

White Collar Crime - Brazil

World Cup and anti-corruption fight

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World Cup and protesters

OECD guidelines

Other considerations

Comment

World Cup and protesters

A country should be enthusiastic about hosting a World Cup, right? But that is not the case in Brazil.

Thousands of people are protesting, demanding, among other things, education and healthcare instead of stadiums. In addition, several strikes were announced days before the games were about to start, involving everyone from police officers to metropolitan transport employees.

So why is a democratic, economically strong and growing country that loves football protesting at hosting the World Cup? The deep-rooted answer to this apparent contradiction lies the decades of corruption and white-collar crime which have caused tremendous corrosion in the quality of life throughout the country. Further, as the military government has been gone since 1985, citizens can now express their frustrations with the extremely poor levels of healthcare, education and transportation, low salaries and the overall poor quality of life.

In light of these frustrations, it is easy to see why the World Cup's huge budget – which has increased several times and now reached \$16 billion in order to build 12 arenas and additional transport and hotels – has triggered unprecedented outrage. Furthermore, after seven years, these facilities were barely finished one week before the games, and most still lacked basic public transportation, due to a lack of planning, incompetence and bureaucracy. It is also likely that corruption scandals in relation to these projects will emerge after the games.

However, the country has nonetheless taken steps to prevent white-collar crime and set guidelines to enforce judgments when white-collar crime and corruption do occur. This update looks at some of the key features of Brazilian law that aim to combat white-collar crime and corruption.

OECD guidelines

The 1997 Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was adopted in 2000.⁽¹⁾ Now in the so-called 'second phase', Brazil is gradually implementing its recommendations. In the last 14 years there have been substantial changes to legislation due to Brazilian law being modelled on:

- the OECD convention;
- the United States' 1977 Foreign Corruption Practices Act; and
- the Inter-American Convention Against Corruption of 1996.

Money laundering

In accordance with the OECD convention, Bill 10.467/2002 amended the Penal Code and has since defined the crime of 'international bribery' against foreign public administrations in commercial

transactions⁽²⁾ and expanded the definition of 'money laundering' in order to encompass money obtained through such illicit conduct.

Furthermore, Bill 12.683/2012 has amended the money laundering law (Bill 9.613/1998) so that any illicit revenue can be the object of a money laundering crime, from a single embezzlement to any type of fraud. Before this reform, only disguising money obtained from the following acts constituted money laundering:

- organised crime;
- drug trafficking;
- terrorism;
- gun smuggling;
- fraud against national and foreign public administrations;
- kidnaping with extortion; and
- crimes against the national financial system involving the stock exchange market and international money transactions.

However, arguably, the new law is too broad, as it encompasses almost any situation in which someone merely accused of a crime disguises the alleged illicit origin of money – for example, by buying a car or a house in the name of a relative.

Moreover, what was once irrelevant and thus not punishable after the fact (ie, where a person who commits a crime disguises the illicit revenue deriving therefrom and uses it on his or her own behalf) is now considered a separate crime, which in turn raises serious concerns with regard to double jeopardy.

The Supreme Court decision in Penal Action 470 (the *Mensalão* case) – in which the court found that no double jeopardy exists and ruled that the person who commits an offence can also be punished for using the illicit money if he or she disguises it as apparently licit assets – highlights such concerns. For example, the Supreme Court recently convicted a federal deputy for embezzling public money (ie, the original crime) and for having his wife withdraw the money directly at a bank cashier in order to make it harder to trace the funds (ie, money laundering). While the federal deputy's wife was not prosecuted, the federal deputy was convicted twice.

In certain situations, using disguised illicit revenue is punished more severely (imprisonment for three to 10 years) than the original crime through which the illicit money was obtained. For example, the penalty for theft is one to four years' imprisonment, and the penalty for embezzlement against a private institution or person is one to five years' imprisonment. This means that an individual could be sentenced to one year's imprisonment for the embezzlement or theft, and another three years for using the money obtained, which would be disproportionate.

Bill 12.846

In 2014 Congress approved Bill 12.846 which, following OECD guidelines, authorises the public administration to impose heavy fines on companies for acts of corruption in association with public authorities – not only for international commerce practices, but also for internal corruption. These fines are imposed independently of any criminal conviction of employees.

In addition, a credit policy was created for companies that enact compliance programmes that comply with the US Foreign Corrupt Practices Act standards, which encourage cultures of personal responsibility and prevention.

These measures encourage Brazilian companies to create internal investigation departments, as seen in the United States and the United Kingdom. This should help to prevent employee misconduct such as bribery and prevent kickback payments, which have been prevalent in, among others, the medical industry.

However, the bill has several flaws, three of which are discussed below.

The first is that it is not enforced everywhere (eg, the city of São Paulo has already published its regulation, but the state of São Paulo and the federal government have not).

