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

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

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 approach looks promising, as it follows the same structure of recent reforms that have been successful in Brazil.

Keywords

Corruption—Law and legislation; Administrative law; Brazil

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

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& IZABELA CORREA***

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 approach looks promising, as it follows the same structure of recent reforms that have been successful in Brazil.

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Dans la lutte du Brésil contre la corruption au cours des deux dernières décennies, des progrès considérables ont été réalisés en matière de surveillance et d'enquête, mais très peu pour ce qui est de tenir les fautifs juridiquement responsables de leurs transgressions. Nous avançons que, jusqu'à tout récemment, cela pouvait s'expliquer en partie par le fait que de nombreuses institutions surveillaient et enquêtaient, alors qu'une seule – le pouvoir judiciaire – se réservait sans trop d'efficacité le monopole de la punition. Afin de circonvier aux limitations des cours brésiliennes, le gouvernement a de plus en plus recours à des sanctions administratives pour combattre la corruption. C'est dans ce contexte que le Brésil a légiféré afin de punir les personnes morales coupables de corruption tant à l'étranger que sur le territoire national : la loi anticorruption (*Lei Anti-Corrupção*), promulguée en août 2013, fait appel à la pluralité des institutions pour tenter de résoudre les problèmes fort connus qui empoisonnent le système anticorruption du Brésil. Nous sommes d'avis que cette approche semble prometteuse, car elle possède la même structure que des réformes qui ont récemment connu du succès au Brésil.

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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.¹ 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

1. Constituição Da República Federativa Do Brasil De 1988.

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.² The 1988 Constitution also conferred greater powers and responsibilities to the National Court of Accounts³ (*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.⁴ 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 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.⁵ The 2014 Edelman Trust Barometer found that Brazil exhibits the largest gap between trust in business and government among the BRIC countries (Brazil, Russia, India, and China), with only 34% of Brazilians surveyed expressing confidence in their government compared with 70% who

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2. Rogério B Arantes, "The Federal Police and the Ministério Público" in Timothy J Power & Matthew M Taylor, eds, *Corruption and Democracy in Brazil: The Struggle for Accountability* (Notre Dame: University of Notre Dame Press, 2011) 184.
 3. Also known as External Court of Accounts or Federal Audit Court.
 4. Timothy J Power & Matthew M Taylor, "Introduction: Accountability Institutions and Political Corruption in Brazil" in Power & Taylor, eds, *supra* note 2 at 3 [Power & Taylor, "Introduction"].
 5. Elizabeth J Zechmeister, ed, *The Political Culture of Democracy in the Americas, 2014: Democratic Governance across 10 Years of the AmericasBarometer* (2014) at 191-222.

trusted business institutions; the report noted that the gap had widened since the previous year's survey.⁶

In addition, strong evidence indicates that the net effect of corruption on the country's economic development has been negative.⁷ While Brazil has experienced impressive economic growth in recent years,⁸ studies have estimated that corruption consumes between 1.4%⁹ and 5%¹⁰ of the country's GDP, translating into economic losses of between \$31.4 billion USD to \$112.3 billion USD 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 \$2,840.81 USD in lost income for the average Brazilian worker that year.¹¹

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 volume and scope of the laws that comprise Brazil's 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.¹² Leading anti-corruption

