protection from any criminal proceedings that may ensue if authorities prove the cartel did in fact exist.¹⁴ The illegal price-fixing between at least five international conglomerates increased bids anywhere from ten

6. *Id.* Transparency International, a non-profit organization, conducted research into 178 countries, with Brazil ranking sixty-ninth.

7. *Snapshot of the Brazil Country Profile*, GLOBAL ADVICE NETWORK (Sept. 2013), <http://www.business-anti-corruption.com/country-profiles/the-americas/brazil/snapshot.aspx>.

8. *Brazil 'Mensalao' Corruption Trial to Be Reopened*, BBC (Sept. 18, 2013), www.bbc.co.uk/news/world-latin-america-24154273 [hereinafter *Mensalao Reopened*]; Joao Fellet & Alessandra Correa, *Will Brazil's 'Mensalao' Corruption Trial Bring Change?*, BBC BRASIL (Dec. 7, 2012), www.bbc.co.uk/news/world-latin-america-20639111.

9. Fellet & Correa, *supra* note 8.

10. *Id.*

11. *Mensalao Reopened*, *supra* note 8.

12. Andreas Knobloch, *Cartel Accusations Against Siemens in Brazil*, DEUTSCHE WELLE (July 18, 2013), <http://www.dw.de/cartel-accusations-against-siemens-in-brazil/a-16960997>.

13. *Id.*

14. *Id.*

to twenty percent, ultimately landing Siemens the construction contract for \$268 million in the late 1990s.¹⁵ The media has reported the use of bribes in the scheme, but Siemens reports that no such allegations have been supported thus far in internal investigations.¹⁶ Regardless, on October 10, 2013, Siemens publicly announced in an investigation hearing that if authorities prove the existence of a price-fixing cartel for the subway bidding, Siemens will reimburse Brazilian authorities.¹⁷ Investigations are still underway in the subway price-fixing scheme; however, these highly publicized corruption scandals involving the government, politicians, and international corporations explain Brazil's motivation for enacting a strict anti-corruption law.

II. ANTI-CORRUPTION EFFORTS PRIOR TO PASSAGE OF THE BRAZILIAN CLEAN COMPANIES ACT

As previously mentioned, Brazil began efforts to combat corruption almost two decades ago.¹⁸ Until recently, corruption was prosecuted under Brazilian penal codes; accordingly, some of Brazil's first steps towards ending corruption began with a host of changes and additions to the penal code, "including legislation against bribery-related money laundering, securities fraud, concealment of assets, and economic power abuse."¹⁹ Then, in 2000, Brazil adopted the Organisation for Economic Co-operation and Development's (OECD) Convention on Combating Bribery of Foreign Public Offices in International Business Transactions (Convention on Combating Bribery) and in 2003, Brazil signed the United Nations Convention against Corruption.²⁰ While not actually a member of the OECD, the OECD requested that Brazil, as a party to the Convention on Combating Bribery, update its corruption legislation to impose direct liability on companies for bribery of foreign officials.²¹ Apparently, from the time Brazil ratified the Convention on Combating Bribery in 2002 until 2012, Brazilian authorities had initiated only one case and pursued two investigations concerning international bribery.²² But, since 2008, some progress has occurred as convictions for Brazilian bribery have increased thirty percent.²³ The OECD's request for updated anti-corruption legislation in combination with the public outcry arising from the Mensalao trial presented the perfect backdrop for Brazil to pass the landmark anti-corruption law and make a drastic step towards fighting corruption in transactions with public officials.

15. *Id.*

16. *Siemens Says Will Reimburse Brazil if Cartel Proven -Papers*, REUTERS (Oct. 11, 2013), www.reuters.com/article/2013/10/11/brazil-siemens-idUSL1N0I10GL20131011.

