

2016

The Brazilian Clean Company Act: Using Institutional Multiplicity for Effective Punishment

Mariana Mota Prado

Lindsey D. Carson

Izabela Correa

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/olsrps>

 Part of the [Law Commons](#)

Recommended Citation

Prado, Mariana Mota; Carson, Lindsey D.; and Correa, Izabela, "The Brazilian Clean Company Act: Using Institutional Multiplicity for Effective Punishment" (2016). *Osgoode Legal Studies Research Paper Series*. 119.
<http://digitalcommons.osgoode.yorku.ca/olsrps/119>

This Article is brought to you for free and open access by the Research Papers, Working Papers, Conference Papers at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Legal Studies Research Paper Series by an authorized administrator of Osgoode Digital Commons.

The Brazilian Clean Company Act:
Using Institutional Multiplicity for Effective Punishment

Mariana Mota Prado^{*}
Lindsey Carson^{**}
Izabela Correa^{***}

Abstract: In Brazil's battle against corruption over the past two decades, there has been significant progress associated with the systems of oversight and investigation but very little progress in holding corrupt actors legally accountable for their transgressions. We suggest that until very recently this could be partially explained by the fact that there was institutional multiplicity (i.e. duplication of functions) in oversight and investigative institutions, while at the punishment stage, a single and underperforming institution – the judiciary – exercised monopolistic authority. To circumvent the limits associated with Brazilian courts, the government is increasingly relying on administrative sanctions for corruption. It is in this context that Brazil has enacted legislation to punish legal persons for both foreign and domestic corruption: the Clean Company Act (*Lei Anti-Corrupção*), enacted in August 2013, has used institutional multiplicity in an attempt to circumvent the well-known problems that plague the Brazilian anti-corruption system. We suggest that this looks promising, as it follows the same structure of recent reforms that have been successful in Brazil.

^{*} Associate Professor and Associate Dean (Graduate Studies), University of Toronto Faculty of Law.

^{**} Visiting Scholar and Professorial Lecturer, Johns Hopkins University, The Paul H. Nitze School of Advanced International Studies (SAIS).

^{***} PhD Candidate in Political Science at the London School of Economics and Political Science (LSE), sponsored by the Coordenação de Aperfeiçoamento de Pessoal de Nível Superior (CAPES).

Introduction

Brazil has grappled with corruption for most of its political history, but the issue has assumed a particularly prominent position in the country's politics since its return to democracy. The democratic constitution enacted in 1988 laid the groundwork for the development of Brazil's modern web of accountability institutions, including in the areas of oversight and investigation. Under the Constitution, the Federal Public Prosecutors' Office (*Ministério Público Federal*, MPF) gained independence from the executive branch, emerging as the de facto "fourth branch of government," empowered to act in the defense of the public interest. The MPF's role as the primary enforcer of political law and protector of collective interests was further strengthened under the 1992 Administrative Improbability Law which granted the MPF enhanced authority to act against corruption and the misuse of public funds.¹ The 1988 Constitution also conferred greater powers and responsibilities to the National Court of Accounts² (*Tribunal de Contas da União*, TCU) and guaranteed rights to public information and freedom of press. These and other institutional reforms have strengthened the capacity of officials to detect and investigate corrupt activities, as demonstrated by the many high-profile scandals that have been uncovered during the terms of each of Brazil's six post-authoritarian presidents. However, while the discovery and exposure of such numerous incidences of corruption attest to the competency and effectiveness of the country's monitoring and investigative authorities, they also confirm that corruption remains deeply entrenched across all branches and levels of government in Brazil.

Such endemic corruption has had negative consequences for democracy and has contributed to the erosion of public trust in Brazilian political institutions. Power and Taylor report that the Brazilian public's confidence in politicians dropped from 31% in 1992 (during the run-up to impeachment of President Fernando Collor de Melo) to 8% in late 2005, while confidence in political parties plummeted from 26% to 9% over that same period.³ More recent surveys also indicate that trust in public institutions remains low and may be deteriorating. In the 2014 *AmericasBarometer* survey, for example, Brazilians reported the lowest

¹ Rogério B. Arantes, "The Federal Police and the Ministério Público," in Timothy J. Power and Matthew M. Taylor (Eds), *Corruption and Democracy in Brazil: The Struggle for Accountability* (Notre Dame: University of Notre Dame Press, 2011), Chapter 8.

² Also known as External Court of Accounts or Federal Audit Court.

³ Timothy J. Power and Matthew M. Taylor, "Introduction: Accountability Institutions and Political Corruption in Brazil." In Timothy J. Power and Matthew M. Taylor (Eds), *Corruption and Democracy in Brazil: The Struggle for Accountability* (Notre Dame: University of Notre Dame Press, 2011), at 3.

levels of support for the political system (37.6%) and the third-lowest levels of trust in local government (37.1%) among citizens from 28 countries in the Western Hemisphere.⁴ The 2014 Edelman Trust Barometer found that Brazil exhibits the largest gap between trust in business and government among the BRIC countries, with only 34% of Brazilians surveyed expressing confidence in their government compared with 70% who trusted business institutions; the report noted that the gap had widened since the previous year's survey.⁵

In addition, strong evidence indicates that the net effect of corruption on the country's economic development has been negative.⁶ While Brazil has experienced impressive economic growth in recent years,⁷ studies have estimated that corruption consumes between 1.4%⁸ and 5%⁹ of the country's GDP, translating into economic losses of between US\$31.4 billion to US\$112.3 billion each year. Beyond its adverse impacts on the economy as a whole, corruption imposes real costs on Brazilian citizens; according to the statistical model used by Silva, Garcia, and Bandeira, if the level of corruption in Brazil had been as low as that in Denmark (the least corrupt country in their sample), per worker incomes would have been 43% higher in 1998, meaning that corruption led to US\$2,840.81 in lost income for the average Brazilian worker that year.¹⁰

It is interesting to note that the problem persists despite the existence of an extensive and robust framework of anti-corruption laws and regulations. The

⁴ Elizabeth J. Zechmeister (Eds), "The political culture of democracy in the Americas, 2014: democratic governance across 10 years of the AmericasBarometer" (2014), online: Vanderbilt University <http://www.vanderbilt.edu/lapop/ab2014/AB2014_Comparative_Report_English_V3_revised_011315_W.pdf> at 191-222.

⁵ Robert Holdheim, "Trust and the BRICs: going nowhere slowly?" *Edeleman-blog* (23 January 2014), online: <<http://www.edelman.com/post/trust-and-the-brics-going-nowhere-slowly/>>.

⁶ Robert Iquiapaza and Hudson Amaral, "Reflections on the impact of corruption on economic development: a literature review in the Brazilian economy" (2007) MPRA Paper No. 1818, online: <<http://mpa.ub.uni-muenchen.de/1818/>>.

⁷ Between 2000 and 2013, Brazilian GDP growth ranged from -0.3% (2009) to 7.5% (2010), with an average annual growth rate of 3.05%. The World Bank, "Development Indicators" (2015), online: <<http://databank.worldbank.org/data/home.aspx>>.

⁸ Federação das Indústrias do Estado de São Paulo, "Relatório Corrupção: custos econômicos e propostas de combate" (2010), online: <<http://www.fiesp.com.br/indices-pesquisas-e-publicacoes/relatorio-corruptao-custos-economicos-e-propostas-de-combate/>>.

⁹ Época, "Por que o Brasil pode vencer a corrupção," *Revista Época - Special Debate Supplement* (22 July 2008), online: <<http://revistaepoca.globo.com/Revista/Epoca/1,,EMI5188-15273,00.html>>.

¹⁰ Marcos Fernandes Gonçalves da Silva, Fernando Garcia and Andrea Camara Bandeira, "How does corruption hurt growth? Evidences about the effects of corruption on factors productivity and per capita income" (2001), online: <<http://bibliotecadigital.fgv.br/dspace/bitstream/10438/1953/1/TD103.pdf>>.

volume and scope of Brazil's laws that comprise the anti-corruption framework are large, including provisions addressing conflicts of interest, public procurement, access to information, freedom of press and expression, and the powers and functions of the government Ombudsman.¹¹ Leading anti-corruption non-governmental organizations have lauded the country's anti-corruption legislative framework and heralded it as a model for other developing countries.¹² However, such accolades are generally based on assessments of countries' formal anti-corruption policies and the existence of institutions charged with fighting corruption, rather than evaluations of how these corruption controls function in reality. The distinction is significant, as there may be sharp divergences between law on the books and law in action. Indeed, the available evidence from Brazil suggests that institutional barriers to accountability remain, preserving opportunities for malfeasance by public officials, particularly in political parties, the legislature, and local governments.¹³

Despite these obstacles, empirical and anecdotal evidence indicate that some progress has been achieved in the battle against corruption in Brazil. In particular, the institutions charged with investigating suspected corrupt activities have performed strongly over the past decade, and, in another article, two of us argue that the explanation for the success of these government agencies appears to lie in their institutional arrangements.¹⁴ Specifically, we contend that the overlap of anti-corruption functions among various governmental entities – “institutional multiplicity” – has strengthened outcomes by allowing institutions to compete, to collaborate, to complement one another, or to compensate for one another's deficiencies or oversights. We assert that the Brazilian experience reveals the

¹¹ Jeremy Pope, “Transparency International source book 2000: confronting corruption: the elements of a national integrity system” (2000), online: <<http://archive.transparency.org/publications/sourcebook>> .

¹² Global Integrity, “Global Integrity scorecard: Brazil 2009” (2009), online: <<http://report.globalintegrity.org/reportPDFS/2009/Brazil.pdf>>; Amarrigo Brasil, “UN Convention against Corruption civil society review: Brazil 2012” (2012), online: <<http://www.transparency.org/files/content/publication/206-brazil-full-report.pdf>>; Frederick T. Stocker, “Anti-corruption developments in the BRIC countries: a MAPI series” (2012), online: <http://www.mapi.net/system/files/PA-107_2.pdf>. However, while Brazil is generally regarded as having a strong legal and institutional anti-corruption framework, some gaps remain, particularly in the area of whistleblower protections. See, e.g., Maira Martini, “Brazil: Overview of Corruption and Anti-Corruption” (2014), online: <http://www.transparency.org/files/content/corruptionqas/Country_profile_Brazil_2014.pdf>.

¹³ Lindsey Carson and Mariana M. Prado, “Diagnosing the disease: Mapping corruption and its institutional determinants in Brazil” (2014) IRIBA Working Paper 08, online: <<http://www.brazil4africa.org/publications/>>.

¹⁴ Mariana M. Prado and Lindsey Carson, “Brazilian Anti-Corruption Legislation and its Enforcement: Potential Lessons for Institutional Design” (2014), *Journal of Self-Governance and Management Economics* (forthcoming).

advantages in pursuing alternative institutional approaches, including institutional multiplicity combined with institutional malleability, in developing effective strategies to reduce corruption.

Building on those claims, this article focuses on institutional multiplicity at the adjudication and punishment stages – specifically, the establishment or strengthening of administrative and civil sanctions for corruption-related offenses by corporations – and argues that a strategy may confer particularly valuable benefits in environments in which conventional judicial institutions face severe problems of rigidity and overall inefficiency. Recent political developments in Brazil strongly suggest that the country’s executive and legislative officials were cognizant of the potential advantages of such a form of institutional multiplicity when designing a new punishment system for corporations involved in corruption. Specifically, the new Brazilian Clean Company Act (Law n. 12,846/13), enacted in August 2013 and in force since January 2014,¹⁵ relies heavily on administrative processes to impose sanctions on Brazilian companies involved in corruption either in Brazilian territory or in foreign countries. This reliance on administrative processes and sanctions creates an alternative way to investigate and punish corporations not relying uniquely on the Judiciary, as explicitly acknowledged in the justification for the Anti-Corruption Bill presented by the executive branch to the National Congress:

The present bill opted for administrative and civil liability of legal persons, due to the fact that Criminal Law does not offer effective and speedy mechanisms to punish corporations, which are often the ones interested in and benefitting from corrupt practices. (...) 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.¹⁶

As discussed in the academic literature and elsewhere in this article (section 2.2.3 *infra*), the Brazilian judiciary represents one of the most significant institutional barriers to holding individuals and legal persons accountable for their

¹⁵ The statute is known in Portuguese as *Lei Anti-Corrupção*. The English language literature generally refers to the statute as the Clean Company Act, which better captures the fact that the statute is mostly focused on punishing companies for bribing government officials.

¹⁶ Message 52 Executive to National Congress. EMI N. 00011 2009 – CGU/MJ/AGU, online: <http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=519F1B865607F805C445F533D460A0DE.proposicoesWeb2?codteor=735505&filename=Tramitacao-PL+6826/2010>.

corrupt activities.¹⁷ Thus, by creating an alternative pathway to investigation and punishment, we hypothesize that the new statute has the potential to overcome longstanding barriers to an effective accountability system for at least one category of corrupt actors: corporations and other legal entities. If successful in overcoming these barriers, the Brazilian Clean Company Act may prove to be an institutional development that could provide insights to other developing countries struggling with similar issues.

To develop this claim, this article is divided in three parts. The first part provides a brief history of the Brazilian Clean Company Act and an overview of its main provisions. The second part analyzes in greater depth the administrative process for investigation and punishment in Brazil, emphasizing how institutional multiplicity seems to have strengthened the country's anti-corruption system. Building on the institutional multiplicity hypothesis, the third part argues that by relying on administrative and civil processes and sanctions the new statute has the potential to effectively bypass the Brazilian judiciary, which currently represents one of the most important bottlenecks in the country's anti-corruption system. We conclude by acknowledging that it is too early to assess the efficacy of the new Clean Company Act in deterring and sanctioning corruption. However, we suggest that, if our institutional multiplicity hypothesis proves correct, and the administrative liability regime created by the Clean Company Act proves effective in holding corrupt companies accountable, the Brazilian experience may provide a useful example for other countries in the Global South facing similar constraints.

1. The Brazilian Clean Company Act

Individuals engaged in corruption in Brazil can be subject to three types of punishment: administrative, civil and criminal.¹⁸ Each is determined by separate administrative or judicial processes that run independently of one another. While the Brazilian system to punish individuals involved in corruption schemes is quite robust, especially for public servants, until 2013 there was no express legal basis for extending strict liability for corruption-related offenses to legal entities,

¹⁷ See section 2.2.3 *infra*. See also, Carlos H. R. Alencar and Ivo Gico Jr. "When crime pays: measuring judicial performance against corruption in Brazil" (2011), *Law and Business Review of the Americas*, v. 17; Matthew M. Taylor, "Veto and voice in the courts: policy implication of institutional design in the Brazilian Judiciary" (2006), *Comparative Politics*, v. 38, n. 3; Fausto M. Sanctis, "Recent legal and judicial reform initiatives in Brazil" (2013), *International Judicial Monitor*, Winter; Carson and Prado, *supra* note 13.

¹⁸ Carson and Prado *supra* note 13.

including corporations, whether committed in national or foreign territory.¹⁹ Corporate liability was introduced for the first time in August 2013, with what became known in Brazil as *Lei Anti-Corrupção* or the Clean Company Act (Law n. 12,846/13).

1.1 International Pressure for Legal Reforms

Brazil's decision to enact the new Clean Company Act reflects the convergence of long-standing obligations under international conventions and heightened attention from national and foreign media and civil society organizations in the lead-up to the 2014 World Cup and 2016 Summer Olympics. Focusing specifically on its international legal obligations, Brazil is a signatory to three multilateral anti-corruption conventions: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention);²⁰ the Inter-American Convention Against Corruption, enacted by the Organization of American States;²¹ and the United Nations Convention Against Corruption (UNCAC).²² All three conventions require each state party to impose liability for corrupt acts on legal entities in a manner "consistent [in accordance] with its legal principles."²³ Considering that the Brazilian Constitution only authorizes criminal responsibility of legal persons in cases involving environmental offenses, it would not be possible to impose criminal sanctions for corporations or other legal persons without a constitutional amendment. Hence, when Brazil revised its criminal code in 2002 to include the prohibition on transnational bribery, it included criminal sanctions only for individuals.²⁴

¹⁹ However, prior to the enactment of Law 12,846, legal persons could potentially be held administratively liable for foreign bribery under other existing Brazilian laws governing public procurement, regulating publicly-held companies, etc. See: OECD Working Group on Bribery, "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 Business Transactions" (2007), online: <<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/39801089.pdf>> at 51-53.

²⁰ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 (1998) [hereinafter OECD Convention] (ratified by Brazil in 2000).

²¹ Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724 (1997) [hereinafter IACAC] (ratified by Brazil in 2002).

²² United Nations Convention against Corruption, Oct. 31, 2003, 43 I.L.M. 37 (2004), 2349 U.N.T.S. 41 [hereinafter UNCAC] (ratified by Brazil in 2006).