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6. Robert Holdheim, "Trust and the BRICs: Going Nowhere Slowly?" (23 January 2014), *Edelman* (blog), online: <www.edelman.com/post/trust-and-the-brics-going-nowhere-slowly>.
 7. Robert Iquiapaza & Hudson Amaral, "Reflections on the Impact of Corruption on Economic Development: A Literature Review in the Brazilian Economy" (2007), online: MPRA Paper No. 1818 <mpa.ub.uni-muenchen.de/1818>.
 8. 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%. See The World Bank, "Development Indicators" (2015), online: <databank.worldbank.org/data/reports.aspx?Code=NY.GDP.MKTP.KD.ZG&id=af3ce82b&report_name=Popular_indicators&populartype=series&ispopular=y>.
 9. Federação das Indústrias do Estado de São Paulo, "Relatório Corrupção: custos econômicos e propostas de combate" (2010), online: <www.fiesp.com.br>.
 10. Época, "Por que o Brasil pode vencer a corrupção" (22 July 2008), online: *Revista Época - Special Debate Supplement* <revistaepoca.globo.com/Revista/Epoca/0,,EDR82402-9306,00.html>.
 11. Marcos Fernandes Gonçalves da Silva, Fernando Garcia & Andrea Camara Bandeira, "How does corruption hurt growth? Evidences about the effects of corruption on factors productivity and per capita income" (2001) at 19, online: *Biblioteca digital* <bibliotecadigital.fgv.br/dspace/bitstream/10438/1953/1/TD103.pdf>.
 12. Jeremy Pope, "Transparency International Source Book 2000 - Confronting Corruption: The Elements of a National Integrity System" (2000), online: <archive.transparency.org/publications/sourcebook>.

non-governmental organizations have lauded the country's anti-corruption legislative framework and heralded it as a model for other developing countries.¹³ 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.¹⁴

Despite these obstacles, empirical and anecdotal evidence indicates 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. Elsewhere, two of us argue that the explanation for the success of these government agencies appears to lie, at least partially, in their institutional arrangements.¹⁵ 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 advantages in pursuing alternative institutional

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13. Global Integrity, *Global Integrity Report: Brazil 2009* (2009); Amarribo Brasil, *UN Convention against Corruption Civil Society Review: Brazil 2012* (2012); Frederick T Stocker, *Anti-Corruption Developments in the BRIC Countries: A MAPI Series* (Manufacturers Alliance for Productivity and Innovation: Arlington, 2012). 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. Maíra Martini, "Brazil: Overview of Corruption and Anti-Corruption" (2014), online: <http://www.transparency.org/files/content/corruptionqas/Country_profile_Brazil_2014.pdf>.
 14. See Lindsey Carson & Mariana M Prado, "Mapping Corruption and its Institutional Determinants in Brazil" (2014) International Research Initiative on Brazil and Africa Working Paper No 08, online: <http://www.brazil4africa.org/wp-content/uploads/publications/working_papers/IRIBA_WP08_Mapping_Corruption_and_its_Institutional_Derminants_in_Brazil.pdf> [Carson & Prado, "Mapping"].
 15. Mariana M Prado & Lindsey Carson, "Brazilian Anti-Corruption Legislation and its Enforcement: Potential Lessons for Institutional Design" (2014) International Research Initiative on Brazil and Africa Working Paper No 09, online: <http://www.brazil4africa.org/wp-content/uploads/publications/working_papers/IRIBA_WP09_Brazilian_Anti-Corruption_Legislation_and_its_Enforcement.pdf> [Prado & Carson, "Brazilian Anti-Corruption"].

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 offences by corporations—and argues that a strategy may confer particularly valuable benefits in environments where 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*¹⁶ enacted in August 2013 and in force since January 2014 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, which does not rely 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.¹⁷

As discussed in the academic literature and elsewhere in Part II(B)(3), below, the Brazilian judiciary represents one of the most significant institutional barriers

16. Law No 12, 846/13 [*Clean Company Act*]. 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.

17. Message 52 Executive to National Congress (29 October 2009) EMI No 00011 2009 – CGU/MJ/AGU, online: <www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=519F1B865607F805C445F533D460A0DE.proposicoesWeb2?codteor=735505&filenam e=Tramitacao- PL+6826/2010> [translated by the authors].

to holding individuals and legal persons accountable for their corrupt activities.¹⁸ We hypothesize that by creating an alternative pathway to investigation and punishment, 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* could provide insights for other developing countries struggling with similar issues.

To develop this claim, this article is divided into three parts. Part I provides a brief history of the Brazilian *Clean Company Act* and an overview of its main provisions. Part II analyzes the administrative process for investigation and punishment in Brazil in greater depth, emphasizing how institutional multiplicity seems to have strengthened the country's anti-corruption system. Building on the institutional multiplicity hypothesis, Part III argues that the new statute has the potential to effectively bypass the Brazilian judiciary by relying on administrative and civil processes and sanctions. This is significant because the judiciary 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.

