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Brazil: Trends & Developments

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Trends and Developments

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Author

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Corruption Charges in Brazil: Dwindling, but Alive

General outlook

After years of intense investigations in a landmark probe that became known as *Operação Lava Jato*, Brazil has gradually ended the model of specialised task forces that led to many arrests in the past decade, as well as to significant rewarded co-operation agreements with prominent figures of the Brazilian scene.

Operação Lava Jato began in 2014 as a money laundering investigation but soon evolved to a large probe into offences committed by Brazilian construction companies, foreign multinational enterprises, and high-level corporate executives, politicians, and employees of state-owned businesses such as the oil company Petrobras.

As recently recognised by the OECD in its monitoring report for 2023, *Operação Lava Jato* led Brazil to participate in at least 12 major multijurisdictional resolutions of transnational corruption cases constituting foreign bribery, which resulted in over USD9 billion imposed in monetary penalties on the companies. Because of its leading role in those cases, Brazil ultimately received approximately USD5.6 billion of the total amount.

As of 2021, the Federal Prosecution Service informed that over 500 people had been charged in connection with *Operação Lava Jato*, hundreds of requests for mutual legal assistance were executed with foreign authorities, and approximately USD5 billion were expected to be recovered in the following years.

However, the context of euphoria that led to such results suffered important setbacks.

The probative value of investigation elements obtained through the signing of rewarded co-operation agreements is currently under severe scrutiny, as the methods used by the authorities to carry out the investigations are re-evaluated by superior courts, and private conversations from the prosecutorial team behind *Operação Lava Jato* emerge, revealing inappropriate communication with the judge who presided over the great majority of the cases.

Legal framework

Corruption is punished under the Brazilian Penal Code in both domestic and international terms.

Penalties range from two to 12 years in prison for domestic corruption, and from one to eight years of imprisonment for foreign bribery, in addition to fines that can exceed BRL2 million (or approximately USD400,000). The Brazilian Penal Code

also provides for the possibility of increasing the sentence if, due to corruption, a public official commits an act in breach of a duty.

The definition of domestic corruption provided by law is broad, encompassing:

- the promise or the offer of an undue advantage to a public official to encourage him to perform, omit, or delay an official act (Article 333 of the Penal Code); and
- the request or the receipt of an undue advantage from a public official, directly or indirectly, even outside its functions or before assuming them, but as a result of it, or the acceptance of a promise of such an advantage, even if the undue advantage is destined to others (Article 317 of the Penal Code).

The notion of public official is also broadly established. Domestic officials are defined by Article 327 of the Penal Code as "anyone who, even though temporarily or unpaid, performs a public job, position or function" and "anyone who performs a public job or holds a function in a parastate body or who works for a service-providing company hired or contracted to carry out any typical activity in the Public Administration". Employees of state-owned companies such as Petrobras are considered public officials for the purpose of the corruption provision.

Foreign bribery, on the other hand, is punished by Article 337-B of the Penal Code in quite similar terms, as the act of "promising, offering or giving, directly or indirectly, an undue advantage to a foreign public official, or to a third person, to encourage him [or her] to perform, omit or delay an official act related to an international commercial transaction". Differently from its domestic counterpart, the foreign bribery offence applies only to commercial transactions.

Also under the Brazilian Penal Code, a foreign public official is considered "to be anyone who, even temporarily or without remuneration, holds a position, job or public function in state entities or in diplomatic representations of a foreign country", as well as "anyone who holds a position, job or function in companies controlled, directly or indirectly, by the Public Administration of a foreign country or in international public organizations" (Article 337-D).

As of 2023, only one case had ever been tried before the Brazilian courts involving foreign bribery, and the conviction was reversed due to the elapse of the limitations period.

Besides criminal liability – which applies only to natural persons in the Brazilian legal system – Federal Law 12,846/2013 establishes the rules that discipline the civil and administrative liability of legal entities that conduct corruption-related acts against national or foreign governments.

The OECD recent report

In October 2023, the OECD released a report detailing Brazil's achievements and challenges with respect to the implementation and enforcement of the OECD Anti-Bribery Convention, which establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures to make such intent effective.

In the document, the OECD recognises advances achieved in recent years with non-trial resolutions and the implementation of Federal Law 12,846/2013 but indicates as a focus of concern that Brazil may not be capable of sustaining the level of corruption enforcement that it achieved in recent years.

In particular, the OECD highlights its concern with the effectiveness of the statute of limitations for natural persons and the whistle-blower framework.

The statute of limitations

The statute of limitations in Brazil operates in two ways.

Before the sentence is imposed, the limitations period is calculated based on the maximum imprisonment penalty that is statutorily foreseen. As applied to domestic corruption, the ordinary limitation period is 16 years, and 20 years for the aggravated offence, if the bribe or promise of undue advantage actually induces the public official to act or omit to act in breach of a duty. The limitation period for foreign bribery is 12 years for the ordinary offence, and 16 years for the aggravated form.

Upon sentencing, however, the statute of limitations is retroactively recalculated to reflect the limitation period for the actual sentence, which means that a shorter period of four years may apply in case the accused is sentenced to a minimum imprisonment penalty, or of eight years, if the penalty ranges between two and four years of imprisonment.

The whistle-blower framework

Whistle-blowing plays a significant role in detecting corruption, especially in the private sector.