²³ OECD Convention, *supra* note 20, at Art. 2; IACAC, *supra* note 21, at Art. VIII; UNCAC, *supra* note 22, at Art. 26.

²⁴ Interministerial Letter to the President arguing for the approval of the bill. EMI N° 00011 2009 – CGU/MJ/AGU, online:

This gap in Brazilian anti-corruption legislation became especially apparent in 2010 after the evaluation of Brazil in the second phase of the monitoring process of the OECD Working Group on Bribery. This monitoring process is designed to determine whether a country has established the structures to enforce the laws and rules implementing the OECD Convention and to assess their application. In the case of Brazil, the monitoring team noted multiple deficiencies in the country's anti-corruption laws,²⁵ generating momentum and international pressure for a discussion about Brazil's international obligations. This opened up the opportunity for the Executive Branch to send a bill addressing the corporate liability gap to Congress.

1.2 The Brazilian Clean Company Act in Comparative Perspective

The Clean Company Act extends civil and administrative liability to corporations and other legal persons for "acts committed against the domestic or foreign public administration," including the bribery of foreign and domestic public officials, fraud in connection with public procurement activities, and obstruction of government investigations (Art. 5). This section assesses the Act against Brazil's international obligations under the OECD Convention, UNCAC, and IACAC and provides a comparison of its terms with anti-corruption laws in other states party to one or more of those agreements. As these comparisons reveal, the Brazilian legislation is fundamentally similar to the anti-corruption laws in a range of other countries.

However, the effectiveness of law depends not only on its content but also its enforcement. The OECD Working Group on Bribery explicitly addresses this potential gap between "law on the books" and "law in action" in the design of its country monitoring system, which assesses the adequacy of the anti-corruption legislation in its signatories but also their application of those laws.²⁶ As evidenced by the OECD's peer monitoring reports, countries with similar laws may demonstrate enormous variability in their rates of enforcement of those laws.²⁷ Thus, a doctrinal analysis and comparison of the content of the new

<http://www.planalto.gov.br/ccivil_03/projetos/EXPMOTIV/EMI/2010/11%20-%20CGU%20MJ%20AGU.htm>.

²⁵ OECD Working Group on Bribery, "Brazil Phase 2: Follow-Up Report on the Implementation of the Phase 2 Recommendations" (2010), online: <<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/45518279.pdf>> at 35-41.

²⁶ OECD, "Country Monitoring of the OECD Anti-Bribery Convention," online: <<http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm>>

²⁷ See, e.g., OECD Working Group on Bribery in International Business Transactions, "Compilation of Recommendations Made in the Phase 3 Reports: Implementation and

Brazilian legislation can provide valuable information on the changes the law effects and how its provisions align or diverge from anti-corruption statutes in other countries. However, the ultimate effectiveness of the Anti-Corruption Law will largely depend on enforcement, which will in turn be influenced by institutional multiplicity, as we argue in the next section.

a) Scope of the Bribery Prohibitions

Brazil's Clean Company Act prohibits the bribery of both foreign and domestic public officials. While laws against the bribery of domestic officials have been common in countries around the world for decades if not centuries,²⁸ prohibitions against foreign bribery are a more modern phenomenon. In 1977, the United States enacted the Foreign Corrupt Practices Act (FCPA),²⁹ the world's first law regulating the business conduct of domestic actors engaged in foreign markets with foreign officials. After decades of advocacy on the part of American officials and businesses and amid increased attention and pressure from civil society and the media, in December 1997, members of the OECD were joined by five other countries (including Brazil) in signing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The OECD Convention, which came into force in February 1999 and requires states party to establish legally-binding standards to prohibit foreign bribery. Most signatories to the OECD Convention have opted to address foreign and domestic bribery in different sections of their legal codes,³⁰ but Brazil's unified approach is consistent with anti-bribery laws in several other states party, including Colombia, Germany, Portugal, and the United Kingdom (UK).³¹

Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendations on Further Combating Bribery” (2014), online: < <http://www.oecd.org/corruption/anti-bribery/CompilationofRecommendationsP3ReportsEN.pdf>>; OECD Working Group on Bribery in International Business Transactions, “Compilation of Recommendations Made in the Phase 2 Reports” (March 2010).

²⁸ John T. Noonan Jr., *Bribes: The Intellectual History of a Moral Idea* (University of California Press, 1987).

²⁹ 15 U.S.C. §§ 78dd-1 *et seq.* (2012).

³⁰ Rachel Brewster, “The Domestic and International Enforcement of the O.E.C.D. Anti-Bribery Convention” (2014) 15 *Chicago Journal of International Law* 84.

³¹ OECD Working Group on Bribery, “Steps Taken by State Parties to Implement and Enforce the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions” (2014), online: OECD <<http://www.oecd.org/daf/anti-bribery/WGB-Steps-Taken-Update.pdf>>.

While UNCAC urges signatories to criminalize bribery in the private sector (commercial bribery) as well as the public sphere,³² Brazil's Clean Company Act's prohibitions are limited to the bribery of public officials, though the law does prohibit fraud and manipulation by private companies when bidding on public contracts (Art. 5(IV)). However, many other UNCAC members, including Argentina, Ecuador, Japan, and Mexico, join Brazil in lacking specific laws that prohibit bribery among private parties, and in other countries, such as the United States and Australia, commercial bribery is regulated by a patchwork of federal and sub-national laws rather than a single statute.³³

A distinctive feature of the Clean Company Act is the explicit extension of its prohibitions on bribery to include third parties related to foreign and domestic public officials (Art. 5(I)). While authorities in other jurisdictions have publicly confirmed that an individual or legal person can be held liable under anti-bribery laws for advantages improperly conferred on a third party for the eventual benefit of a public official,³⁴ only a handful of other countries, including Canada and South Korea, directly address payments made to family members of public officials.³⁵

Another notable feature of the Brazilian Clean Company Act is its lack of definition of "public official" in the text of the law itself.³⁶ The law does define

³² UNCAC, *supra* note 22, at Art. 21.

³³ Sarah Clark, "New solutions to the age-old problem of private-sector bribery" (2013) *Minnesota Law Review* 97 at 2285-2319; Jones Day, "Anti-Corruption Regulation Survey of Select Countries" (2014), online: <http://www.jonesday.com/files/Publication/697734d5-7d1e-44ad-9f90-0a919c43ac30/Presentation/PublicationAttachment/ea6c2fe5-1944-470b-b634-0c12b886b6bd/TOI_760138682_5_%5bFINAL%5d%20Anti-Corruption%20Regulation%20Survey%202014.PDF>.

³⁴ Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, "A Resource Guide to the U.S. Foreign Corrupt Practices Act" (2012), online: <<http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>>.

³⁵ Canadian Criminal Code, RSC 1985, c. C-46, §121; Choe Sang-Hun, "South Korea Tightens Rules Against Gifts to Fight Graft," *New York Times* (3 March 2015), online: <http://www.nytimes.com/2015/03/04/world/asia/south-korea-seeking-to-curb-graft-passes-law-restricting-gifts.html?_r=0>.

³⁶ The concept of foreign public official in Brazilian doctrine and jurisprudence is based on the mentioned long-established definition in Article 327 of the Penal Code, which provides: "For the purposes of criminal law, anyone who, even though temporarily or unpaid, performs a public job, position or function is deemed to be a public official. Paragraph 1. Anyone who performs a public job, or holds a function in a para-state body or who works for a service-providing company hired or contracted to carry out any typical activity in the Public Administration is also deemed to be a public official." According to the OECD Phase I Monitoring Report, this definition of "public official" has been interpreted very broadly by Brazilian courts and doctrine, to cover anyone who exercises, in any way, a public function, online: <<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/33742137.pdf>>.

“foreign public administration” in detail, providing an arguably reasonable basis for extrapolating a general definition of “foreign public official,” but it is silent on the meaning of “domestic public administration” and thus provides no indication of which domestic actors fall within the scope of the bribery prohibition.³⁷ The absence of a definition may present particular challenges in situations involving state-owned enterprises and other companies over which the government exerts some control, such as Petrobras, embroiled in a large corruption scandal at the time of this writing. In comparison, while ambiguity persists in varying degrees in the interpretation of the meanings and scope of the term “public official” under the laws of many other countries such as Canada, the US, and the UK, their anti-bribery statutes do provide definitions of that term.³⁸

b) Forms of Liability

In accordance with the UNCAC, OECD Convention, and IACAC, Brazil’s Clean Company Act establishes liability for legal entities, but that liability is administrative or civil, not criminal. While most signatories to the OECD Convention (as well as many other countries around the world) have adopted corporate criminal liability for bribery and other corruption-related offenses,³⁹ under Brazilian law, legal persons can only be held criminally liable in cases involving environmental offenses.⁴⁰ However, Brazil’s exemption of corporations and other legal entities from criminal liability for corruption is consistent with its domestic legislation and with the approach taken under the anti-corruption laws of other states party to the OECD Convention (Bulgaria, Colombia, Germany, Greece, Italy, Russia, and Turkey).⁴¹ Moreover, as discussed below, by imposing administrative liability on legal persons, the Clean Company Act allows Brazilian

³⁷ “Foreign public administration” includes any entity directly or indirectly controlled by the public administration of a foreign state as well as any public international organization. Brazilian Law No. 12,846, of August 1, 2013, Art. 5(1)-(3).

³⁸ Bribery Act (2010) [UK], Art. 6(5); 15 U.S.C. §§78dd-1(f)(1), 78dd-2(h) (2), 78dd-3(f)(2); 18 U.S.C. §201 (a); 18 U.S.C. §§666 (d)(1)-(4); Corruption of Foreign Public Officials Act (CFPOA), S.C. 1998, c. 34, §2; Canadian Criminal Code, RSC 1985, c. C-46, §§120-123.

³⁹ OECD Anti-Corruption Network for Eastern Europe and Central Asia, “Liability of Legal Persons for Corruption in Eastern Europe and Central Asia” (2015), at 12.

⁴⁰ Brazilian Federal Constitution, Art. 225, paragraph 3; Brazilian Law No. 9605, February 12, 1998.

⁴¹ OECD Anti-Corruption Network for Eastern Europe and Central Asia, *supra* note 39, at Annex 2. In some countries, such as the US and Japan, legal persons can be held administratively or civilly liable as well as criminally liable in foreign bribery cases. OECD Working Group on Bribery, “2013 Data on Enforcement of the Anti-Bribery Convention” (2014), online: OECD <<http://www.oecd.org/daf/anti-bribery/Working-Group-on-Bribery-Enforcement-Data-2013.pdf>> at 4-6.

authorities to bring corruption cases in fora separate from the country's inefficient judicial system.

Corporate liability for offenses under the Brazilian Clean Company Act is strict, meaning that a company can be held administratively or civilly liable by merely showing that its employee, officer, director, or other agent committed a prohibited act in the company's interest or for its benefit, without need to prove negligence or willful conduct or knowledge on the part of the legal entity (Art. 2).⁴² Similarly, the UK Bribery Act imposes strict liability on "relevant commercial organizations" that fail to prevent individuals "associated with" them from bribing so long as there is proof that a bribe was paid with the intention to obtain or retain business or a business advantage for the organization.⁴³ In contrast, under the bribery laws of most other countries, including Canada and the United States, corporate liability only attaches if the individuals involved possessed the requisite *mens rea*,⁴⁴ while in other jurisdictions, such as the Netherlands, authorities face a higher hurdle in imposing corporate liability as they must prove that an associated individual engaged in the bribery act with the view to induce a public official improperly and that the legal entity was aware of the transfer as well as the nature or purpose for which it was given.⁴⁵

c) Jurisdictional Reach

UNCAC, the OECD Convention, and IACAC all oblige signatories to take measures to establish territorial jurisdiction over corruption-related offenses and further urge states parties to extend jurisdiction to offenses committed abroad by

⁴² In its most recent assessment of Brazil's implementation of the OECD Convention on Bribery, members of the OECD Working Group on Bribery reported that some of the anti-corruption officials, prosecutors, and lawyers with whom they spoke during their consultations and evaluation in Brazil emphasized that the strict liability provided under the Anti-Corruption Statute would not have been possible under a criminal law, which would have required proof of fault or intent on the part of the legal person and thus made it more difficult to hold companies legally responsible for corruption. OECD Working Group on Bribery, "Phase 3 Report on Implementing the OECD Convention on Bribery in Brazil" (2014), online: <<http://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf>> at 17 [hereinafter OECD Phase 3 Brazil Report].

⁴³ Bribery Act (2010) [UK], Art. 7.

⁴⁴ The US laws governing both foreign and domestic bribery require proof of corrupt intent, while the Canadian bribery law requires that the individual who committed the prohibited act "did so intentionally or recklessly, with knowledge of the facts constituting the offense, or with willful blindness toward them." 15 U.S.C. §§78dd-1, 78dd-2, 78dd-3; 18 U.S.C. §201; *R v Sault Ste Marie*, [1978] 2 SCR 1299 at 1309, 85 DLR (3d) 161.

⁴⁵ Bram Meyer, Tessa Van Roomen and Eelke Sikkema, "Corporate Criminal Liability for Corruption Offences and the Due Diligence Defence: A Comparison of the Dutch and English Legal Frameworks," 10(3) *Utrecht Law Review* 37-54 (2014), online: Utrecht <<https://www.utrechtlawreview.org/index.php/ulr/article/view/283/284>> at 50.

their nationals.⁴⁶ The jurisdictional scope of Brazil's Clean Company Act goes beyond these requirements and applies to Brazilian companies (regardless of corporate structure), foundations, and associations, as well as foreign companies active in Brazil through branches, subsidiaries, or representative offices, even if de facto or temporary (Art. 1).

While most countries exercise jurisdiction over corruption-related offenses more narrowly,⁴⁷ the extra-territorial reach of the Brazilian law and its broad application to non-Brazilian companies mirror the provisions of the UK Bribery Act concerning the "failure of commercial organizations to prevent bribery," which apply not only to British companies and individuals, but also to foreign companies that carry on any "part of a business" in the UK.⁴⁸ Thus, under both the Brazilian and UK laws, a multinational enterprise that has an office in São Paulo/London could ostensibly face prosecution in Brazil/the UK for bribery that occurred in a different country, even if no act or individual in Brazil/the UK was involved.

d) Principles of Corporate Liability

Consistent with the terms of the UNCAC, OECD Convention, and IACAC, under the Clean Company Act, legal persons can be held liable for misconduct committed by their agents or other intermediaries as well as by their employees, officers, and directors (Art. 5). The Act thus creates strong incentives for corporations to conduct thorough due diligence on and close scrutiny of any consultants, agents, or companies that they hire to act on their behalf. Brazil's comprehensive approach to corporate liability brings it in line with the laws of most other signatories to the OECD Convention, although recent reports from the OECD Working Group do note that the application of foreign bribery laws to legal persons who use intermediaries is incomplete or unsettled in more than a dozen states party.⁴⁹

⁴⁶ UNCAC, *supra* note 22, at Art. 42; OECD Convention, *supra* note 20, at Art. 4; IACAC, *supra* note 21, at Art. V.

⁴⁷ For example, while the jurisdictional scope of the FCPA covers US persons – real and legal – when acting anywhere in the world, with respect to foreign corporations and individuals, liability only extends to issuers of US securities, or those who make corrupt use of US "mails or any means or instrumentality of interstate commerce" or commit any act in furtherance of bribery or attempted bribery of a foreign official while in US territory. 15 U.S.C. §§78dd-1(a), -1(g), -2(i), 3(a), 78l, 78m(b)(2), 78o(d) (2012). Under the CFPOA, non-Canadian companies can be held liable only under territorial jurisdictional principles, which require a "real and substantial" connection between the alleged offense and Canada. *R v. Libman* [1985] 2 SCR 178, 21 DLR (4th) 174 (Supreme Court of Canada).

⁴⁸ Bribery Act (2010) [UK], Art. 7.

⁴⁹ OECD Working Group on Bribery in International Business Transactions (2014), *supra* note 27.