17. *Id.*

18. Varela, *supra* note 1.

19. *Id.*

20. *Id.*

21. Boadle & Grebler, *supra* note 4.

22. *Id.*

23. *Id.*

III. THE BRAZILIAN CLEAN COMPANIES ACT

The Brazilian Chamber of Deputies approved the legislation in April, Brazil's Senate subsequently approved it in July,²⁴ and finally President Dilma Vana Rousseff signed the legislation, officially enacting the BCCA in August.²⁵ It will come into effect on January 28, 2014.²⁶ The BCCA concentrates on combating fraud and corruption within the bidding and acquisition process for public contracts; however, the law imposes very comprehensive liability and covers a wide array of acts of corruption besides acts directly related to public contracts.²⁷ The BCCA has received considerable attention as a forward step for Brazil's fight against corruption, but it remains to be seen how effectively the BCCA can be implemented and enforced.²⁸

IV. THE ACT'S KEY PROVISIONS

The BCCA imposes very comprehensive liability, but first and foremost, it imposes civil liability on individuals and corporations, whereas previously only individuals could be liable for their acts.²⁹ Now an entity may be held civilly and administratively liable for any corrupt act of any of its agents, including any of its directors, officers, or employees.³⁰ Under the BCCA, civil and administrative liability can arise when a Brazilian company or its agents bribe foreign officials or when any company or its agents bribe any local Brazilian official.³¹ Basically, any entity doing business in Brazil that attempts to bribe either a foreign or Brazilian official imposes liability on that entity, even if the act occurs outside of Brazil.³² Furthermore, unlike its U.S. and U.K. counterparts, the BCCA holds all parent and subsidiaries jointly liable for any public contract found to be in violation of the Act.³³

The BCCA employs broad prohibitions to tackle corruption. Accordingly, it prohibits more than simply bribery, but rather it prohibits conduct that gives an unfair advantage or even actions that would in any way prohibit the natural competitiveness inherent in public bidding.³⁴ For ex-

24. Jaeger, *supra* note 3.

25. Louise Zornoza, *Brazil's President Signs Anti-Bribery Law*, REG. AFF. PROF. SOC'Y (Aug. 16, 2013), <http://www.raps.org/focus-online/news/news-article-view/article/3952/brazils-president-signs-anti-bribery-law.aspx>.

26. Valera, *supra* note 1.

27. *Id.*

28. MARCELO DOS SANTOS BARRADAS CORREIA, MYLES K. BARTLEY & REGINA F. KILVER, ASS'N OF CORP. COUNSEL, A COMPARISON OF THE NEW BRAZILIAN ANTI-CORRUPTION LAW, THE FCPA, AND THE UK BRIBERY ACT (2013), available at <http://www.acc.com/legalresources/quickcounsel/cnbalfuba.cfm?makepdf=1>.

29. *Id.*

30. Jaeger, *supra* note 3.

31. Boadle & Grebler, *supra* note 4.

32. Jaeger, *supra* note 3.

33. BARRADAS CORREIA ET AL., *supra* note 28. Holding companies and their subsidiaries jointly liable is one of the major differences of the BCCA in comparison with other anti-corruption statutes.

34. *Id.*

ample, "acts of offering, promising, sponsoring or otherwise supporting" bribery or any conduct that would unfairly advantage any third party or any public official are illegal.³⁵ This covers direct and indirect benefits offered to a public official or even offered to a relative of a public official.³⁶ Attempting to cover up the interests or beneficiaries of illegal acts through the use of third parties also constitutes a violation of the BCCA.³⁷ If an entity finances any act prohibited by the BCCA, then they too become liable for the acts.³⁸ Furthermore, the BCCA is a strict liability statute and therefore no showing of a specific intent is required.³⁹ Liability arises simply upon a showing that any agent or employee of an entity engaged in an act prohibited under the statute.⁴⁰ Basically, prosecutors do not need to prove that a high level employee knew of the incident or even that the entity failed to take reasonable precautions, so long as they demonstrate that the illegal act occurred.⁴¹