The OECD recognised that Federal Law 8,112/1990 protects public officials against criminal, civil, or administrative liability for reporting crimes or irregularities to their superiors or, if the superior is involved, to the competent authorities. The Organisation, however, considered this provision to be insufficient in its previous reports, because it did "not expressly provide for confidential reporting, protection from disciplinary or other retaliatory acts within or outside the workplace, or remedies for damages caused by retaliation".

In 2018, Brazil enacted Federal Law 13,608/2018, authorising Brazilian authorities to offer rewards for information concerning "crimes or administrative offences". As of 2019, the OECD recognises that the law "provides anti-retaliation protections for 'any person' who reports 'information on crimes against the public administration, unlawful administrative procedures or any actions or omissions harmful to the public interest'". Normative acts, such as Decree 10,153/2019, provide additional safeguards for the identity of those who report the crimes.

Despite the improvements, the 2023 OECD report understands that there is still room for change, as "none of the laws or decrees expressly contemplate offences against the 'foreign public administration'". It is difficult to follow the logic of the OECD on this specific point since the generality of Brazilian provisions would cover foreign officials. In the author's view, legislation could be improved through the introduction of appropriate safeguards against wanton whistle-blowing without support in actual offences. A large stride in this direction would be the confirmation in statute that any information provided by whistle-blowers and unsubstantiated by hard facts should be kept under seal.

The constant discrediting of Operação Lava Jato non-trial resolutions

Federal Law 12,850/2013 introduced criteria to execute rewarded co-operation agreements with natural persons. This tool was largely employed during *Operação Lava Jato* to arrest individuals and execute search warrants based solely

on declarations made under the co-operation agreement, without corroborating evidence.

In late 2019, Federal Law 12,850/2013 was amended by Federal Law 13,964/2019 to establish that such declarations may not lead to precautionary measures nor the acceptance of charges to commence a criminal lawsuit. Federal Law 13,964/2019 also maintained the original provision that declarations provided under the co-operation agreement cannot serve as grounds for conviction if no corroborating evidence is produced.

Brazilian courts have been granting requests to discontinue lawsuits on such basis even before Federal Law 13,964/2019 was enacted, and many cases arising from *Operação Lava Jato* were dismissed for this reason.

As established by the Supreme Court in 2018, information obtained through a rewarded co-operation agreement constitutes only a "means of obtaining evidence" and, as such, "is capable of authorising the initiation of the preliminary investigation, aiming to acquire material things, traces or statements endowed with probative force", which "constitutes its true probative vocation". The statements provided by way of such co-operation, however, "without other suitable corroborating evidence, do not have sufficient density to support the acceptance of charges to commence a criminal lawsuit".

The Supreme Court decision on the Odebrecht agreement

In September 2023, a Supreme Court justice held that evidence obtained through the leniency agreement entered into with Odebrecht – an important Brazilian construction company – could not be used in criminal proceedings or before any other authority.

The decision also determined that defendants and any person under investigation should be granted access to the material leaked by a media outlet (The Intercept) in the past few years on private conversations from prosecutors involved in *Operação Lava Jato*.

Based on such material, back in 2021, another justice from the Supreme Court noticed "the outrageous collusion recorded between the prosecution and the judicial body against the complainant, and even in disfavour of other defendants", which only became known through the leak.

Though the evidence obtained by these means is considered illegal for prosecutorial purposes, the defence is allowed to use it to prove failures in the probe, such as political bias and the lack of neutrality of the judge who presided over most of the cases brought in connection with *Operação Lava Jato*.

The movement to review leniency agreements

In the first quarter of 2023, three Brazilian political parties – PSOL, Solidariedade, and PCdoB – filed a Claim for Non-compliance with a Fundamental Precept (ADPF), aimed at reviewing the criteria adopted in leniency agreements executed within the scope of *Operação Lava Jato*.

The parties claim that the agreements were signed under coercion, in a situation of political-legal-institutional abnormality. As a preliminary injunction, the parties requested the suspension of the payment of fines and compensation established in the leniency agreements.

In July 2023, the reporting justice who presides over the case ordered that the ADPF should be examined, which has not yet occurred. If grant-

ed, the ADPF may lead to the discontinuation of many agreements executed during *Operação Lava Jato*, including those signed with natural persons that may have admitted under coercion to the practice of wrongdoings.

As part of the same movement to re-examine agreements entered into in the past few years, in early November 2023, the media reported that a company from the same group of the giant meat producer JBS appealed to the Supreme Court to reverse the sale of Eldorado – one of the largest pulp manufacturers in Brazil – and suspend the payment of fines arising from its leniency agreement. The sale of Eldorado was being discussed by JBS before the Brazilian courts in a large lawsuit brought after an adverse ruling in arbitration, being the target of constant media attention. Now, the company alleges that it was coerced into selling Eldorado in 2017 as part of the leniency agreement signed with the Brazilian authorities.

The request is under seal, but its result may encourage other companies and individuals to re-discuss their own agreements and seek reparation.

Trends for the future

Despite the termination of *Operação Lava Jato* and its task-force model, the fight against corruption is expected to continue, as the topic is always on the agenda of prosecutorial authorities, though in a less intense way. In such a scenario a possible outcome would be the migration of corruption probes to regional and state practices out of the federal spotlight, that, except for high-profile instances, have not been, so far, subject to intense scrutiny.

Rulings on the validity of leniency and rewarded co-operation agreements are relevant to establish new criteria for individuals and companies who want to re-discuss their own agreements, and thus should be closely followed.

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