With regard to corporate transactions, the Clean Company Act specifically states that liability under the law is unaffected by changes in corporate ownership, although it limits the magnitude of the potential fine in such cases to the amount of the assets transferred in the merger or acquisition (Art. 4). While criminal and civil successor liability is consistent with general corporate law principles in common law countries, successor liability in civil law jurisdictions is typically restricted to civil liability for fines, disgorgement, and similar financial penalties, ordered by court decision before the merger or acquisition.⁵⁰

e) Enforcement Authority and Procedures

For cases involving the bribery of domestic officials, Chapter IV of the Clean Company Act lays out a basic framework for administrative proceedings, but the specific procedures for imposing corporate administrative liability are articulated in Decree No. 8,420,⁵¹ which was signed by President Dilma Rousseff on March 18, 2015 and took effect the following day. Pursuant to the Decree, violations of the Act shall be investigated and adjudicated through an administrative liability proceeding (Processo Administrativo de Responsabilização, or PAR proceeding). Generally the highest authority of the public entity against which the wrongful act was allegedly committed will have jurisdiction over the PAR proceeding, but, under certain conditions, the Controladoria-Geral da União (Office of the Comptroller General of the Union, CGU) holds concurrent jurisdiction to initiate and conduct PAR proceedings. Circumstances under which the CGU may exercise this discretionary jurisdiction include when the 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.⁵²

According to the Clean Company Act, the CGU also has jurisdiction over administrative enforcement actions involving alleged bribery of foreign officials. In addition, for both domestic and foreign corruption cases, once an administrative proceeding is completed, the committee responsible for

⁵⁰ Mark Pieth, Lucinda A. Low and Nicola Bannucci, “The OECD Convention on Bribery: A Commentary” (2nd ed., 2014). The Czech Republic is a notable exception among civil law countries in that its Corporate Criminal Liability Act provides that “criminal liability of legal persons descends to all its legal successors,” including for cases involving corruption. OECD Working Group on Bribery, “Phase 3 Report on Implementing the OECD Convention on Bribery in the Czech Republic” (2013), online: <<http://www.oecd.org/daf/anti-cbribery/CzechRepublicphase3reportEN.pdf>> at 17.

⁵¹ Brazilian Decree No. 8,420, March 18, 2015.

⁵² *Ibid.* at Art. 13.

determining the liability of the legal entity must give notice to the Public Prosecutors' Office (*Ministério Público*) which can then decide whether to proceed with civil charges (Art. 15). The federal, state, and municipal governments also have the authority to file judicial actions in relation to alleged violations of the Act (Art. 19).

By dispersing the authority to hold administrative proceedings across public entities in cases involving domestic officials, the Act creates the potential risk of uneven levels of enforcement as well as inconsistent rulings and standards. In addition, the entrustment of such proceedings to the highest authority within the public body involved in the alleged corruption may create troubling conflicts of interest. However, as discussed in more detail in Section 3, the concurrent jurisdictional authority exercised by the CGU alleviates some of these concerns as the functional institutional multiplicity it creates may facilitate compensation, collaboration and competition in administrative proceedings. Moreover, the ability of the Public Prosecutors' Office and other government officials to bring civil charges provides an additional check on possible impunity.

The Brazilian approach of allowing corruption-related cases to be brought and heard in multiple fora is not unique among other signatories to the OECD Convention. For example, in Colombia, legal persons can face administrative liability in independent proceedings by the central Superintendence of Corporations or within judicial criminal proceedings against natural persons, as well as civil liability for damages in the court system.⁵³ Under the Administrative Offenses Act, which established corporate administrative liability in Germany, an administrative fine may be imposed against a legal person in cases where a criminal or administrative forum has found that member of the management has committed a corruption-related offense.⁵⁴

f) Penalties

The potential administrative penalties for violations of the Clean Company Act include fines and publication of the administrative decision sanctioning the breaching company in a local or national newspaper, notices at the corporate headquarters, and on its website. The Act establishes that legal entities can be

⁵³ OECD Working Group, "Phase 1 Report on Implementing the OECD Anti-Bribery Convention in Colombia" (2012), online <<http://www.oecd.org/daf/anti-bribery/ColombiaPhase1ReportEn.pdf>> at 11-13.

⁵⁴ OECD Working Group on Bribery, "Germany: Follow-Up to the Phase 3 Report & Recommendations" (2013), online: <<http://www.oecd.org/daf/anti-bribery/GermanyPhase3WrittenFollowUpEN.pdf>> at 8.

liable for fines between 0.1% to 20% of the company's gross revenue (Art. 6), and the Decree specifies the minimum and maximum levels for such fines:

- Minimum: the greater value among (i) the benefit sought or obtained by the company, (ii) 0.1% of the company's gross revenue, and (iii) R\$6,000 (approximately US\$2,300), if the company's gross revenues cannot be determined.
- Maximum: the lesser value between (i) 20% of the company's gross revenue, and (ii) three times the value of the benefit sought or obtained by the company.⁵⁵

Beyond the administrative penalties, legal entities also face severe judicial penalties for violations of the Act, including disgorgement of the benefits sought or obtained by the illegal act; suspension or partial interruption of the company's activities; exclusion from government funding and assistance (e.g., subsidies, grants, loans, donations) for one to five years; and, in extreme cases, dissolution of the legal entity (Art. 19).

These corporate penalties are comparable to those provided under the bribery laws in other signatories to the OECD Convention. For example, under German law, legal persons face a maximum administrative fine of 10 million euros (US\$11 million),⁵⁶ and, under the US FCPA, corporations and other business entities are subject to a criminal penalty of up to US\$2 million per violation or twice the pecuniary gain sought in the corrupt transaction as well as a civil penalty of up to \$16,000 per violation of the anti-bribery provisions.⁵⁷ Like Brazil, other countries such as Australia, Greece, Hungary, and Korea all also allow fines to be calculated based on the advantage gained or intended to be gained through the corrupt act,⁵⁸ while the UK Bribery Act sets no limits on potential fines for corporations. In addition, as under the Brazilian law, legal entities in many jurisdictions also face additional penalties such as confiscation of the proceeds of bribery or disgorgement of ill-gotten profits,⁵⁹ as well as

⁵⁵ Using her line-item veto power, President Rousseff rejected a provision that would have limited the amount of the potential fine to the value of the contract or public tender related to the offense and would thus have provided minimal incentive for parties to refrain from engaging in bribery.

⁵⁶ OECD Working Group on Bribery (2013), *supra* note 54.

⁵⁷ 15 U.S.C. §§ 78dd-2(g)(1)(A)-(B), 78dd-3(e)(1)(A)-(B), 78ff(c)(1)(A)-(B); 18 U.S.C. § 3571(d).

⁵⁸ OECD and The World Bank, "Identification and Quantification of the Proceeds of Bribery" (2012), online: <<http://dx.doi.org/10.1787/9789264174801-en>> at 20.

⁵⁹ *Ibid.*

collateral consequences such as the potential suspension or debarment from public contracting or assistance.⁶⁰

When determining penalties, the Clean Company Act states that authorities can consider the seriousness of the offense, the advantage gained or intended by the offender, whether the offense was fully completed, the degree of damage or risk of damage, the effects of the offense, the company's economic strength of the company, its cooperation with investigating authorities, and the existence of internal compliance controls (Art. 6(6)). The 2015 Decree that complements the Act⁶¹ uses these general criteria to lay out a comprehensive scheme for authorities to calculate the amount of any fine based on a series of aggravating and mitigating factors (Arts. 17 to 19); it further establishes that the specific factors that can be applied to a given case must be determined during the administrative proceeding (Art. 20).

The Clean Company Act also allows authorities to conclude "leniency agreements" with companies accused of misconduct as a means to mitigate potential sanctions. Under the Act and the Decree, entry into a leniency agreement requires a company to cooperate and collaborate "effectively" with the investigation and any administrative proceeding, including identifying the involved parties and expeditiously providing information, documents, and other evidence substantiating the misconduct to the government. The Act and Decree further specify that the CGU may execute leniency agreements relating to violations at the federal level or involving foreign governments. Performance under the terms of a leniency agreement may have one or more of the following benefits for a firm: (i) exemption from publication of the administrative decision sanctioning its misconduct; (ii) exemption from the prohibition on receiving public funding and assistance; (iii) reduction of the fine imposed by up to two-thirds; or (iv) exemption from, or mitigation of, administrative sanctions set out in certain statutes governing public tenders and government contracts.

Most countries join Brazil in allowing officials to take aggravating and mitigating factors, including a company's willingness to cooperate with enforcement authorities, into consideration when determining the level of fines or

⁶⁰ While debarment is discretionary in countries like the United States and Australia, conviction under the Canadian Corruption of Foreign Public Officials Act (CFPOA) results in mandatory debarment. Public Works and Government Services Canada, "Integrity Regime: Ineligibility and Suspension Policy" (July 3, 2015), online: <<http://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html>> Part C §§3(e), 5(e). See also Stuart H. Deming, *Anti-Bribery Laws in Common Law Jurisdictions* (Oxford: Oxford University Press, 2012).

⁶¹ Brazilian Decree No. 8,420, March 18, 2015.

other sanctions to be imposed in corruption cases.⁶² In addition, jurisdictions such as the UK and US allow prosecutors to reach negotiated resolutions with legal and natural persons accused of misconduct that serve a purpose similar to that of Brazil's leniency agreements. Deferred-prosecution agreements (DPAs) and non-prosecution agreements (NPAs) generally require the defendant to agree to pay a monetary penalty, cooperate with authorities, admit the relevant facts, and take specified compliance and remediation measures; in exchange, the government agrees to delay or withdraw criminal charges.⁶³

2. Using Institutional Multiplicity to Fight Corruption in Brazil

While ex-ante mechanisms are intended to prevent or deter actors from engaging in corruption before it takes place, a system of accountability operates ex-post, i.e. only after the corrupt act has occurred. An effective system of accountability requires a "web" of effective institutions that will increase the likelihood that those who engage in corrupt activities will be caught and punished.⁶⁴ In this regard, there are three primary functions that these institutions should perform: (i) oversight, which entails monitoring those occupying positions of power and/or engaged in activities where there is high risk of corruption in order to identify quickly anything suspicious or atypical; (ii) investigation, which is the process of obtaining more detailed information about acts or activities once suspicion has been raised; and (iii) punishment, which is the effective application of sanctions in those cases in which there is sufficient evidence to prove misconduct.⁶⁵

Brazil possesses an extensive stock of anti-corruption legislation.⁶⁶ It also boasts a wealth of accountability institutions charged with monitoring, investigating and

⁶² OECD Anti-Corruption Network for Eastern Europe and Central Asia, *supra* note 39; Ministry of Justice, "The Bribery Act 2010: Guidance" (2010), at 8; Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *supra* note 34, at 52-53; Transcript of Proceedings Taken in the Court of Queen's Bench of Alberta, Judicial Centre of Calgary, "Her Majesty the Queen v. Griffiths Energy International, E-File No.:CCQ13GRIFFITHSENER," (January 25, 2013) Action No. 130057425Q1.

⁶³ See, e.g., Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *supra* note 34; Crime and Courts Act 2013, Schedule 17, online: <<http://www.legislation.gov.uk/ukpga/2013/22/schedule/17/enacted>>.

⁶⁴ Pope *supra* note 10; Scott Mainwaring and Christopher Welna (Eds.), *Democratic accountability in Latin America* (Oxford: Oxford University Press, 2003).

⁶⁵ Matthew M. Taylor and Vinicius C. Buranelli, "Ending Up in Pizza: Accountability as a Problem of Institutional Arrangement in Brazil" (2007), *Latin American Politics and Society*, 49(1), at 59-87; Power and Taylor, *supra* note 3.

⁶⁶ Stocker, *supra* note at 12; Carson and Prado, *supra* note 13.

sanctioning those involved in corruption. The numerous investigations that have uncovered corruption schemes at different levels of the government over the past decade provide evidence of the strong performance of the country's systems of oversight and investigation. There has also been progress in the system of administrative sanctions, although, as discussed in detail below, the judiciary remains a core weakness in Brazil's accountability system.⁶⁷ We have hypothesized that such progress can be partially explained by the duplication of oversight, investigative, and punishment functions among various governmental entities, which we label "institutional multiplicity."⁶⁸ Largely relying on previous work that has been done on this concept, this section explores the instances of institutional multiplicity in Brazil's systems of corruption oversight (National Court of Accounts and Office of the Comptroller General), investigation (Public Ministry, Federal Police Department, and the Comptroller General), and punishment (the Comptroller General, the National Audit Court, and the Brazilian judiciary).

The Brazilian experience suggests that functional institutional overlaps allow for compensation, collaboration and competition among various governmental entities and seem to have played a role in bolstering anti-corruption efforts in Brazil. Thus, the country's experience suggests that institutional multiplicity may provide advantages in combatting a complex governance challenge like corruption, especially in a context where there are flaws or other sources of inefficiency or ineffectiveness in the accountability system as a whole.

2.1 What is Institutional Multiplicity?

The concept of institutional multiplicity has been used by different scholars to refer to different phenomena. For instance, a significant portion of the political science literature has used the concept in connection with analyses of the

⁶⁷ Leonardo Avritzer, "O real combate à corrupção," *Carta Capital* (4 September 2011), online: <<http://www.cartacapital.com.br/sociedade/combate-a-corrupcao-e-programa-de-governo>>;

Fernando Filgueiras, "Transparência e controle da corrupção no Brasil." In: Leonardo Avritzer, Fernando Filgueiras (Eds.), *Corrupção e sistema político no Brasil* (Rio de Janeiro: Civilização Brasileira, 2011) at 133-162; Matthew M. Taylor, "Corruption, accountability reforms and democracy in Brazil." In: Charles H. Blake and Stephen D. Morris (Eds.), *Corruption and Democracy in Latin America* (Pittsburgh: University of Pittsburgh Press, 2009) at 150-68.

⁶⁸ For an analysis of the recent progress, see Bruno W. Speck, "Auditing institutions." In: Timothy J. Power and Matthew M. Taylor (Eds.), *Corruption and democracy in Brazil: the struggle for accountability* (Notre Dame, University of Notre Dame Press, 2011) chapter 6; Arantes, *supra* note 1. For an analysis of the concept of institutional multiplicity in the context of anti-corruption legislation, see Prado and Carson, *supra* note 14.

mechanisms, patterns, and processes of institutional change and stability.⁶⁹ Many sociologists, in contrast, have relied on the concept to analyze heterogeneity in models of action, especially those in processes that culminate in the loss of social order or growth of social entropy.⁷⁰ While the former aims to explain change in formal rules and in organizations, the latter focuses on explaining behavioural and social change. The concept of institutional multiplicity used in this article is closer to the latter, for two reasons.

First, economists and political scientists have often adopted the widely popular definition of institutions provided by Douglass North: “Institutions are the rules of the game of a society, or, more formally, the humanly devised constraints that structure human interactions. They are composed of formal rules (statute law, common law, regulation), informal constraints (conventions, norms of behaviour, and self-imposed codes of conduct), and the enforcement characteristics of both.”⁷¹ However, as Michael Trebilcock and Mariana Mota Prado have argued, this definition of institutions generally strikes lawyers and legal scholars as odd and overly broad:

“the legally prescribed speed limit on a given highway is not considered to be an institution but rather a legal rule promulgated by one set of institutions, enforced by another, and in the event of disputes, adjudicated by yet another. Moreover, by including informal constraints (cultural conventions, norms of behaviour, and self-imposed codes of conduct) in this definition of institutions, the concept of institutions becomes so all-encompassing that it includes almost any conceivable factor that may influence human behaviour and hence risks losing any operational content.”⁷²

A definition of institutions that may be more attractive to lawyers is “those organizations (formal and informal) that are charged or entrusted by a society

⁶⁹ Kathleen Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States and Japan* (New York: Cambridge University Press, 2004). James Mahoney and Kathleen Thelen (Eds.), *Explaining Institutional Change: Ambiguity, Agency, and Power* (New York: Cambridge University Press, 2010); Wolfgang Streeck and Kathleen Thelen (Eds.) *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford: Oxford University Press, 2005).

⁷⁰ Elizabeth S. Clemens and James M. Cook, “Politics and Institutionalism: Explaining Durability and Change” (1999), 25 *Annual Review of Sociology* 441.

⁷¹ Douglass North, “The new institutional economics and Third World development.” In J. Harris et al. (Eds), *Economics and Third World Development* (London: Routledge, 1995).

⁷² Michael Trebilcock and Mariana Mota Prado, *Advanced Introduction to Law and Development* (Massachusetts: Edward Elgar Publishing), Chapter 3.

with making, administering, enforcing, or adjudicating its laws or policies”.⁷³ This is the definition adopted by organizational and economic sociologists and endorsed in this article.⁷⁴

Second, this article explores the possibility that the existence of more than one institutional option may change individuals’ choices and behaviours. Thus, rather than explaining why there have been such significant institutional and legal reforms in the Brazilian anti-corruption system in recent years (such as the creation of the Office of the Comptroller General and the strengthening of the Federal Police),⁷⁵ our analysis focuses on the potential for behavioural change in environments in which institutional and legal changes have already taken place. In this regard, our conception of institutional multiplicity is closer to the one often adopted by sociologists. As Clemens and Cook explain, a lack of institutional alternatives can generate regularities of social action, which are then taken for granted.⁷⁶ In the Brazilian case, such established patterns include the expectation that efforts against corruption will not succeed and that individuals and companies, especially those in positions of power, will continue to engage in corrupt activities with impunity. In this context, the creation or existence of alternative institutional paths to hold corrupt actors accountable can generate contradictions that destabilize these existing regularities of action.⁷⁷ More specifically, institutional multiplicity has the potential to generate an external contradiction, i.e. the behavioural regularities observed in one institution are challenged by contradictory behavioural patterns followed by another institution.