I. THE BRAZILIAN *CLEAN COMPANY ACT*

Individuals engaged in corruption in Brazil can be subject to three types of punishment: administrative, civil, and criminal.¹⁹ Each is determined by separate administrative or judicial processes that run independently of one another. The Brazilian system to punish individuals involved in corruption schemes is quite robust, especially for public servants. Until 2013, however, there was no express legal basis for extending strict liability for corruption-related offences

18. See Part II(B)(3), below. See also, Carlos HR Alencar & Ivo Gico Jr, "When Crime Pays: Measuring Judicial Performance Against Corruption in Brazil" (2011) 17 *Law & Bus Rev* 415; Matthew M Taylor, "Veto and Voice in the Courts: Policy Implication of Institutional Design in the Brazilian Judiciary" (2006) 38:3 *Comparative Politics* 337; Fausto M Sanctis, "Recent Legal and Judicial Reform Initiatives in Brazil" (2013) Winter *International Judicial Monitor*; Carson & Prado, "Mapping," *supra* note 14.

19. *Ibid.*

to legal entities, including corporations, whether committed in national or foreign territory.²⁰ 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*.

A. 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. Brazil is a signatory to three multilateral anti-corruption conventions: the Organisation for Economic Co-Operation and Development ("OECD") *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD Convention);²¹ the *Inter-American Convention Against Corruption*, enacted by the Organization of American States;²² and the *United Nations Convention Against Corruption* (UNCAC).²³ All three conventions require each state party to impose liability for corrupt acts on legal entities in a manner "consistent with its legal principles."²⁴ Considering that the Brazilian Constitution only authorizes criminal responsibility of legal persons in cases involving environmental offences, it would not be possible to impose criminal sanctions for corporations or other legal persons without a constitutional amendment. Hence, when Brazil revised

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20. 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, and so on. 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) at 51-53.
 21. OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (1998) 37 ILM 1 [OECD Convention] (ratified by Brazil in 2000).
 22. Organization of American States, *Inter-American Convention Against Corruption* (1997) 35 ILM 724 [IACAC] (ratified by Brazil in 2002).
 23. United Nations, *Convention against Corruption* (2004) 43 ILM 37 [UNCAC] (ratified by Brazil in 2006).
 24. OECD Convention, *supra* note 21, art 2; IACAC, *supra* note 22, art VIII; UNCAC, *supra* note 23, art 26.

its criminal code in 2002 to include the prohibition on transnational bribery, it included criminal sanctions only for individuals.²⁵

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 (“OECD Working Group”). This monitoring process was designed to determine whether a country has established the structures to enforce the laws and rules that implement 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,²⁶ 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.

B. 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.²⁷ In this Part, we evaluate the *Act* against Brazil’s international obligations under the OECD Convention, UNCAC, and IACAC, and compare its terms with anti-corruption laws in other states that are party to one or more of these agreements. As the 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. This potential gap between law on the books and law in action is addressed explicitly in the design of the OECD Working Group’s country monitoring system, which assesses the adequacy of both the content and application of anti-corruption legislation.²⁸ As evidenced by the OECD’s

25. Letter from Jorge Hage Sobrinho, Tarso Genro Fernando Herz & Luis Inácio Lucena Adams to the President (23 November 2009) EMI No 00011 2009 – CGU/MJ/AGU, online: <www.planalto.gov.br/ccivil_03/projetos/EXPMOTIV/EMI/2010/11%20-%20CGU%20M%20AGU.htm> [Interministerial Letter] (arguing for the approval of the bill).

26. OECD Working Group on Bribery, *Brazil Phase 2: Follow-Up Report on the Implementation of the Phase 2 Recommendations* (2010) at 35-41 [OECD Working Group (2010)].

27. *Supra* note 16, art 5.

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

peer monitoring reports, countries with similar laws may demonstrate enormous variability in their rates of enforcement of those laws.²⁹ Thus, a doctrinal analysis and comparison of the content of the new 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 *Clean Company Act* will largely depend on enforcement, which will in turn be influenced by institutional multiplicity, as we argue in Part II, below.