The second is that it gives power not only to one level of the public administration, but to all three levels – municipal, state and federal. Each one can independently impose heavy fines and prohibit contracting

on a government level. In a country with a history of corruption of public servants, this situation may, if not well controlled, lead to more corruption. For example, even in cases where a company goes through the legal system to bar an administrative sanction, it could still be hostage to corrupt authorities. In short, the more power given, the more control and transparency is required from the government. Companies will also need to be vigilant and keep a close eye on employees, and ensure that offices, data centres and internal protections are in place.

Finally, the inefficacy of the bill's leniency regulation is a cause for concern because, unlike Bill 12.529/2011 – which was created in order to protect free competition and prevent cartels by providing a leniency programme that allows for immunity – Bill 12.846 has no such full immunity clause. Instead, the bill has introduced a time-consuming process whereby a collaborator must likely sign a leniency agreement with all three levels of the public administration.

Other considerations

Media

Notwithstanding the current government's attempt to pass a law regulating journalism by requiring individuals to obtain a diploma before entering the field – which would diminish freedom of the press – the legal system supports freedom of the press and Brazil has a thriving media sector.

The power of the media can be seen through its coverage of white-collar crimes involving authorities and influential figures. In some cases, investigative journalism and media coverage have led to police investigations and prosecutions of such figures.

Of course, if intentionally misleading information is published, those who publish the information will face judicial consequences, such as having to pay compensation to injured parties or, in extreme cases, criminal sanctions. This, however, is not a form censorship, nor does the country support censorship.

Further, no prosecutor, judge or court should decide a case based on media reports, but rather on their own conviction based on the proof produced during investigations or court proceedings.

Technical programmes

The country has also created strong technical programmes that have helped to reduce corruption, including:

- fiscal controls (eg, the Integrated System of Information about Interstate Operations with Goods and Services (SINTEGRA), which digitalises income tax statements); and
- a public transparency website, on which all official credit card transactions used by public employees are available to the public.

In addition, due to technical advances, the 270 million mobile phones throughout the country have provided a tremendous amount of criminal evidence and have proved to be an important instrument in the fight against corruption. However, there are concerns over the abuse of monitoring.

Comment

Of course, corruption is still rife throughout the country and the World Cup expenses will likely soon prove another example. After all, how can a country justify financing – with public money – a \$16 billion budget to construct 12 arenas and some infrastructure? It is likely that down the line it will emerge that at least some of that money has gone towards corruption.

Although much more work is needed – such as passing the draft Penal Code amendment that will make private corruption a crime – the aforementioned reforms should help to ensure the future stability of the country.

And while laws to combat corruption and white-collar crime are a step in the right direction, Brazil must be careful to avoid creating a 'police state' through excessive so-called 'industry sweeps' and excessive telephone and data monitoring. Authorities must have clearly defined limits in order to avoid this potentially serious concern.

Despite this concern, Brazil has successfully enforced the anti-corruption laws that are already in place. For example, in December 2012, 2,703 people were incarcerated for corruption. In the last four years, there has been an 133% increase in convictions, according to the Federal Department of Criminal

Execution.⁽³⁾ Further, convictions for bribery – even in high-profile cases such as *Nicolau* and *Mensalão* – have become a reality.

However, despite these changes, there is still one aspect of corruption that has not been addressed (even in countries with strong anti-corruption policies): the private financing of political campaigns by companies that sign multimillion-dollar contracts with all levels of public administration and make extensive campaign donations. In such cases (and as seen in the run-up to the World Cup), the question becomes: why would a private company donate millions to a political campaign (in some cases, to multiple candidates), if not to advance its own position? Herein lies the biggest challenge regarding corruption, and all multilateral governments must address it.

In Brazil, the Supreme Court – which has been very proactive, which in turn has raised some concerns about its limits – is ruling on a petition presented by the Bar Association which claims that the federal law that allows companies to make campaign donations is unconstitutional. Although the judgment is ongoing, a preliminary vote took place on April 2 2014 and the majority of the Supreme Court justices (six of 11) voted to prohibit companies from making campaign donations.⁽⁴⁾ Only Justice Teori Zavascki voted to keep the policy in place. However, the composition of the Supreme Court is changing, with one confirmed retirement, and thus the court's final decision may be different.

With the World Cup starting, Brazil can only hope that it will be successful not only in the tournament, but also in the battle against corruption. That battle is already being fought by a population that is protesting the World Cup's \$16 billion budget in order to make clear that it will not accept the misuse of public funds and that the Brazilian people should be priority.

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Endnotes

⁽¹⁾ Presidential Decree 3.678.

⁽²⁾ Articles 337-b, 337-C and 337-D.

⁽³⁾ See <http://congressoemfoco.uol.com.br/noticias/presos-por-corrupcao-sao-apenas-01-no-brasil/>.

⁽⁴⁾ Dias Toffoli, Luís Roberto Barroso, Luiz Fux, Joaquim Barbosa, Marco Aurélio Mello and Ricardo Lewandowski.

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