For example, individuals in one accountability institution with a history of inaction or ineffectiveness may be unable to change their behaviour in that context, but a new institution may not set up the constraints that existed in the old one, creating space for effective accountability by setting up under different incentives and operating under a different culture. And the change can be even more drastic: once those in the old and inefficient institution starts to observe their counterparts in another institution proactively investigating or prosecuting

⁷³ Michael Trebilcock and Mariana Mota Prado, *What Makes Poor Countries Poor? Institutional Determinants of Development* (Massachusetts: Edward Elgar, 2011), at 27-28.

⁷⁴ Clemens and Cook, *supra* note 70, at 442.

⁷⁵ For an article focused on this, see Sergio Praça and Matthew M. Taylor, “Inching Toward Accountability: The Evolution of Brazil’s Anticorruption Institutions, 1985–2010” (2014), *Latin American Politics and Society* 56 (2), at 27–48.

⁷⁶ Clemens and Cook, *supra* note 70, at 446.

⁷⁷ See, M., W. E. D. Creed, “Institutional contradictions, praxis, and institutional change: A dialectical perspective” (2002) *Acad. Management Rev.* 27(2) 222–247; Tammar B. Zilber, “Institutional Multiplicity in Practice: A Tale of Two High-Tech Conferences in Israel” (2011), *Organization Science*, 22(6):1539-1559.

corruption, they may begin to question their negative assumptions about their own institution's potential role in combatting corruption.

However, while the concept of institutional multiplicity used in this article is closer to the one often adopted in the sociological literature, it does not fully overlap with it; specifically, we look beyond those factors identified in the sociological literature to embrace a wide array of potential causal explanations as to how institutional multiplicity can generate change. As discussed by Clemens and Cook, there are two potential mechanisms that can effect change in behavioural patterns: socialization and institutional incentives. Both have significant power in explaining observed changes, as illustrated by the following analogy: "if a mouse repeatedly takes the same path across a table, this regular path may be due to either to the presence of a maze that obstructs many possible changes in direction or to effective socialization through behaviour modification. However, since the mouse may be well socialized and in a maze, these 'institutionalisms' are properly understood as complements, rather than mutually exclusive explanations."⁷⁸ Thus, while the focus of our analysis is on the creation of formal institutions that offer alternative paths and how this new "maze" may be modifying behaviour, we do not dismiss the possibility that the causal mechanism that may be allowing for changes to take place in such alternative institutional pathways also include informal mechanisms, such as socializing actors in a different institutional culture.

While the causal mechanisms that explain behavioural change may be quite distinct for economists, political scientists, and sociologists, these disciplines share a generally consistent approach to explaining why there is lack of change in many circumstances. As described by path dependence theory,⁷⁹ once an institution has been established, various feedback effects and self-reinforcing mechanisms make it increasingly more costly and difficult to enact serious reform (or eliminate it entirely), even when its performance is sub-optimal. Institutions and institutional arrangements often foster increasing returns, such that the benefits of maintaining the status quo – and the relative costs associated with pursuing alternatives – grow over time as more and more people become invested in the existing framework. Cognizant of these obstacles to change, so-called historical institutionalists frequently characterize institutional

⁷⁸ Clemens and Cook, *supra* note 70.

⁷⁹ For a review of the political science literature on path dependency, see Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," (2000) 94 *American Political Science Review* 251 at 252–7. See also Mariana Prado and Michael Trebilcock, "Path Dependence, Development, and the Dynamics of Institutional Reform" (2009) 59 *University of Toronto Law Journal* 341; Brian Arthur, "Increasing Returns and Path Dependence in the Economy" (Ann Arbor: University of Michigan Press, 1994).

evolution as a process “characterized by relatively long periods of path-dependent institutional stability and reproduction that are punctuated occasionally by brief phases of institutional flux – referred to as critical junctures – during which more dramatic change is possible.”⁸⁰ However, the literature on institutional change has increasingly challenged this dualist view of institutional development as a contrast between periods of stability and significant change to emphasize that institutional transformation is often incremental.⁸¹

The idea that institutional and behavioural change is associated with multiple institutional pathways is captured by a number of different concepts in the literature. So-called institutional “layering”⁸² describes a process of gradual institutional change that occurs as the result of introducing new rules or creating new organizations without eliminating existing ones. Closely related to the concept of institutional layering and partially overlapping with it is the concept of institutional bypass.⁸³ An institutional bypass has three characteristics: (1) it keeps the traditional institution in place; (2) it creates an alternative pathway through which to deliver government services or discharge governmental functions (which becomes an option to those using the services); and (3) it tries to be more efficient or functionally effective than the traditional institution.⁸⁴ Bypasses are a specific type of layering. For example, while layering includes the introduction of new rules that fundamentally change the way existing institutions work,⁸⁵ institutional bypass is limited to situations in which newly-established institutions operate independently and in parallel to pre-existing institutions, while performing essentially the same functions.⁸⁶

⁸⁰ Giovanni Capoccia and R. Daniel Kelemen, “The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism” (2007), 59(3) *World Politics* 341-69, at 341.

⁸¹ See, e.g., James Mahoney and Kathleen Thelen, “A Theory of Gradual Institutional Change.” In *Explaining Institutional Change: Ambiguity, Agency, and Power*, *supra* note 69, at 1-37; Eric Schickler, *Disjointed, Pluralism: Institutional Innovation and the Development of the U.S. Congress* (Princeton: Princeton University Press, 2001), at 252-54; Wolfgang Streeck and Kathleen Thelen, “Introduction: Institutional Change in Advanced Political Economies.” In *Beyond Continuity: Institutional Change in Advanced Political Economies*, *supra* note 69, at 1-39.

⁸² Thelen (2004), *supra* note 69.

⁸³ Graham D. Willis and Mariana M. Prado, “Process and Pattern in Institutional Reforms: The Police Pacifying Units in Brazil as an Institutional Bypass” (2014), *World Development*, Vol. 64, at 235.

⁸⁴ Mariana M. Prado, “Institutional Bypass: An Alternative for Development Reform” (2011), online: SSRN <<http://ssrn.com/abstract=1815442>>.

⁸⁵ Schickler, *supra* note 81 at 16 (describing how the superimposition of new budget committees on a decades-old structure of authorization, appropriations, and revenue committees in the U.S. Congress altered the process of developing fiscal policy).

⁸⁶ For the distinction between institutional bypass and institutional layering, see Willis and Prado (2014). See also, Thelen (2004), *supra* note 69 (detailing how establishment of an alternate

While institutional multiplicity is not necessarily the same as layering or bypass, it does share with both these concepts some important characteristics. The idea of institutional multiplicity is broad enough to embrace the cases of layering in which the changes happen through the creation of a new institution as well as cases of bypasses. However, not all cases of institutional multiplicity can be described as layering or bypass. Layering, on the one hand, comprises “a partial renegotiation of elements of a given set of institutions while leaving others in place.”⁸⁷ An example of layering in the Brazilian context is the creation of special “judicial bancs” (*varas especializadas*) to evaluate money-laundering cases. The initiative was implemented as an option for federal tribunals in 2003,⁸⁸ and, after showing significant results, these specialized judicial bancs became mandatory for federal appeals tribunals in 2013.⁸⁹ This is a case of layering because it adds a new element into the system, but prosecutors still cannot choose in which forum their cases will be heard. An example of bypass, on the other hand, can be found in Indonesia where prosecutors have the option of bringing corruption-related cases in conventional courts or in specialized anti-corruption courts that operate in parallel.⁹⁰ These courts offer a bypass because they create a choice of forum for prosecutors. In the context of accountability systems more broadly, institutional multiplicity embraces any diversification of functions, such as the common existence of multiple forms and layers of punishment options that reinforce each other. For example, in cases involving political corruption, offenders may face a series of overlapping penalties, including electoral sanctions from the public at the ballot box, political sanctions such as censure or administrative removal from

accreditation committee by Germany’s machine industry bypassed the pre-existing handicraft chambers without directly changing the rules or operation of that organization).

⁸⁷ Kathleen Thelen, “The Political Economy of Business and Labor in the Developed Democracies: Agency and Structure in Historical Institutional Perspective.” In Ira Katznelson and Helen Milner (Eds.), *Political Science: The State of the Discipline* (New York: W.W. Norton; Washington, D.C.: American Political Science Assn, 2002), at 225.

⁸⁸ CJF Resolutions 314/03, and 517/06.

⁸⁹ CJF Resolution 273/13.

⁹⁰ Simon Butt, “Indonesia’s Anti-Corruption Drive and the Constitutional Court” (2009) 4(2) *Comp L J* 186; Sofie Arjon Schütte, “Appointing Top Officials in a Democratic Indonesia: The Corruption Eradication Commission” (2011) 47(3) *Bulletin of Indonesian Economic Studies* 355; Sofie Arjon Schütte, “Against the Odds: Anti-Corruption Reform in Indonesia” (2012) 32 *Public Admin & Development* 38. While the Indonesian Supreme Court recently declared the anti-corruption judiciary unconstitutional, after a few reforms, the specialized courts are now operational again. Simon Butt, “Anti-Corruption Reform in Indonesia: An Obituary?” (2012) 47(3) *Bulletin of Indonesian Economic Studies* 381; Simon Butt and Sofie Arjon Schütte, “The Indonesian Court for Corruption Crimes: Circumventing Judicial Impropriety?” (2013) U4 Brief September 2013 No 5.

office, and negative coverage in the media coverage, as well as formal legal sanctions, such as criminal or civil judgments.⁹¹

Returning to the specific example of Brazil's Clean Company Act, the creation of accountability processes that can culminate in administrative sanctions for legal entities which have engaged in corruption is therefore a case of multiplicity, rather than layering or bypass. As in cases involving layering and bypasses, the establishment of administrative process and sanctions do not affect the existing sanctioning institution – the judiciary. However, unlike layering and bypass, the new administrative system runs parallel to the judicial system but does not perform exactly the same functions. Similarly to electoral or political sanctions, the administrative sanction is complementary to and independent of the judicial sanction. Moreover, it is subordinated to judicial scrutiny. Thus, unlike the examples of layering and bypass, the new administrative system does not provide a functional equivalent to the existing judicial system of punishment; however, as we argue below, this new approach to sanctioning corrupt entities has the potential to overcome obstacles in the existing accountability system.

Despite the differences among the concepts of institutional multiplicity, layering, and bypass, all three arrangements have particular advantages in overcoming entrenched barriers to institutional change. The establishment of an alternative communicates to parties both within and outside that pre-existing institution that the status quo is not inevitable or necessarily interminable.⁹² It thus introduces the possibility of a new institutional framework that may lead to stronger performance and outcomes. Moreover, outright and abrupt institutional displacement – the supplantation of one institution by a new one – may generate intense opposition from constituencies invested in (or who benefit under) the current framework. Institutional layering, bypass, and multiplicity can create displacement over time and in the long term, but in the short term they leave intact existing institutions and merely provide alternative paths for achieving the same or similar objectives.⁹³ For this reason, these three arrangements may ignite less direct antagonism.⁹⁴ Finally, the presence of multiple institutional referents

⁹¹ Power and Taylor (2011), *supra* note 3, at 14.

⁹² See Zilber, *supra* note 77, at 1540.

⁹³ See Mahoney and Thelen (2010) *supra* note 69, describing slow-moving displacement: “[D]isplacement exists when existing rules are replaced by new ones. This kind of change may well be abrupt, and it may entail the radical shift that is often featured in leading institutional theories (...). Yet, displacement can also be a slow-moving process. This may occur when new institutions are introduced and directly compete (rather than supplement) an older set of institutions.”

⁹⁴ See Schickler, *supra* note 81, at 252.

“enlarges the toolbox from which reformers can draw in crafting new solutions, facilitating deeper change.”⁹⁵

Broadly, institutional multiplicity can combat corruption by limiting opportunities for corruption (proactive institutional multiplicity) or by increasing the likelihood of catching and sanctioning corrupt behavior (reactive institutional multiplicity). Examples of proactive institutional multiplicity to reduce opportunities for corruption include the elimination of monopolies in the provision of services. For example, Susan Rose-Ackerman has argued that, rather than entrusting a single official with the power and discretion to issue a given license or provide another service, multiple officials should be granted such authority so that a private party who is solicited for a bribe by one agent can simply turn to another to secure the service honestly.⁹⁶ While intuitively compelling, this strategy is subject to several drawbacks and qualifications. First, there is a risk of unintended consequences: while competing jurisdictions may decrease bribes, it can increase the amount of total theft from the government.⁹⁷ Second, institutional competition can also create more opportunities for corruption: if I want to obtain a license that I do not qualify to obtain, having two officials to approach with a bribe, rather than one, may increase the chances that I will be successful. Third, the implementation of an effective system of institutional multiplicity depends on the possibility of establishing competing jurisdictions, which may not be possible due to limited resources or the type of service delivered. Fourth, it requires the creation and cultivation of an institutional structure in which competition creates incentives to improve performance; if institutional multiplicity merely facilitates shirking by one or more employees or agencies, it will be ineffective in helping to curtail corruption and may simply waste resources.⁹⁸

Institutional multiplicity as a reactive tool for combatting corruption, in turn, involves generating alternative avenues through which authorities may monitor, investigate, and punish corruption. When it is possible for multiple institutions to independently monitor, investigate and pursue administrative, civil,

⁹⁵ Matt Andrews, *The Limits of Institutional Reform in Development: Changing Rules for Realistic Solutions* (Cambridge: Cambridge University Press, 2013), at 182 (citing Elinor Ostrom, *Design Principles of Robust Property-Rights Institutions: What Have We Learned?*, In K.G. Ingram and Y.-H. Hong (Eds) *Property Rights and Land Policies* (Cambridge: Cambridge University Press, 2008), at 25-51).

⁹⁶ Susan Rose-Ackerman. *Corruption: A study of political economy* (New York, NY: Academic Press, 1978).

⁹⁷ Andrei Shleifer and Robert W. Vishny, “Corruption” (1993), *Quarterly Journal of Economics*, 108, at 599-617.

⁹⁸ Pranab Bardhan, “Corruption and development: a review of issues” (1997), *Journal of Economic Literature*, 35(3), at 1320-46.

and criminal charges based on suspicions or detected irregularities, the likelihood that those engaged in corruption will be held accountable will rise. The assumption is that institutional overlap can enhance the overall effectiveness of the “web” of accountability institutions by avoiding self-reinforcing mechanisms or corrupt institutional cultures and fostering institutional competition.⁹⁹

Institutional multiplicity as a reactive tool has a number of potential benefits. First, it arguably fosters competition to improve institutional efficiency.¹⁰⁰ This idea is present in the broader rule of law literature; for example, Thomas Heller has recommended institutional multiplicity as a strategy to overcome obstacles to rule of law reforms in developing countries.¹⁰¹ Effective change in established organizations, Heller argues, can only come about when organizations are motivated by incentives that come with competition; where multiple legal organizations have non-exclusive jurisdiction, the ability of the incumbent institution to resist change is reduced. Applied to the issue of corruption, competition can create pressure for organizations to address those obstacles that hamper their ability to combat corrupt activity effectively. Second, institutional overlap can serve a gap-filling function in instances when institutions fail to perform their duties in regard to investigating and punishing corrupt activity.¹⁰² Corruption is a complex, secretive activity and therefore presents unique challenges to investigative officials. As such, functional overlap may be the best mechanism to ensure that corruption, whether entrenched or opportunistic, is ultimately exposed. Institutional multiplicity could reduce the risk of failures in each step of the corruption accountability process. Third, institutional multiplicity could result in collaboration and complementarity.¹⁰³ In this situation there is, first, a benefit to enforcement to the extent that institutional multiplicity corresponds to more available human, financial, and other resources. Moreover, cooperation between institutions could result in specialization, where different institutions contribute different skills to perform a particular task, and these different sets of skills complement each other, improving overall effectiveness in tackling corruption. These advantages suggest that institutional multiplicity may, in some instances, be an effective strategy for combatting corruption.

⁹⁹ Prado and Carson, *supra* note 14.

¹⁰⁰ *Ibid.*

¹⁰¹ Thomas Heller, “An Immodest Postscript.” In Thomas Heller and Erik Jensen (Eds.), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford: Stanford University Press, 2003), at 382-419.

¹⁰² Prado and Carson, *supra* note 14.