1. 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,³⁰ prohibitions against foreign bribery are a more modern phenomenon. In 1977, the United States enacted the *Foreign Corrupt Practices Act* ("FCPA"),³¹ the world's first law regulating the business conduct of domestic actors engaged in foreign markets with foreign officials. In December 1997, after decades of advocacy on the part of American officials and businesses and amid increased attention and pressure from civil society and the media, members of the OECD and five other countries (including Brazil) signed the OECD Convention. The Convention, which came into force in February 1999, 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,³² but Brazil's unified approach is consistent with anti-bribery laws

29. See *e.g.* OECD Working Group on Bribery in International Business Transactions, *Compilation of Recommendations made in the Phase 3 Reports: Implementation and Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendations on Further Combating Bribery* (2014) [OECD Working Group (2014)]; OECD Working Group on Bribery in International Business Transactions, *Compilation of Recommendations made in the Phase 2 Reports* (2010).

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

31. 15 USC 2012, §§ 78dd-1 *et seq* [FCPA].

32. Rachel Brewster, "The Domestic and International Enforcement of the OECD Anti-Bribery Convention" (2014) 15:1 Chicago J Int'l L 84.

in several other States Party, including Colombia, Germany, Portugal, and the United Kingdom.³³

While UNCAC urges signatories to criminalize bribery in the private sector (commercial bribery) as well as the public sphere,³⁴ the *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.³⁵ Brazil is like many other UNCAC members, including Argentina, Ecuador, Japan, and Mexico in lacking specific laws that prohibit bribery among private parties. Moreover, other countries, such as the United States and Australia, regulate commercial bribery by a patchwork of federal and sub-national laws rather than a single statute.³⁶

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.³⁷ 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,³⁸ only a handful of other countries, including Canada and South Korea, directly address payments made to family members of public officials.³⁹

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33. 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: <www.oecd.org/daf/anti-bribery/WGB-Steps-Taken-Update.pdf>.
34. UNCAC, *supra* note 23, art 21.
35. *Clean Company Act*, *supra* note 16, art 5(IV).
36. Sarah Clark, “New Solutions to the Age-Old Problem of Private-Sector Bribery” (2013) 97:6 Minn L Rev 2285; Jones Day, “Anti-Corruption Regulation Survey of Select Countries” (2014), online: <[http://www.jonesday.com/files/Publication/7c9d704f-e85f-4f61-b379-791aa13e9917/Presentation/PublicationAttachment/f42e5f97-71ff-4cea-b597-7a61ef3674b5/Anti-Corruption%20Regulation%20Survey%202013%20\(optimized\).pdf](http://www.jonesday.com/files/Publication/7c9d704f-e85f-4f61-b379-791aa13e9917/Presentation/PublicationAttachment/f42e5f97-71ff-4cea-b597-7a61ef3674b5/Anti-Corruption%20Regulation%20Survey%202013%20(optimized).pdf)>.
37. *Supra* note 16, art 5(I).
38. Criminal Division of the US Department of Justice and the Enforcement Division of the US Securities and Exchange Commission, “A Resource Guide to the US Foreign Corrupt Practices Act” (2012), online: <www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> [US Department of Justice, “Resource Guide”].
39. *Criminal Code of Canada*, RSC 1985, c C-46, s 121 [*Criminal Code*]; Choe Sang-Hun, “South Korea Tightens Rules Against Gifts to Fight Graft,” *New York Times* (3 March 2015), online: <www.nytimes.com/2015/03/04/world/asia/south-korea-seeking-to-curb-graft-passes-law-restricting-gifts.html?_r=0>.

Another notable feature of the *Clean Company Act* is its lack of a definition of “public official” in the text of the law itself.⁴⁰ The law defines “foreign public administration” in detail, providing what appears to be a 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.⁴¹ 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, which is embroiled in a large corruption scandal at the time of writing. In comparison, while ambiguity persists in varying degrees in the interpretation of the meaning 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.⁴²

2. FORMS OF LIABILITY

In accordance with the UNCAC, OECD Convention, and IACAC, Brazil’s *Clean Company Act* establishes liability for legal entities, but the 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

40. The concept of foreign public official in Brazilian doctrine and jurisprudence is based on the previously 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. See OECD, *Brazil Phase 1: Review of Implementation of the Convention and 1997 Recommendation* (2004) at 5-6.