V. PENALTIES AND INCENTIVES

On top of providing very comprehensive civil and administrative liability, the BCCA imposes severe penalties for violations.⁴² If a company receives a conviction for bribery under the BCCA, up to twenty percent of their gross annual revenue from the previous year is susceptible to fines, with a maximum fine of \$26,220,000.⁴³ During the drafting of the BCCA, the fines capped off at the value of the contract; however, President Dilma Rousseff vetoed this provision to allow for the imposition of greater fines.⁴⁴ The BCCA allows for sanctions on top of fines including blacklisting companies previously convicted for bribery and preventing them from obtaining government contracts, subsidies, or funding for a maximum of five years.⁴⁵ Additional penalties allow for disgorgement of benefits, suspension, and in extreme cases, even dissolution of the entity.⁴⁶

But, while the BCCA does impose strong penalties, it also provides some incentives. For example, companies that have an effective compli-

35. *Id.*

36. Zornoza, *supra* note 25.

37. *Id.*

38. Valera, *supra* note 1.

39. BARRADAS CORREIA ET AL., *supra* note 28.

40. *Id.*

41. Michael Volkov, *Brazil and its Commitment to Anti-Corruption Enforcement*, CORRUPTION, CRIME AND COMPLIANCE (Sept. 4, 2013), <http://corruptioncrime.compliance.com/2013/09/brazil-and-its-commitment-to-anti-corruption-enforcement/>.

42. Zornoza, *supra* note 25.

43. Boadle & Grebler, *supra* note 4.

44. BARRADAS CORREIA ET AL., *supra* note 28. This veto has been commended as a demonstration of Brazil's true commitment to end corruption through strong penalties.

45. Boadle & Grebler, *supra* note 4.

46. Jaeger, *supra* note 3.

ance program in place⁴⁷ or entities that self-report any incidents of bribery may have reduced penalties.⁴⁸ If a company self-reports, the BCCA allows the government to create leniency agreements, which can reduce fines by a maximum of two-thirds, so long as the companies cooperate in all of the subsequent investigative and administrative proceedings.⁴⁹ General demonstrations that the entity has cooperated in investigations and has attempted to comply with the new provisions allow the government to impose lesser penalties and even to execute non-prosecution agreements, completely barring the government from bringing suit.⁵⁰

VI. POSSIBLE SHORTCOMINGS

Thus far, the BCCA has been perceived as on par with some of the most advanced anti-corruption laws in the world;⁵¹ however, certain aspects of the legislation have been doubted, if not criticized. For example, many terms within the BCCA have no definition, which will likely result in confusion for companies trying to comply; hopefully, with time such confusion should dissipate with actual implementation and enforcement.⁵² Also, any branch of the Brazilian government can bring an action for a violation and the highest authority within that public body then presides over the hearing, creating a high risk for inconsistent practices and potential conflict of interests.⁵³ Unlike the Federal Corrupt Practices Act, the BCCA does not cover corruption in private transactions; it only addresses liability for illegal acts in relation to public official.⁵⁴ Lastly, although many international organizations and foreign governments have praised Brazil's new anti-corruption law as a positive step forward, skepticism remains about effective enforcement.⁵⁵

VII. CONCLUSION

After struggling with corruption in transactions with public officials that negatively impacted Brazil's economic opportunities, Brazil has now enacted a monumental anti-corruption law similar to corruption laws in the United States and United Kingdom. The BCCA sets an unprecedented new standard in anti-corruption legislation in Latin America and brings Brazil into compliance with international standards. If effectively enforced, the BCCA's comprehensive personal and corporate liability

47. *Id.*

48. *Id.*

49. BARRADAS CORREIA ET AL., *supra* note 28.

50. Volkov, *supra* note 41.

51. See Valera, *supra* note 1.

52. BARRADAS CORREIA ET AL., *supra* note 28. For example, the BCCA does not define what sufficiently demonstrates that a company took "adequate procedures" so as to mitigate possible liability or who qualifies as a "public agent."

53. *Id.* (an exception exists for proceedings relating to foreign public officials; the Federal Government General Controller governs such proceedings).

54. *Id.*

55. Jaeger, *supra* note 3.

and strict penalties should severely curtail future bribery and corruption in transactions with public officials.