¹⁰³ *Ibid.*

While reactive institutional multiplicity can offer benefits, it also has a number of potential drawbacks. First, because institutional overlap implies duplication it can sometimes be an inefficient allocation of resources, especially in the short term, and this concern is particularly relevant in low-income developing countries with scarce fiscal resources that struggle to provide adequate coverage for other societal needs, such as education and health. Second, in some contexts institutional multiplicity may engender destructive competition and encourage individuals in one institution to act in a manner that undermines the efforts of their counterparts in another institution. Third, insofar as institutional multiplicity increases the number of officials with the power to investigate and punish corruption, there may be an increased incidence of corruption in the processes of holding individuals accountable for corruption. For example, institutional multiplicity may increase the number authorities from multiple (corrupt) investigation institutions who are able to extract bribes by threatening innocent citizens with false charges. We acknowledge these limitations, which should be considered in a careful cost-benefit analysis on a case-by-case basis, taking into consideration the resources, capacities, and policy needs within individual countries or societies. As such, a strategy of institutional multiplicity should be undertaken only after careful consideration of the potential benefits and drawbacks, based on the specific context.

2.2 Institutional Multiplicity in Brazil

Since 2005, there has been a generally a considerable number of high-profile and widely publicized corruption-related “operations,” which typically involve the execution of arrest or search and seizure warrants as well as the participation by the Public Prosecutors’ Office (*Ministério Público*) or other bodies such as the Revenue Service, the Social Security Ministry, the state police, or regulatory agencies.¹⁰⁴ In addition to these criminal and civil investigations, there have also been a number of administrative investigations, including those related to the various audits regularly conducted by the CGU.¹⁰⁵ This heightened activity by

¹⁰⁴ Arantes, *supra* note 1, p. 200.

¹⁰⁵ Internal audit of the Brazilian federal administration is highly centralized in the CGU, although every public body has an Internal Audit Advisor. State-owned and mixed-capital enterprises have their own internal audit functions. The CGU performs an extensive range of different audits, e.g. performance audits, financial audits, audits to assess performance of subnational delivery of federal programs, and investigative audits. According to the OECD, “During 2008, over 3,200 complaints or requests for investigations were received, of which nearly 2,500 were audited. The gap between the number of complaints received and those that are addressed (25%) was due, in many cases, to a lack of data or consistency of the information provided through a preliminary review of information. Some 900 inspections were completed in 2008, spanning 348 municipalities and involving a number of federal programmes within, among others, the Federal Ministries of Cities, Health, Education, Social Development and Fight against Hunger.” OECD

Brazilian authorities in the realm of corruption over the past ten years has been particularly notable given its contrast to the previous weakness and paucity of anti-corruption initiatives in the country. What could explain what has been perceived as significant changes in the system, and what lessons can be learned from them?

While increases in the number of cases could be interpreted as evidence suggesting that bureaucratic waste and corruption spiked dramatically over that period, the specialized literature has suggested that the escalations may more appropriately reflect changes in the anti-corruption institutions capacity, resources, policies, or procedures.¹⁰⁶ Similarly, the higher number of investigations by the Public Prosecutors' Office may reveal "more on the traits of how the criminal code is applied than on the crime in question."¹⁰⁷ Nevertheless, Prado and Carson argue that institutional multiplicity may explain, at least partially, why the Brazilian federal government's accountability system has demonstrated strong vitality, especially in monitoring and investigating corruption.¹⁰⁸

2.2.1 Institutional Multiplicity in Oversight

At the federal level, there is a multitude of institutions performing constant monitoring of the government in Brazil, but our analysis focuses on two core oversight institutions: National Court of Accounts (*Tribunal de Contas da União*, TCU) and Office of Comptroller General of the Union (*Controladoria-Geral da União*, CGU).

The external oversight body for the legislative and executive branches, the TCU possesses institutional guarantees of autonomy akin to an independent central bank or an independent regulatory agency. As part of its oversight and monitoring activities, the TCU assists Congress in the preparation and execution of the federal budget, inspects annual financial reports from all offices of the public administration, and approves the hiring, retirement, and pension policies for all civil servants (Federal Constitution art. 71, I, II and III). Each year the TCU's staff of 2,400 people inspects roughly 3,000 annual financial reports from

Public Governance Reviews OECD Integrity Review of Brazil Managing Risks for a Cleaner Public Service: Managing Risks for a Cleaner Public Service (2012), p. 203.

¹⁰⁶ For a literature review, see Carson and Prado, *supra* note 13.

¹⁰⁷ Bruno W. Speck, *Mensurando a corrupção: uma revisão de dados provenientes de pesquisas empíricas*. In: *Cadernos Adenauer 10: Os custos da corrupção*. São Paulo: Fundação Konrad Adenauer 2000, p. 11.

¹⁰⁸ Prado and Carson, *supra* note 14.

various government offices and processes several thousands of cases involving the employment and retirement of civil servants.¹⁰⁹

CGU is part of the executive branch. Despite being responsible for internal accountability within the executive branch, CGU can be considered an instrument of horizontal accountability.¹¹⁰ Notable among its functions is its program to audit the use and management of federal transfers by municipalities. Brazil has over 5,000 municipalities and the CGU does not have resources to audit all of them. Thus, it uses a lottery to randomly select those of up to 500,000 inhabitants that will be audited, around a total of 60 municipalities in average twice per year.¹¹¹ This is known as the Random Audits Program (*Programa de Fiscalização a partir de Sorteios Públicos*).¹¹² There have been studies indicating that such audits have been effective in reducing corruption at the local level, especially in education and health, and the likelihood that corrupt mayors are reelected.¹¹³ Another important initiative is the Observatory of Public Expenses (*Observatório de Despesa Pública*),¹¹⁴ which develops technology to constantly evaluate patterns in public expenditures at the federal level. The initiative has received multiple international awards, including the United Nations Public Service Award in 2011.¹¹⁵ The CGU's Directorate of Strategic Information also conducts a less publicly visible monitoring program which involves cross-checking data in

¹⁰⁹ Speck (2011), *supra* note 68.

¹¹⁰ Cecília Olivieri. "O controle interno como instrumento de accountability horizontal: uma análise exploratória da Controladoria Geral da União" (2006), Paper presented at the Meeting of Public Administration and Governance, online: <<http://admsp20061.wikispaces.com/file/view/O+Controle+Interno+como+Instrumento+de+Accountability+Horizontal+-+Cec%C3%ADlia+Olivieri.pdf>>.

¹¹¹ Marcus A. Melo, "Brazil: democracy and corruption", Democracy consensus project seminar (Rio de Janeiro: Legatum Institute, 15 May 2013).

¹¹² For a program description, see Claudio Ferraz and Frederico Finan, "Exposing Corrupt Politicians: The Effects of Brazil's Publicly Released Audits on Electoral Outcomes" (2008) 123(2) Q J Econ 703; CGU, "Programa de Fiscalização a partir de Sorteios Públicos" (2014), Random Audits Program, online: <<http://www.cgu.gov.br/english/AreaAuditoriaFiscalizacao/ExecucaoProgramasGoverno/Sorteios/index.asp>> (English) <<http://www.cgu.gov.br/controleinterno/AvaliacaoExecucaoProgramasGoverno/Sorteios/index.asp>> (Portuguese).

¹¹³ Ferraz and Finan, *supra* note 112; Claudio Ferraz and Frederico Finan, "Electoral Accountability and Corruption: Evidence from the Audits of Local Governments" (2011) 101(4) Amer Econ Rev 1274; Yves Zamboni and Stephan Litschigz, "Audit Risk and Rent Extraction: evidence from random audit reports" (2013), online: <<http://www.aeaweb.org/2013conference/program/retrieve.php.pdf>>.

¹¹⁴ See: CGU, online: <<http://www.cgu.gov.br/ODP/index.asp>>.

¹¹⁵ See: CGU, online: <<http://www.cgu.gov.br/ODP/premios.asp>>.

publicly available databases, in search for evidence of misuse of misappropriation of federal government funds.¹¹⁶

The institutional multiplicity created by the coexistence of these two separate monitoring authorities appears to have helped to redress some of the internal weaknesses in each organization – especially the TCU – and improve overall oversight in the country.

Despite being formally touted as an archetypical auditing institution,¹¹⁷ three characteristics of the TCU undermine its efficacy in fighting corruption. First, TCU officials spend most of their time on routine monitoring tasks such as the preparation of the audit statement of the government’s annual accounts, review of annual financial reports from all units of government managing public funds, and approval of policies related to civil servants’ employment and retirement, rather than detecting irregularities or analyzing systematically areas in which there is greater risk of corruption.¹¹⁸ Second, the TCU’s governance structure is perceived to be dysfunctional. Despite being independent from Congress, and relying on a cadre of highly qualified and professional civil servants, the top echelon of politically-appointed and organizationally-powerful ministers has strong incentives to block politically sensitive issues and topics.¹¹⁹ Thus, as illustrated by the labour court case (TRT case) described below, the TCU is vulnerable to political capture.¹²⁰ Third, the liberal accessibility of judicial appeals limits the ability of the TCU to punish effectively those involved in wrongdoing. While, as described below, the TCU may impose administrative and civil penalties, regular courts often strike down such sanctions or take so long to decide on these cases that they end up being closed due to the statute of limitations.¹²¹

The municipal ambulance kickback scheme eventually uncovered through “Operation Bloodsucker” provides an illustrative example of how institutional

¹¹⁶ See: CGU, online:

<<http://www.cgu.gov.br/PrevencaoDaCorrupcao/InformacoesEstrategicas/index.asp>>.

¹¹⁷ Carlos Santiso, “Eyes wide shut? The politics of autonomous audit agencies in emerging economies” (Centro de Implementación de Políticas Públicas para la Equidad y el Crecimiento (CIPPEC) Document de Trabajo, 2007), online:

<[http://siteresources.worldbank.org/EXTFINANCIALMGMT/Resources/313217-1196229169083/4441154-1196273114377/4444384-](http://siteresources.worldbank.org/EXTFINANCIALMGMT/Resources/313217-1196229169083/4441154-1196273114377/4444384-1196273135391/Santiso2007EyesWideShutWorkingPaper.pdf)

[1196273135391/Santiso2007EyesWideShutWorkingPaper.pdf](http://siteresources.worldbank.org/EXTFINANCIALMGMT/Resources/313217-1196229169083/4441154-1196273114377/4444384-1196273135391/Santiso2007EyesWideShutWorkingPaper.pdf)>.; Melo, *supra* note 111.

¹¹⁸ Speck (2011), *supra* note 68; Melo, *supra* note 111.

¹¹⁹ *Ibid.*

¹²⁰ Santiso, *supra* note 117; Alexandre Rocha, “Especialização e autonomia funcional no âmbito do Tribunal de Contas da União” (2003), *Revista de Informação Legislativa*, 40 (157), at 223-251.

¹²¹ Santiso, *supra* note 117; Speck (2011), *supra* note 68; Melo, *supra* note 111.

multiplicity has proven an effective strategy at addressing some of these core challenges within the TCU. The TCU's formalistic and ossified auditing processes initially failed to detect the scheme, which involved kickbacks to members of Congress for the sale of overpriced ambulances and other medical equipment to municipal governments. However, as part of the aforementioned program of random municipal audits,¹²² in 2004 the CGU came across irregularities in the public procurement processes used in some municipalities to purchase ambulances for the public health care system; specifically they discovered that many municipalities had purchased non-operational or used vehicles despite the fact that the government had paid for new ones, and that many cities that had initiated procurement processes to acquire more vehicles had recently bought ambulances that were not in use.¹²³ Upon finding these irregularities, the CGU sent a document to the Minister of Health indicating that there was a group manipulating procurement processes at the local level across the country and embezzling public funds through the sale of overpriced ambulances to municipalities. The CGU asked the Minister to take the necessary measures to address the failures in procurement processes, while at the same time alerting the Federal Police about the case. In 2006, the federal police unveiled that a total of 1,000 ambulances had been purchased in this scheme, involving a total of US\$55 million. In the same year, Congress started its own internal investigation through a Parliamentary Commission of Inquiry (*Comissão Parlamentar de Inquérito*, CPI). The CPI recommended that 72 congressional representatives be removed from office for being involved in the scheme, but none were expelled or faced any other penalty.¹²⁴ The lack of sanctioning is a problem that we address below.

The CGU's ability to catch an irregularity that had not been detected by the TCU is partially due to the fact that CGU analyzes the effectiveness of government programs, not only the formalities associated with expenditures.¹²⁵ The bloodsucker scandal may thus be an example of **compensation** or **complementarity**. Some may argue that the TCU's failure to detect the scheme reflects deficiencies in its auditing process, while the CGU's success in identifying the irregularities indicates that their auditing methods are

¹²² See *supra* note 112.

¹²³ Leonardo Souza, "Quadrilha vendia ambulâncias com defeitos a prefeitos," *Folha de São Paulo* (23 May 2006), online: <<http://www1.folha.uol.com.br/fsp/brasil/fc2305200620.htm>>.

¹²⁴ Power and Taylor, *supra* note 3, at 3; Marcelo Rocha, "Como se Desvia Dinheiro no Brasil," *Revista Época* (22 July 2012), online: <<http://revistaepoca.globo.com/ideias/noticia/2012/01/como-se-desvia-dinheiro-no-brasil.html>>.

¹²⁵ Maria Rita G. Loureiro, F.L. Abrúcio, C. Olivieri, and Marco Antonio Teixeira, "Do controle interno ao controle social: a múltipla atuação da CGU na Democracia Brasileira" (2012), *Cadernos Gestão Pública e Cidadania*, São Paulo, v. 17, n. 60, Jan./Jun. 2012, at 54-67.

more effective. If so, this would be a case of compensation. On the other hand, one may claim that this is simply a result of two distinct – but sound – auditing methods. The monitoring techniques of the CGU were specifically designed with different parameters than those used by the TCU in order to increase the likelihood that each institution could catch things undetected by the other.¹²⁶ The CGU auditors’ detection of irregularities that were not captured by the TCU’s analysis would thus provide an example of complementarity. Regardless of whether the “bloodsucker” incident is interpreted as a case of compensation or complementarity, the corrupt scheme was uncovered by authorities and thus illustrates how overlapping oversight functions may increase the chances that wrongdoing will be detected.

Institutional multiplicity has also been effective in overcoming the second problem of TCU, which Melo describes as “a lack of connection between the professional work produced by [the TCU’s] cadre of auditors and the political logic that underlies decision-making at its top decision-making body”.¹²⁷ There is some dispute as to how much this affects the functioning of TCU.¹²⁸ Figueiredo claims that such impact is high: “the recommendations contained in the reports prepared by the TCU’s technical personnel are usually not followed by its board of ministers for political reasons”.¹²⁹ Based on that, another political scientist concludes that, “[the TCU’s] effectiveness depends primarily on the extent to which other actors – such as the media or opposition legislators – can publicize its audits”.¹³⁰ In this case, there is **compensation**, as other institutions are stepping in to compensate for the failures of the original institution.

¹²⁶ Prado and Carson, *supra* note 14 (citing interviews conducted at TCU in April 2014).

¹²⁷ Melo, *supra* note 111, at 21.

¹²⁸ In an interview, a high level official at TCU argued that the percentage of cases in which there is this level of disagreement is low. The official emphasized that the decisions of the political cadre need to be justified when they are not in line with the technical report. This creates an accountability system, in which those trying to politically manipulate the process can be identified. The issue is whether there is any sanction associated with this. Except for possible reputational sanctions, there do not seem to be any consequences (especially if we consider that most of those occupying positions in the political body are politicians at the end of their careers). An official of an accounting tribunal at the state level (TCE) challenged this statement by suggesting that while the percentage of cases in which there is disagreement between the technical and the political body may be small, these may actually be the most significant cases. Only a comprehensive assessment of all cases would be able to provide insight as to who is right.

¹²⁹ Argelina C. Figueiredo, “Routine Oversight Mechanisms Under the 1988 Constitution: Legal and Organizational Empowerment and Actual Capacity.” In: Scott Mainwaring and Christopher Welna (Eds.), *Democratic accountability in Latin America* (Oxford: Oxford University Press, 2003) at 185.

¹³⁰ Melo, *supra* note 111 at 23.

A good example of the importance of institutional multiplicity in providing an alternative channel for the technical cadre of auditors to seek further investigation of suspicious activity is the case of corruption scandal involving the labour court in the state of São Paulo (also known as the TRT case). As Power and Taylor describe, “the cost of building the Regional Labor Court in São Paulo during the 1990s was inflated nearly fourfold, with proceeds on the order of US\$100 million allegedly appropriated by Judge Nicolau dos Santos Neto (commonly referred to as ‘Lalau’), with the participation of a senator, Luiz Estevão, and the president and vice president of the construction company that won the building contract.”¹³¹ The scandal came to the fore in 1998, but the auditors of the TCU had called attention to numerous irregularities back in 1992, when the building was simply a project.