41. “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 2013, No 12846, arts 5(1)-(3).

42. *Bribery Act 2010* (UK), s 6(5); FCPA, *supra* note 31, §§ 78dd-1(f)(1), 78dd-2(h)(2), 78dd-3(f)(2); 18 USC § 201(a); 18 USC §§ 666 (d)(1)-(4); *Corruption of Foreign Public Officials Act*, SC 1998, c 34, s 2 [CFPOA]; *Criminal Code*, *supra* note 39, ss 120-23.

corporate criminal liability for bribery and other corruption-related offences,⁴³ under Brazilian law, legal persons can be only held criminally liable in cases involving environmental offences.⁴⁴ 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).⁴⁵ Moreover, as discussed in Part I(B)(5), below, by imposing administrative liability on legal persons, the *Clean Company Act* allows Brazilian authorities to bring corruption cases in fora separate from the country's inefficient judicial system.

Corporate liability for offences under the *Clean Company Act* is strict, meaning that a company can be held administratively or civilly liable merely by 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 wilful conduct or knowledge on the part of the legal entity.⁴⁶ 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.⁴⁷ In contrast, under the bribery laws of most other countries, including Canada and the US, corporate liability

43. 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 [OECD Anti-Corruption Network].

44. Brazilian Federal Constitution, art 225 at para 3; Brazilian Law 1998, No 9605.

45. OECD Anti-Corruption Network, *supra* note 43 at 74. 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. See OECD Working Group on Bribery, "2013 Data on Enforcement of the Anti-Bribery Convention" (2014) at 4-6, online: <www.oecd.org/daf/anti-bribery/Working-Group-on-Bribery-Enforcement-Data-2013.pdf>.

46. *Supra* note 16, art 2. In its most recent assessment of Brazil's implementation of the OECD Convention, 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 Anti-Bribery Convention In Brazil* (2014) at 17 [OECD, *Phase 3 Brazil Report*].

47. *Supra* note 42, s 7.

only attaches if the individuals involved possessed the requisite *mens rea*.⁴⁸ 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 bribery 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.⁴⁹

3. JURISDICTIONAL REACH

The UNCAC, OECD Convention, and IACAC all oblige signatories to take measures to establish territorial jurisdiction over corruption-related offences and further urge States Party to extend jurisdiction to offences committed abroad by their nationals.⁵⁰ 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.⁵¹

While most countries exercise jurisdiction over corruption-related offences more narrowly,⁵² the extraterritorial 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,”

48. The US laws governing both foreign and domestic bribery require proof of corrupt intent. See FCPA, *supra* note 31, §§ 78dd-1, 78dd-2, 78dd-3; 18 USC § 201. The Canadian bribery law, by contrast, 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.” See *R v Sault Ste Marie (City)* [1978] 2 SCR 1299, 85 DLR (3d) 16 [*Sault Ste Marie*].

49. Bram Meyer, Tessa van Roomen & Eelke Sikkema, “Corporate Criminal Liability for Corruption Offences and the Due Diligence Defence: A Comparison of the Dutch and English Legal Frameworks” (2014) 10:3 Utrecht LR 37 at 50.

50. UNCAC, *supra* note 23, art 42; OECD Convention, *supra* note 21, art 4; IACAC, *supra* note 22, art V.

51. *Supra* note 16, art 1.

52. 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. See FCPA, *supra* note 31, §§ 78dd-1(a), (g), 2(i), 3(a), 78l, 78m(b)(2), 78o(d). 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 offences and Canada. See CFPOA, *supra* note 42. *R v Libman* [1985] 2 SCR 178, 21 DLR (4th) 174.