An analysis of the paperwork revealed so many irregularities that the 1992 auditing report suggested cancelling the contract with the construction company, withholding any future transfers from Congress to the project, ordering the return of all money already transferred to the federal government, and conducting a thorough investigation of the project. In 1993, that report reached the highest echelon of the TCU, but the minister initially assigned to the case kept the case moving at glacial pace, allowing the construction (and the corruption scheme) to move forward. In 1995, the minister initially assigned to the case retired, and the new minister in charge took an entire year to evaluate it. In 1996, the TCU issued a decision: there were indeed irregularities, but since the construction had already started, and a lot of money had already been spent, the minister argued that interrupting project at this point would be costlier (due to the waste) than allowing it to be concluded. It is estimated that those involved in the scheme embezzled around US\$35,000/day during this period, which included kickbacks to senators who approved the transfer of federal funds to the construction project.¹³²

The TCU’s failure in monitoring this project was finally remedied by a member of Congress, the Public Prosecutor’s office, and the media.¹³³ In 1996,

¹³¹ Power and Taylor, *supra* note 3, at 2.

¹³² Veja, “A Anatomia do Crime,” *Revista Veja* (2 August 2000), online: Veja <http://veja.abril.com.br/020800/p_038.html>.

¹³³ Brazil has witnessed a dramatic increase in investigative journalism since the return to democracy, and the press has made valuable contributions to the discovery and investigation of incidents of political corruption. Venicio Artur de Lima, *Mídia: Crise Política e Poder no Brasil* (São Paulo: Editora de Fundação Perseu Abramo, 2006). However, political and ideological interests continue to exercise influence over the country’s media, and journalists face harassment, censorship, and violence. Claudio Weber Abramo, “Brazil: A Portrait of Disparities” (2007) 3(1) *Brazilian Journalism Research* 93; Mauro P. Porto, “The Media and Political Accountability” in Timothy J. Power and Matthew M. Taylor (Eds), *Corruption and Democracy in Brazil: The Struggle for Accountability* (Notre Dame: University of Notre Dame Press, 2011), Chap. 5, at 107;

Senator Giovanni Queiroz blocked a special transfer to the TRT project (amounting to US\$5.5 million) during a regular congressional session, only to find out that the same transfer was eventually approved in December, when Congress was in recess and only a few representatives remained at work to deal with urgent matters. Senator Queiroz approached the Public Prosecutors' Office to suggest an investigation of the project. After assessing that the lifestyle of Lalau, which included a US\$1 million apartment in Miami, luxury cars, and lavish parties in expensive restaurants, was incompatible with his means, the Public Prosecutors' Office started an investigation and, in 1997, uncovered the connections between all the parties involved and the money transfers that siphoned public resources to private accounts.¹³⁴

By 1998, the Public Prosecutors' Office had collected enough evidence to request that the judiciary sequester the assets of Lalau and all others involved in the scheme. After that, the scheme became public news and was covered heavily by the media. Under public pressure, the judiciary ordered the removal of Lalau from his position as chief justice of the labor tribunal in September of that year and forced the TCU to conduct a new audit of the project. This time, the TCU was able to determine quickly that there were irregularities and to decide that the construction should be suspended. It was only then that Congress suspended transfers of federal funds to the project, as recommended back in 1992. In 1999, in the aftermath of the scandal, in a move guided by electoral reasons, Congress set up a CPI to assess corruption in the judiciary in general, but gave special attention to the labor law court. It was then revealed that Lalau alone had embezzled more than US\$50 million in the scheme.¹³⁵

In sum, this example illustrates that the existence of alternative mechanisms of oversight and monitoring, especially if the institutions with overlapping jurisdiction have different governance structures and therefore different systems of incentives, may address the shortcomings of the existing auditing institutions. In this case, the TCU failed to act, but the error was "fixed" by a member of Congress, the Public Prosecutors' office, and the media.

Freedom House, 2013. Freedom of the Press: Brazil. Online: <http://www.freedomhouse.org/report/freedom-press/2013/brazil#.Uu9Hd_k7um4>. According to the Committee to Protect Journalists, three Brazilian journalists – "all of them provincial journalists murdered after reporting on local crime and corruption" – were killed for their work in 2013, compared to four in 2012 and three in 2011 (Beiser, 2013). Elana Beiser, "Syria, Iraq, Egypt Most Deadly Nations for Journalists" Committee to Protect Journalists (Dec. 30, 2013). Online: <<http://www.cpj.org/reports/2013/12/syria-iraq-egypt-most-deadly-nations-for-journalis.php>>.

¹³⁴ Veja, *supra* note 132.

¹³⁵ Santiso, *supra* note 117, at 26.

Finally, over the years since the creation of the CGU, the TCU has increased its activity. The MESICIC Committee notes that the total number of processes (including audits, inspections, consultations, complaints, etc.) conducted by the TCU rose from 6,135 in 2006 to 8,019 in 2010.¹³⁶ While no causal connection between these two events can be empirically tested or proven, they suggest that institutional multiplicity and the mechanisms through which it may impact the operation of accountability institutions is something that deserves further investigation.

2.2.2 Institutional Multiplicity in Investigation

The core investigative institutions in Brazil are the Federal Public Prosecutors' Office (*Ministério Público Federal*, MPF) and the Federal Police (*Departamento da Polícia Federal*, DFP). The MPF typically conducts investigations into criminal matters in conjunction with the DFP. Indeed, the rise in the number of DFP investigations over the last 5 to 10 years¹³⁷ appears to be the result not only of an increase in resources for the police but also increased cooperation between the DFP and MPF and other investigative bodies such as state public prosecutors, Revenue Service Inspectors, and government ministries.¹³⁸ In many cases, joint task forces have been formed in order to better coordinate investigations. The results appear positive,¹³⁹ providing strong evidence that institutional multiplicity has led to productive **collaboration**.

While the MPF and DPF collaborate frequently on high profile cases and operations,¹⁴⁰ the same is not true for day-to-day investigations. In these cases, even quick consultations between the DPF and the MPF are rare. In cases involving "serious" violations, the MPF consults with the DPF once a month, and all communication is via paper memorandums. This frequency of communication is fairly low compared to other countries such as the United States and can hardly be classified as cooperation. While the MPF may request additional information from the DPF, such petitions must be done via publicly-available memorandums, reducing the speed and efficacy of the investigative process. If the DPF does not comply with the MPF's request, the MPF may step in and conduct that investigation on its own, but such inquiries are rare. In addition, the

¹³⁶ Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC), 2012. Federative Republic of Brazil Final Report [hereinafter MESICIC (2012)], at 20.

¹³⁷ Carson and Prado, *supra* note 13.

¹³⁸ Arantes, 2011, *supra* note 1 at 200 and 205.

¹³⁹ *Ibid.*

¹⁴⁰ For a detailed description and analysis of DPF operations, see *ibid.*

constitutionality of such investigations into potential criminal matters remains unresolved. A case involving the issue has been pending before the Brazilian Supreme Court (STF) since 2008,¹⁴¹ and, in the absence of a firm resolution regarding the legal status of such independent investigations, the STF has made clear those cases raise suspicions and may be invalidated. In addition to this constitutional ambiguity, the exercise of such powers faces political opposition; a bill proposing to eliminate MPF's investigative authority was introduced but voted down by the Brazilian Congress in 2013.¹⁴² Given these legal and legislative developments, public prosecutors are very careful and selective about the cases in which they proceed alone.¹⁴³

Despite being the exception rather than the rule, in a few cases the investigative powers of MPF have **compensated** for the lack of police action. Cases in which MPF played a prominent role include the recent *mensalão* case. Indeed, according to the Attorney General (*Procurador Geral da República*), it would not have been possible to prosecute and convict those involved in the *mensalão* case without the investigation conducted by the MPF.¹⁴⁴ However, given the current legal and political climate, it remains uncertain whether the MPF will retain these powers moving forward. If they are curtailed or, alternatively, confirmed or enhanced, it will be an opportunity to test the hypothesis advanced in this paper. Such a change could allow assessment of the impact that institutional multiplicity may have on the overall level and success of criminal investigations in Brazil.

While there is multiplicity in criminal investigations, the DPF has no jurisdiction over civil investigations. In actions concerning administrative improbity, the MPF is the only institution that can officially conduct a civil investigation (*inquérito civil*). However, the MPF's civil investigations can benefit from investigations in the criminal and administrative spheres. Since they often relate to the same facts or actions, the investigative efforts of MPF frequently share similarities with the investigative efforts of the Internal Affairs Division of the Union (*Corregedoria Geral da União*, CGR), the arm of CGU in

¹⁴¹ Brazilian Supreme Court, RE 593727/2008

¹⁴² Newspaper O Globo, PEC 37 é votada e rejeitada na Câmara dos Deputados, 25/06/2013. Available at <http://oglobo.globo.com/pais/pec-37-votada-rejeitada-na-camara-dos-deputados-8806597>.

¹⁴³ Prado and Carson, *supra* note 14 (citing interviews conducted with CGU officials in April 2014).

¹⁴⁴ Gustavo Gantois, "Gurgel: sem investigação do MP, ação do mensalão não teria existido", *Terra* (11 March 2013), online: <<http://noticias.terra.com.br/brasil/politica/julgamento-do-mensalao/gurgel-sem-investigacao-do-mp-acao-do-mensalao-nao-teria-existido,d3b5f2532da5d310VgnVCM5000009ccceb0aRCRD.html>>.

charge of administrative investigations. Similarly, civil and administrative investigations can feed into criminal investigations and vice-versa. Indeed, CGU has been working closely with the DPF in most of its operations.¹⁴⁵ In such cases, while each institution may be focusing on a different aspect of the investigation, they can **complement** each other's work.

Two recent examples of this type of complementarity are the operations Two-Way Road (*Mão Dupla*), regarding a company hired by the government to build roads, and 13 of May (*13 de maio*), concerning the embezzlement of education funds by municipal officials. In the first case, in 2010, cooperation between the DPF and the CGU uncovered a scheme in which civil servants from the Department of Roads and Transportation of the State of Ceará accepted bribes from Delta, the company contracted by the Federal Department of Infrastructure and Transportation (DNIT) in exchange for allowing the firm to charge more for their services and to use lower quality materials than the ones specified in the contract. In the second operation, 13 of May, officials from the CGU and the DPF uncovered a scheme in which 26 municipalities in the state of Bahia were misappropriating funds from Fundeb, the national program to finance primary and secondary education. In most cases, civil servants and mayors had created shadow companies that pretended to sell services to the municipality (e.g., school buses, event organization services, etc.), but were actually redirecting federal funds to their own personal bank accounts.

The expansion in high profile and widely publicized corruption investigations undertaken by Brazilian authorities in recent years and the heightened public awareness they have triggered represent notable changes in the country's accountability processes,¹⁴⁶ and we hypothesize that these enhancements to the investigatory capacity of the country's institutions are attributable, at least in part, to multiplicity. In the presence of multiple authorities able to pursue cases of suspected corruption, investigations have been launched into misconduct at all levels of the federation and across all branches of government as well as into private sector actors. However, we acknowledge that other factors have likely also contributed to these performance improvements and highlight in particular initiatives undertaken in 1998 and enhanced after 2003 to strengthen the DPF.¹⁴⁷ With an increased budget, more personnel, a newly defined focus on corruption, and the systematic use of catchy names to gain publicity for operations, the DPF has become an increasingly potent force in fighting

¹⁴⁵ Prado and Carson *supra* note 14 (citing interviews conducted with members of CGR in April 2014).

¹⁴⁶ Arantes, *supra* note 1, at 200.

¹⁴⁷ *Ibid.*

corruption in Brazil. Nevertheless, it is noticeable that the increase in criminal investigations and operations at the DFP between 2005 and 2009¹⁴⁸ was followed by an increase in civil investigations initiated by the MPF on corruption and administrative impropriety between 2007 and 2011.¹⁴⁹ Although we cannot prove a causal connection, our hypothesis is that the strengthening of the DPF may have had a positive impact on the MPF's performance and vice-versa.

While multiplicity may result from having independent institutions that can conduct investigations which will lead to criminal corruption charges (**inter-institutional multiplicity**), there is also some level of multiplicity in the fact that individual actors are independent to act within each of these institutions (**intra-institutional multiplicity**). For example, while the previous section emphasized how the concentration and monopolization of authority in the TCU gives politically-appointed ministers the discretion to halt auditors' inquiries into accounting or budget irregularities, individual prosecutors at the MPF are largely autonomous – if one prosecutor receives information concerning potential corruption and decides not to investigate the case, another prosecutor is free to proceed with the investigation. This lack of centralization – which we consider an example of intra-institutional multiplicity – has largely strengthened MPF's power to act as an effective anti-corruption body.¹⁵⁰

2.2.3 Institutional Multiplicity in Punishment

Multiple legal reforms over the past several decades appear to have been aimed at fostering institutional multiplicity in Brazil's systems for punishing corruption. A core motivation in this regard has been the heavy burden of proof necessary to establish guilt in criminal cases. The Law of Administrative Improbability of 1992, enacted to expedite corruption cases and to empower the MP's office as a body of horizontal accountability, allows prosecutors to choose between bringing civil or criminal charges depending on the amount and quality of evidence collected. As Arantes explains, this law provides an alternative to rather burdensome criminal trials as the burden of proof is lower in civil cases.¹⁵¹ Available civil penalties for individuals include the removal of a public official from office, temporary suspension of political rights, and reimbursement to the public coffers.

¹⁴⁸ MESICIC (2012), *supra* note 136 at 27.

¹⁴⁹ *Ibid*, at 36.

¹⁵⁰ Maria Tereza Sadek and Rosangela B. Cavalcanti, "The new Brazilian public prosecution: an agent of accountability." In: Scott Mainwaring and Christopher Welna (Eds.), *Democratic Accountability in Latin America* (Oxford: Oxford University Press, 2003) at 201-27.

¹⁵¹ Arantes, *supra* note 1.

However, the 1992 reform did not produce the expected results, as the strategy required prosecutors to continue to rely on the Brazilian judiciary, an institution plagued by problems; since 1992, very few civil corruption cases brought have reached conclusion and resulted in sanction.¹⁵² Arantes argues that the fifteen years of evidence on administrative improbity cases “suggests that they are not entirely effective in the courts, whether as a result of the slowness of the proceedings, numerous dilatory appeals, or, frequently, judges’ concerns about MP’s authority to act in this arena, as when they fail to recognize the legal legitimacy of suits or the legality of procedures adopted during the investigation. Of 572 suits brought by the prosecutors in São Paulo since 1992, for example, fewer than 10 have reached a definitive conclusion to date.”¹⁵³ Indeed, the average time for trying cases concerning administrative improbity was approximately 5 years in the regional federal courts, which is quite lengthy.¹⁵⁴

More recently, this picture seems to have changed significantly. In 2001, the CGU was created to “provide effective and efficient sanction of administrative misconduct by public officials while criminal investigations and prosecution were being processed in the federal judiciary.”¹⁵⁵ Since its creation, the CGU has extensively expanded its jurisdiction. In 2001, the Secretariat of Federal Internal Control (*Secretaria Federal de Controle*, SFC), previously located in the Ministry of Finance, was incorporated into the CGU, and the CGU started operating the internal control of the Federal Executive.¹⁵⁶ A year later, it incorporated the Office of the Ombudsman General (*Ouvidoria-Geral da União*), previously housed in the Ministry of Justice. In 2006, it created the Secretariat for Corruption Prevention and Strategic Information (*Secretaria de Prevenção da Corrupção e Informações Estratégicas*), becoming the central authority overseeing compliance with the Code of Conduct applicable to all federal public officers. The CGU is also responsible for coordinating the internal investigative units housed within each department of the federal government.¹⁵⁷

Independent of the civil and criminal sanctions imposed by the judiciary, the CGU, TCU, and internal accountability bodies can impose administrative sanctions on actors found to have engaged in corrupt activities. At the federal level, the law requires every department to have a unit responsible for conducting

¹⁵² *Ibid.*; MESICIC (2012), *supra* note 136.

¹⁵³ Arantes, *supra* note 1 at 198-9.

¹⁵⁴ MESICIC (2012), *supra* note 136 at 47.

¹⁵⁵ OECD, *Integrity Review of Brazil: Managing Risks for a Cleaner Public Service* (Paris: OECD Public Governance Reviews, 2012) at 243.

¹⁵⁶ *Ibid.*

¹⁵⁷ The structure of the Brazilian Office of the Comptroller General was changed in September 2013 by Decree 8.109, notably to accommodate new mandates, but maintained previous ones.

administrative disciplinary procedures and to forward them to higher authorities when appropriate. Investigations are started *ex officio* or upon receipt of a report with credible allegations of misconduct. These units are responsible for submitting data and coordinating actions with CGU, which performs a subsidiary role: it initiates or intervenes in administrative investigations and disciplinary procedures in cases where the independence of the unit is questionable or when high-level authorities are involved. Between 2003 and 2014, the Administrative Disciplinary System of the Federal Administration (which comprises CGU and all these departmental units) dismissed 5,125 public officials for corruption or mismanagement, averaging 427 dismissals per year or more than one per day. The overall number of dismissals is significant, as it represents approximately 0.9% of the total number of federal government officials employed in 2014.¹⁵⁸

As discussed in Section 1.2, under the new Clean Company Act, corporations and other legal entities that become involved in corruption may be called before an administrative liability proceeding by the authorities of any affected government department or, in some cases, by the CGU. Penalties for corporate misconduct can include sizeable fines as well as potential debarment from public procurement. An illustrative example is the Gautama case.

In July 2007, after an investigation uncovered fraud both in bidding processes and contracts with the federal government, the CGU debarred the constructing company Gautama from government contracting, and all 50 contracts in which audits revealed misconduct were suspended. In imposing the penalties, the Minister of the CGU publicly stated that administrative sanctions were the most effective method of punishing corrupt companies as well as in deterring future misconduct.¹⁵⁹ In addition to the cancellation of existing contracts and debarment of the company involved in the scandal, the investigation also led to the resignation of one minister and the imprisonment of almost 50 people, including high level federal and state government officials, former members of Congress, entrepreneurs and employees of the construction company. It is estimated that out of the R\$420.3 million (US\$161.12 million) paid by the federal government to the Gautama Company, around 36.5%, i.e. R\$153.4 million (US\$58.8 million) was misappropriated by private parties.

In 2008, the CGU created the National Registry of Ineligible and Suspended Contractors, a public database that consolidates and disseminates

¹⁵⁸ CGU, Dismissal report (June 2015), online: <<http://www.cgu.gov.br/assuntos/atividade-disciplinar/relatorios-de-punicoes-expulsivas/arquivos/punicoes-mensal.pdf>>.

¹⁵⁹ Andrea Michael, "CGU proíbe contratos da União com a Gautama," *UOL* (24 July 2007), online: <http://www1.folha.uol.com.br/fsp/brasil/fc2407200708.htm#_=_>.

information on companies debarred from contracting with the federal or state administrations. Inclusion in the Registry was initially voluntary, but it became mandatory with the Clean Company Act. As of June 2015, 11,911 sanctioned suppliers and contractors were listed on the Registry, including some from the states and one from a municipality.¹⁶⁰

A 2010 analysis of the effectiveness of the Brazilian judiciary in preventing and combating corruption revealed the apparent superiority of administrative procedures and sanctions in comparison to their conventional criminal and civil justice counterparts. Examining data on public sector dismissals, Alencar found that two-thirds of employees administratively discharged between 1993 and 2005 had been removed for reasons linked to corruption.¹⁶¹ He further proved that while the majority of the discharged employees in his study (333 of 441) appealed their terminations to the judiciary, extremely few of those applications (4.53%) were successful. However, while administrative sanctions were infrequently overturned, they also rarely resulted in criminal charges or penalties; only one-third of officials dismissed for corruption-related reasons were ever prosecuted, and the conviction rate in those cases – 3.17% – was notably low. However, the high and rising number of administrative sanctions imposed as well as the anecdotal evidence provide by the Gautama case suggest that CGU is one the most important institutions involved in the punishment of corruption-related offenses in Brazil today.

However, authority to impose administrative sanctions is not limited to the CGU and individual government ministries. As an external oversight body, the National Court of Accounts (TCU) also has the power to impose fines or order other administrative penalties, including compensation for losses caused to the public administration, removal from office, temporary suspension of political rights, and debarment from public contracting, for corruption-related offenses. The TCU's legal authority to apply sanctions for misconduct is particularly strong compared to autonomous audit agencies in other Latin American countries,¹⁶² and, in recent years, the institution has demonstrated an increased willingness to exert those powers. In 2006, the TCU disqualified 13 individuals from holding commissioned or trust positions and barred 23 firms from participating in competitive federal bidding, but by 2010, these figures increased to 103 and 109, respectively.¹⁶³

¹⁶⁰ See: Portal da Transparencia, online:

<<http://www.portaldatransparencia.gov.br/ceis/Consulta.seam>>.

¹⁶¹ Carlos H. R. Alencar, "Prevenção e Combate à Corrupção e Eficácia Judicial no Brasil" (Brasília: 5º Concurso de Monografias da CGU, 2010) at 52.

¹⁶² Santiso, *supra* note 117.

¹⁶³ MESICIC (2012), *supra* note 136, at 20.

However, Speck argues that the authority of the judiciary to hear appeals and possibly revise or overturn the TCU's sanctions reduces their overall effectiveness.¹⁶⁴ While acknowledging the need to protect against potential abuses of the administrative sanctioning system, Beck asserts that such judicial appeals are dysfunctional and disruptive, rather than salutary, to the process for two reasons. First, the standard for judicial review of the TCU's decisions remained unresolved by the courts. The TCU functions as a tribunal, following procedural steps that are very similar as those that would be followed in a case brought before the judiciary. However, some cases argue that the judiciary can review the substance of TCU's decisions, while others affirm that the review is only procedural.¹⁶⁵ The dispute has generated much insecurity in the finality of TCU decisions, negatively impacting the effectiveness of such sanctions. Moreover, this dispute creates a somewhat higher rate of revisions than it would be the case if the judicial review was merely procedural. The second problem is time. As discussed below, the Brazilian judiciary generally operates at a glacial pace. As a result, many appeals take too many years to be decided, running against statutes of limitations or in some cases becoming moot (e.g, leaving of public office or death of the accused).

While the orders of the CGU are also subject to judicial review, unlike TCU, CGU decisions are rarely overturned by the courts. When asked about the discrepancy, a CGU official indicated that they have hired a team of lawyers that make sure that every single step in the administrative process is in absolute conformity with the courts' most recent proclamations concerning the scope of their review. In sum, CGU is "making the administrative processes bullet proof"

¹⁶⁴ Speck (2011), *supra* note 68.

¹⁶⁵ For judicial decisions declaring that the judiciary can only do procedural review of TCU decisions, see Supremo Tribunal Federal, Mandado ,de Segurança (MS) nº 7.280 (Rel. Ministro Henrique D'Avila); Superior Tribunal de Justiça Recurso Especial 8970/SP (Rel. Ministro Humberto Gomes de Barro, 1ª Turma), Diário da Justiça, 09.03.93, at 2533. For decisions that declare that the judiciary can also perform substantive reviews, see Supremo Tribunal Federal, Mandado ,de Segurança (MS) nº 28745, Liminar emitida em 6 de maio de 2010 (Rel. Ministra Ellen Gracie), Tribunal Regional Federal 5a. Região, Apelação Cível: AC 380126 PE 2005.83.02.000431-8. Relator(a): Desembargador Federal Élio Wanderley de Siqueira Filho (Substituto). Órgão Julgador: Primeira Turma. Julgamento: 11/07/2007. For doctrinal analyses, see Roberto Mateus 2009, at 37/39 and Aguiar Filho 2009, at 21/22 (arguing that the judiciary can only perform procedural reviews of the TCU decisions). But see Bandeira de Mello (1974, at 172), Cretella Junior (1986, at 9), Di Pietro (1996, at 29), and Alexandre Pacheco Lopes Filho (2012) (arguing that the judiciary can also perform substantive reviews of TCU decisions).

so as to minimize the changes of them being stricken down by courts afterwards.¹⁶⁶

Turning to the ultimate sanctioning authority in most corruption cases, the Brazilian judicial system displays “impressive institutional strength, illustrated by clear rules, impressive autonomy, and decisions that are widely adhered to by other branches of government,” but the courts “operate[] in an institutional framework that tends to delay clear, universally applicable, and binding policy decisions.”¹⁶⁷ A 2012 report by a committee of experts under the Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption (MESICIC) documents the judiciary’s poor rates of resolution in corruption-related cases¹⁶⁸:

	STF	Regional federal courts
# of complaints of acts of corruption and money laundering received	4	229
# of proceedings concerning corruption or money laundering resolved	0	53 (30 final, with 14 defendants receiving final convictions and 3 in which the statute of limitations ran)
# of complaints related to administrative impropriety	0	571
# of proceedings concerning administrative impropriety resolved	1 (final)	79 (4 final)

The Brazilian judiciary’s underperformance relates not to sporadic errors in execution but rather to fundamental structural problems such as its excessively formalistic, burdensome procedural rules and corruption.¹⁶⁹ Our discussion below focuses on two broad categories of factors that contribute to the overall inefficiency of the country’s sanctioning system: (1) lengthy delays in proceedings, and (2) overly rigid rules and procedures.

¹⁶⁶ Prado and Carson, *supra* note 14 (citing interviews conducted with CGU officials in April 2014).

¹⁶⁷ Matthew M. Taylor, “The Federal Judiciary and Electoral Courts.” In Timothy J. Power and Matthew M. Taylor (Eds), *Corruption and Democracy in Brazil: The Struggle for Accountability* (Notre Dame: University of Notre Dame Press, 2011), Chap. 7.

¹⁶⁸ MESICIC (2012), *supra* note 136, at 46-47.

¹⁶⁹ William C. Prillaman, “The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law” (Westport: Greenwood Press, 2000); Taylor, *supra* note 167; Power and Taylor, *supra* note 3.

Turning first to the protracted pace of legal proceedings, the causes of the delays under the current system are manifold. First, there is a considerable degree of ineffectiveness and lack of rationality in management of the judicial system.¹⁷⁰ At the operational level, as of 2012, the judiciary was utilizing at least 210 different, unintegrated computer systems, frustrating attempts at coordination or efficient administration.¹⁷¹ The National Judicial Council (*Conselho Nacional de Justiça*, CNJ) which was created in 2004 with the mandate of exercising external control over the judicial branch to ensure that the system operates morally, efficiently, and effectively, did successfully increase productivity in the courts by 7.5% between 2009 and 2013; while these results appear initially promising, some officials within the CNJ have suggested that such gains in productivity reflect an organizational prioritization of simple, uncomplicated cases that shifts more complex cases (such as those involving corruption) farther down the list.¹⁷² In addition, as this article was being written, the CNJ had decided to abolish an electronic system created in 2007 for jurisdictional control, corruption prevention and transparency of the Judiciary, known as Open Justice (*Justiça Aberta*).¹⁷³

Beyond the problems facing the judicial branch's management and administration systems, the courts are over-stretched by the excessive number of cases before them. Brazilian courts – even the Supreme Court – cannot select the cases they will hear, meaning that even meritless or frivolous cases have a right to a hearing; the lack of impediments to initial filings coupled with a paucity of extrajudicial means of dispute resolution (e.g., mediations, arbitrations) contribute to significant backlogs across the judicial system.¹⁷⁴ The burden at the federal level is made excessively acute by the breadth of causes of action that can be “constitutionalized” and thus brought before federal courts. Even given the efforts of the CNJ to modernize the judiciary and prioritize certain types of cases, the total number of cases pending before the federal justice system rose from 7.6 million in 2009 to 8.1 million in 2009. In 2010 alone, the Brazilian Supreme Court received 72,000 new cases.¹⁷⁵

Third, the appellate system is overly generous to defendants who can afford to pay for continuous appeals; if all the available remedies are used, a standard criminal proceeding has to exhaust four judicial instances in order to be

¹⁷⁰ *Ibid*; Sanctis, *supra* note 19.

¹⁷¹ MESICIC (2012), *supra* note 136 at 37; M.R. Machado and L.M.A. Ferreira, *Estudos sobre o Caso TRT* (São Paulo, SP: Editora Saraiva, forthcoming).

¹⁷² Prado and Carson, *supra* note 14 (citing authors interviews, conducted in April 2014).

¹⁷³ CNJ, Ofício Circular 25/CNJ/COR/2015.

¹⁷⁴ De Sanctis, *supra* note 63.

¹⁷⁵ *Ibid*.

considered concluded and no longer subject to appeal (*trânsito em julgado*).¹⁷⁶ Constitutionally, no sanction can be executed before a case is finally concluded,¹⁷⁷ so the multiple levels of appeal allow defendants to drag out proceedings and thus delay punishment for years, if not decades (see discussion of the Collorgate case below). If defendants and their counsel adequately prolong the appellate process, the statute of limitations may toll, thus requiring dismissal of the case and precluding the imposition of any sanctions. In its critique of Brazil's multiple appeals process, the 2012 MESICIC Report notes that it "contributes, in practice, to a final (not subject to appeal) judgment being virtually unattainable, often leading to the statute of limitations to run on cases and, consequently, impunity for those accused of acts of corruption."¹⁷⁸ The OECD Report presents criticisms along the same lines.¹⁷⁹

Beyond the lengthy delays that plague Brazil's courts, the performance and efficiency of the judiciary is further undermined by the legal system's excessively formalistic rules and rigid standards. Brazilian courts still follow so-called positivistic doctrines, which impose a high evidentiary burden on prosecutors to interpret the law, resulting in a very low rate of corruption convictions. In addition to the formalism regarding the burden of proof, courts are also very strict in determining the admissibility of evidence. For instance, a high profile case, *Operação Castelo de Areia*, was dismissed by the Supreme Court of Justice (STJ), the second highest court in the country, because the recording of phone conversations was considered illegal. While the police had requested and secured judicial authorization to perform the recording, the judicial authorization itself was ruled illegal because the request was based on an anonymous lead which could not be considered grounds for a court of law to grant authorization for the recording. Such excessive procedural formality in the courts undermines the effective punishment of corruption in Brazil.

The Collorgate case provides an excellent illustration of how deficiencies in the Brazilian judicial system weaken the overall accountability process. After his impeachment by Congress in 1992, former President Fernando Collor was

¹⁷⁶ In the First Instance, a single judge reviews the evidence and analyzes the facts and law. A judgment at First Instance may be appealed to a collegiate body (Second Instance) which will review the facts and law. That collegiate body decision may be appealed to the Supreme Court of Justice (STJ) (Third Instance) to examine legal questions under federal law. Finally, the STJ is subject to appeal to the STF (Fourth Instance) under an "extraordinary appeal," in which constitutional issues are raised. *Ibid* at 43.

¹⁷⁷ Brazilian Federal Constitution, Art. 5, LVII: "no one shall be considered guilty until the criminal conviction is final."

¹⁷⁸ *Ibid* at 44.

¹⁷⁹ OECD Phase 3 Brazil Report, *supra* note 42, at 45-47.

formally charged with three counts of corruption-related offenses, but multiple circumstances and factors allowed him to escape conviction or sanction in the courts. First, reflecting the protracted pace of resolution in the judicial system, the last decision in the Collor matter was issued on April 24, 2014 – more than twenty years after Congress launched a CPI into the scandal. Due to those delays, the statute of limitations expired on two of the three charges against the former president and had to be dismissed. Citing the prosecution’s inability to meet the high evidentiary requirements to prove personal wrongdoing, the Brazilian Supreme Court finally acquitted Collor of the third and final corruption charge,¹⁸⁰ although other individuals more directly involved in the scheme were convicted and sentenced.

The Collorgate case offers an example of another troubling trend in the resolution of corruption cases in Brazil. While high level politicians and business leaders typically escape sanction for corruption-related offenses, their subordinates, who have often engaged directly in corrupt activities but only at the behest or for the benefit of their superiors, have often been held legally accountable for their misconduct. However, the 2013 Mensalão case represents a potentially significant shift in the assignment of culpability for corruption offenses. In that case, the Supreme Court imposed vicarious liability on superiors who, by nature of their relationship with the acting party, could be assumed by the court to have ordered the subordinate to commit a criminal act. While this high-profile case resulted in prison sentences for top-level officials and politicians being, it is too early to know how lower courts will incorporate the decision into their own jurisprudence.

3. Institutional Multiplicity in the Brazilian Clean Company Act

While there is a great deal of research exploring the system of accountability for the public sector in Brazil,¹⁸¹ there is almost no literature examining the system of accountability as it applies to private actors, especially companies operating abroad. This lack of scholarship is partially related to the novelty of the Clean Company Act, which has been in force for only a year and a half at the time of this writing (July 2015). Recognizing that the recentness of the Act makes it hard to provide empirical evidence about its operation and to assess its effectiveness, this section analyzes the Act’s potential. It builds on the idea that institutional

¹⁸⁰ Brazilian Supreme Court, Ação Penal 465, online:

<<http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=2565265>>.

¹⁸¹ Power and Taylor, *supra* note 3; Carson and Prado, *supra* note 13; Prado and Carson, *supra* note 14.

multiplicity is a desirable strategy in accountability systems (section 2.2.1 and 2.2.2) to argue that the Brazilian Clean Company Act's establishment of civil and administrative liability for legal persons is likely to provide more effective enforcement and punishment than the alternative of imposing criminal liability, which would have limited the authority over such cases to the judiciary.

The Clean Company Act is not the first initiative to use institutional multiplicity in order to bypass problems with the Brazilian judiciary. Administrative bodies such as the TCU and CGU have long been searching for ways to impose administrative sanctions that take immediate effect and do not depend on judicial authorization to be enforced. While administrative penalties remain subject to judicial appeal, unlike criminal or civil penalties imposed by courts, such sanctions can be imposed while the judicial appeal process proceeds; given the judiciary's glacial pace, in the absence of an injunction, administrative sanctions may in place for a few years even if ultimately revoked. Indeed, the TCU has been concentrating more on imposing sanctions, such as removal from office and exclusion from public procurement, that can be made effective immediately and generate financial and reputational costs.¹⁸² Similarly, as discussed earlier, the CGU has also been relying on immediately enforceable administrative sanctions. Considering the risk that such sanction may be reversed through judicial appeals, CGU has also ensured that the administrative procedures closely follow the requirements imposed by the judiciary, in order to reduce the chances of the decision being reversed.¹⁸³ These efforts, which have been in place before the enactment of the Clean Company Act, seem to have proven effective as the number of administrative decisions reverted by judicial review has been fairly low.¹⁸⁴

Recognizing the success that this reliance on administrative sanctions for individuals has achieved in curtailing corruption in Brazil (especially when compared to the performance of the judiciary),¹⁸⁵ the penalties for legal entities under the Clean Company Act are also primarily administrative in nature and thus deliberately avoid the judiciary as much as possible.¹⁸⁶ It is interesting to note that

¹⁸² Speck (2011), *supra* note 68.

¹⁸³ Prado and Carson, *supra* note 14 (citing interviews conducted with CGU officials in April 2014).

¹⁸⁴ Carlos H. R. Alencar, "Prevenção e combate à corrupção e eficácia judicial no Brasil" (Brasília: 5º Concurso de Monografias da Controladoria-Geral da União, 2010), online: <http://www.cgu.gov.br/concursos/Arquivos/5_ConcursoMonografias/2-lugar-profissionais-carlos-higino-ribeiro-de-alencar.pdf>.

¹⁸⁵ *Ibid*; Carlos H.R. Alencar, and Ivo Gico, "When crime pays: measuring judicial performance against corruption in Brazil" (2011), 17(3) *Law and Business Review of the Americas* 415.

¹⁸⁶ Interministerial Letter, *supra* note 24; Prado and Carson, *supra* note 14 (citing interviews conducted in May 2014).

the Act offers a few innovations over the pre-existing systems of administrative sanctions. Perhaps most important is the strict liability clause, which largely reduced the burden of proof, consequently reducing the risks that the judiciary may reverse the administrative decision on evidentiary grounds. Also innovative are the comprehensive scope and broad definitions of the Act, as discussed in section 1.2 *supra*. This strategy reduces the risks of judicial appeals that rely on the narrowness of legal provisions and on a tendency for formalist statutory interpretation. Indeed, the Act made it very hard for the parties to rely on legal loopholes in order to avoid sanctions. These two innovations seem designed to address two important problems of the Brazilian judiciary discussed in section 2 above.

In sum, the hypothesis developed here is that the legislation's heavy reliance on administrative investigation and sanctions was deliberate and designed to avoid the obstacles that one normally faces with judicial action in Brazil, especially in corruption-related cases. In doing so, the Act has relied on institutional multiplicity, incorporating some of the lessons learned in other spheres of the Brazilian accountability system while also bringing some interesting innovations. These institutional innovations may help overcome some of the obstacles that have prevented Brazil from effectively fighting corruption since its return to democracy.

It is not only the substance of the provisions in the new Clean Company Act in Brazil that are innovative, but, as discussed in section 1.2 *supra*, the statute also relies on a multitude of high level administrative organizations to conduct investigations and enforce such provisions. While this can be interpreted as a strategy to rely on institutional multiplicity, it may also involve trade-offs. Specifically, institutional multiplicity may exacerbate two of the problems that have motivated the creation of dedicated anti-corruption agencies (ACAs) in many countries: coordination problems and lack of expertise. Theoretically, the centralization of all anti-corruption activities into a single ACA should facilitate the sharing of information and intelligence, thus greatly reducing coordination problems, as well as allow managers and staff to gain specialized experience with and knowledge of the particular issues surrounding corruption.¹⁸⁷ While ACAs have often failed to meet such expectations or to contribute meaningfully to corruption reduction, the challenges presented by coordination problems and lack of specialization loom over the institutional multiplicity strategy.

While it may be advisable to keep related cases separate under certain circumstances, such as when dealing with different evidentiary standards, in other

¹⁸⁷ Patrick Meagher, "Anti-corruption agencies: rhetoric versus reality" 8(1) *Journal of Policy Reform* 69 (2005).

cases there may be advantages in coordinating prosecutorial efforts. In the particular case of the TRT,¹⁸⁸ enhanced communication and collaboration between those conducting the civil and the criminal trials could have saved a significant amount of resources for the legal system.¹⁸⁹ As a result of the simultaneous but non-integrated civil and criminal lawsuits in the Brazilian judiciary, there were more than ten different proceedings related to the TRT scandal pending before Brazilian courts as of May 2014.¹⁹⁰ This is a result of what Machado calls the “compartmentalization of legal knowledge,” which demands that different spheres of the law (administrative, civil, and criminal) deal with the same set of events independently of each other, despite obvious interconnections.¹⁹¹ In the specific case of the TRT, this “compartmentalization” has been taken to the extreme, as subdivisions within each of the three spheres have led to an unnecessary repetition of proceedings, evidence, and production of documents in cases that have included criminal trials for the accused individuals, appeals of the administrative sanctions, civil restitution proceedings to recover the embezzled funds, and bankruptcy proceedings involving the company at the center of the scheme.¹⁹²

The lack of communication and coordination in the TRT case contrasts with the more recent examples of collaboration between the CGU and DPF, discussed in section 2.2 *supra*. Indeed, such cooperation seems to be building on the fact that the Brazilian courts have authorized sharing of evidence provided in the criminal and the administrative spheres. Thus, evidence collected by the DPF in the criminal investigation can be used by CGU in the administrative process, and vice-versa.¹⁹³ Bolstered by institutional rules and structures that allow and facilitate such cooperation, the CGU and DPF have increased efforts to share evidence and collaborate on cases. This type of coordination may not only reduce system inefficiencies, but can also enhance each entity’s individual capacity to fight corruption in its respective sphere, thus strengthening each institution’s ability to perform its own role effectively. In the particular case of the Clean Company Act, there are no explicit mechanisms to create or foster such type of coordination although such collaboration could be potentially useful when in corruption cases in which the police are investigating individuals, while the CGU is interested in pursuing administrative charges against an implicated company.

¹⁸⁸ See Machado and Ferreira, *supra* note 171.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ Maira R. Machado, “Contra a departamentalização do saber jurídico: a contribuição dos estudos de caso para o campo direito e desenvolvimento.” In: *Direito e Desenvolvimento no Século XXI* (Brasília: IPEA/Conpedi, 2013).

¹⁹² Machado and Ferreira, *supra* note 171.

¹⁹³ Alencar, *supra* note 127 at 31.

The lack of coordination is not only a problem in the judiciary. As discussed earlier, the individual independence of Brazilian public prosecutors can be perceived as a form of intra-institutional multiplicity that is advantageous for the accountability system as a whole. However, it may also lead to duplication of efforts and inefficient use of resources. Individual prosecutors may not communicate with other prosecutors working on different aspects of the same case, and they may also not share information about best practices that could potentially enhance efficiency.¹⁹⁴ Thus, prosecutorial independence may also foster coordination problems that can ultimately impair anti-corruption efforts. In the context of the new Clean Company Act, the same problem may take place if the highest level of administration in different spheres of government (local, state, federal) decide to pursue investigation and/or prosecute the same case independently. As indicated, earlier (section 1.2 *supra*) the lack of a precise definition of the authorities that will be enforcing the Act may create multiplicity, but may also result in lack of coordination.

An example of an initiative that tries to curtail such problems in the public prosecutor's office is the State Strategy to Fight Corruption (*Programa Estratégia Estadual de Combate à Corrupção*, ECCO). ECCO won the Innovare Institute Prize for Best Strategy to Fight Corruption created by the Public Prosecutors office in 2013.¹⁹⁵ ECCO provides individual prosecutors with a “toolkit of best practices” to adopt preventive measures to fight corruption. The use of the toolkit is discretionary, so the program does not impair the individual independence of prosecutors. Instead, the idea is that adoption of the tools by prosecutorial offices throughout the state will enhance efficiency by reducing the time each individual prosecutor needs to invest in order to determine the best course of action. Moreover, by providing prosecutors with a set of best practices, the toolkits foster consistency in prosecutorial criteria for adopting preventive measures, reducing both the risk and perception that prosecutions may be politically motivated. The initiative was well received: 75% of the offices of the MP in state of Rondônia have agreed to participate in the initiative. Unfortunately, there is no data on the effectiveness of the measures adopted by the individual offices. Nevertheless, perhaps this initiative can serve as a model for the enforcement of the new Clean Company Act in Brazil.

¹⁹⁴ Prado and Carson *supra* note 14, (citing authors interviews, conducted in April 2014).

¹⁹⁵ Pedro Abi-Ecab, “Práticas: Estratégia Estadual de Combate a Corrupção” (Porto Velho: Innovare, 2013), online: <<http://www.premioinnovare.com.br/praticas/estrategia-estadual-de-combate-a-corrupcao-ecco/>>.

From an institutional design perspective, these examples suggest that the supposed trade-off between independence and coordination can be addressed effectively through institutional malleability. Creating institutional structures that allow – but do not require – otherwise independent entities to coordinate when feasible and beneficial can encourage efficient and effective inter- and intra-institutional collaboration while protecting organizational autonomy. In the context of the TRT cases, if the legal system had maintained its existing institutional multiplicity with separate spheres for civil, criminal, and administrative cases but introduced an element of malleability to permit prosecutors from those arenas to share evidence to the extent practicable and helpful, resources could have been saved while the integrity of the system was upheld. The ECCO initiative offers another example of the benefits of combining institutional multiplicity with malleability: it provides the tools for coordinated action but leaves room for independent action as well.

As the examples in Sections 2.1 and 2.2 illustrate, the effects of institutional multiplicity in oversight and investigation in Brazil have not been uniform, sometimes resulting in compensation, sometimes complementarity, and, in other cases, collaboration. This diversity reflects the existence of malleable institutional structures that permit but do not force coordination. The design of structures that encourage and nourish coordination when advantageous for the system as a whole is clearly a challenging task. Praça and Taylor provide a map of the evolution to the web of accountability institutions in Brazil suggesting that it has been characterized by self-reinforcing reforms in multiple institutions, which ended up generating what they call an “autocatalytic process of reform.”¹⁹⁶ This may explain why there have been so many coordination efforts in Brazil in the last decade. While acknowledging their importance, exploring the mechanisms that may effectively promote productive coordination in other areas may provide lessons that will help making the enforcement of the new Clean Company Act in Brazil more effective.

In this regard, it is worth mentioning that the Brazilian anti-corruption system has created a mechanism that has been particularly useful in enhancing institutional coordination and cooperation, the National Strategy to Combat Corruption and Money Laundering (*Estratégia Nacional de Combate a Corrupção e Lavagem de Dinheiro*, ENCCLA). Created in 2003 via Presidential Decree and located at the Ministry of Justice, ENCCLA was an attempt to coordinate the efforts of three branches of government, the Public Prosecutors’ Office and civil society to fight money laundering. After making significant progress in this area, its mandate was expanded in 2006 to include corruption,

¹⁹⁶ Praça and Taylor, *supra* note 75.

changing the name from ENCLA to ENCCLA. ENCCLA promotes the exchange of information, fosters strategic cooperation among different institutions, and pushes for legislative and institutional reforms that can enhance collaboration.¹⁹⁷ While ENCCLA has been able to promote a great deal of cooperation at the strategic level, it has encountered barriers to do the same at the operational level.¹⁹⁸ In sum, how to effectively foster inter-institutional collaboration in an environment of institutional multiplicity is a topic that certainly deserves more attention, especially by those concerned with the effective enforcement of Brazil's new Clean Company Act.

If it is not possible to adopt robust efforts to improve coordination, there are reasons to support the idea that inter-institutional communication should at least avoid destructive or uncooperative behaviour. For example, while the relationship between the MPF and DPF and other investigative bodies can be collaborative and complementary, as described in section 2 *supra*, it can also be uncooperative. Indeed, there are cases in which fierce and unproductive competition between the two institutions has undermined overall investigative efforts.¹⁹⁹ This shows that institutional multiplicity may also create coordination problems, and it may increase the risk of some actors undermining the functions performed by others. Thus, if malleable coordination such as that promoted under ECCO and ENCCLA is not possible, trying to avoid uncooperative and destructive behaviour may at least increase the chances of institutional multiplicity generating positive outcomes.

It is important to note that a great deal of the advances achieved in Brazil in general and by ENCCLA in particular are due to the fact that specialized departments to combat money laundering and fight corruption have been created within the DFP, MPF, the Ministry of Justice, and other institutions. This begs the question about the advantages of specialization. Perhaps the clearest example of its advantages comes from the creation of special “judicial bancs” (*varas especializadas*), discussed in section 2.1 *supra*. Specialized judges seem to be able to process the cases much faster than generalist judges, who are often unfamiliar with the complicated laws governing money laundering. This initiative is often cited as an example of success,²⁰⁰ suggesting that the enforcement of the Clean Company Act in Brazil could also potentially benefit from some level of specialization. However, it is hard to determine to what extent the specialization

¹⁹⁷ Prado and Carson *supra* note 14 (citing authors interviews, conducted in April and May 2014).

¹⁹⁸ OECD (2010), *supra* note 25.

¹⁹⁹ R.G. Azevedo and F.B. Vasconcellos, “O inquérito policial em questão: situação atual e a percepção dos delegados de polícia sobre as fragilidades do modelo Brasileiro de investigação criminal,” 26(1) *Sociedade e Estado* 59 (2011). Melo, *supra* note 111 at 29.

²⁰⁰ *Ibid.*

in the judiciary alone is the sole factor that can possibly explained expedited decisions. Confounding variables include the specialization in the DPF and MPF (which may have generated claims based on more robust evidence) and a legislative change in 1998 that has defined money laundering as a stand-alone crime, rather than being defined in connection to a pre-defined list of criminal activities.²⁰¹

Based on the perceived success of the money laundering initiative, ENCCCLA is currently advocating for the creation of specialized “judicial bancs” for corruption cases.²⁰² While this may be a promising development, it is important to note that such initiatives may be more likely to generate positive outcomes if they are structured as an option to the existing system, not a replacement of it. The separate judiciary created in Indonesia to analyze corruption cases (see section 1.2 *supra*) may be an interesting experiment to be explored in the Brazilian context. More specifically, it may suggest that there are advantages in specialization, but these are likely to be particularly promising if they do not exclude attempts to promote institutional multiplicity (i.e. there is a choice to bring the case to a specialized court or not). In other words, there needs to be malleability in specialization as well.

As discussed in section 2.1 *supra*, institutional multiplicity may generate alternative avenues to perform each one of the accountability functions (oversight, investigation, and punishment), but it may also create problems. Both coordination and specialization may be undermined by institutional multiplicity, but this does not need to be necessarily the case. Indeed, Brazil provides a few examples of initiatives in which malleability has been used, and institutional multiplicity, coordination, and specialization were successfully reconciled to produce promising results. These lessons can and should be easily applied to the enforcement of the Clean Company Act to make it more effective.

Conclusion

There are three types of legal punishment that can be imposed on someone engaged in corruption in Brazil: administrative, civil and criminal. Each is determined by separate judicial or administrative processes that run independently from one another.²⁰³ The institutional multiplicity argument suggests that the independence among the processes might be positive: if one process is flawed, another may be able to compensate. As argued in this paper, the new Brazilian

²⁰¹ Brazilian Law n° 9.613/98.

²⁰² Prado and Carson, *supra* note 14 (citing Interviews conducted in April and May 2014).

²⁰³ Brazilian Law n° 8.112/90, art. 125.

Clean Company Act seems to be largely relying on institutional multiplicity to enforce sanctions against companies involved in corrupt practices in Brazil and abroad. Our hypothesis is that this may help the Act overcome some of the obstacles often encountered to effectively punish corrupt practices in Brazil. There are, however, no guarantees that institutional multiplicity will generate the benefits identified in this article. Indeed, it may actually generate inefficiencies with institutional duplication, destructive competition, and obstacles to cooperation and coordination. Whether the Clean Company Act will prove to be a positive or a negative example of institutional multiplicity remains to be seen.