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.⁵³ Thus, under both the Brazilian and UK laws, a multinational enterprise that has an office in São Paulo and London could ostensibly face prosecution in Brazil, the UK, or both, for bribery that occurred in a different country, even if no act or individual in Brazil or the UK was involved.

4. 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.⁵⁴ 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 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.⁵⁵

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.⁵⁶ 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.⁵⁷

5. ENFORCEMENT AUTHORITY AND PROCEDURES

Chapter IV of the *Clean Company Act* lays out a basic framework for administrative proceedings in cases involving the bribery of domestic officials, but the specific

53. *Supra* note 42, s 7.

54. *Supra* note 16, art 5.

55. OECD Working Group (2014), *supra* note 29.

56. *Supra* note 16, art 4.

57. Mark Pieth, Lucinda A Low & Nicola Bannucci, *The OECD Convention on Bribery: A Commentary*, 2d ed (New York: Cambridge University Press, 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. See OECD, *Phase 3 Brazil Report*, *supra* note 46.

procedures for imposing corporate administrative liability are articulated in Decree No. 8,420,⁵⁸ which was signed by President Dilma Rousseff on 18 March 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*) (“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 Office of the Comptroller General of the Union (*Controladoria-Geral da União*) (“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.⁵⁹

According to the *Clean Company Act*, the CGU also has jurisdiction over administrative enforcement actions involving alleged bribery of foreign officials. In addition, in both domestic and foreign corruption cases, once an administrative proceeding is completed, the committee responsible for 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.⁶⁰ The federal, state, and municipal governments also have the authority to file judicial actions in relation to alleged violations of the *Act*.⁶¹

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, entrusting 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 Part III, below, the concurrent jurisdictional authority exercised by the CGU alleviates some of these concerns because 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.

58. Brazilian Decree 2015, No 8.420.

59. *Ibid.*, art 13.

60. *Clean Company Act*, *supra* note 16, art 15.

61. *Ibid.*, art 19.

The Brazilian approach of allowing corruption-related cases to be brought and heard in multiple fora is not unique among 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 in judicial criminal proceedings against natural persons, as well as civil liability for damages in the court system.⁶² 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 a member of the management has committed a corruption-related offence.⁶³

6. PENALTIES

The potential administrative penalties for violations of the *Clean Company Act* include fines, publication of the administrative decision sanctioning the breaching company in a local or national newspaper, and notices at the corporate headquarters or on the company's website. The *Act* provides that legal entities can be liable for fines between 0.1% and 20% of the company's gross revenue,⁶⁴ and the Decree specifies the minimum and maximum levels for such fines. The minimum fine is the greater of (1) the benefit sought or obtained by the company, (2) 0.1% of the company's gross revenue, and (3) 6,000 Brazilian Real ("BRL") (approximately \$2096 CAD), if the company's gross revenues cannot be determined; and the maximum fine is the lesser of (1) 20% of the company's gross revenue, and (2) three times the value of the benefit sought or obtained by the company.⁶⁵

Beyond 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.*,

62. OECD Working Group, *Phase 1 Report on Implementing the OECD Anti-Bribery Convention in Colombia* (2012) at 11-13.

63. OECD Working Group on Bribery, *Germany: Follow-Up to the Phase 3 Report & Recommendations* (2013) at 8 [OECD Working Group (2013)].

64. *Supra* note 16, art 6.

65. 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.

subsidies, grants, loans, and donations) for one to five years; and, in extreme cases, dissolution of the legal entity.⁶⁶

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 Euro (\$14 million CAD).⁶⁷ Also, under the US FCPA, corporations and other business entities are subject to a criminal penalty of up to \$2 million USD per violation or twice the pecuniary gain sought in the corrupt transaction as well as a civil penalty of up to \$16,000 USD per violation of the anti-bribery provisions.⁶⁸ Like Brazil, other countries such as Australia, Greece, Hungary, and Korea all allow fines to be calculated based on the advantage gained or intended to be gained through the corrupt act,⁶⁹ 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,⁷⁰ as well as collateral consequences such as the potential suspension or debarment from public contracting or assistance.⁷¹

The *Clean Company Act* states that when determining penalties, authorities can consider the seriousness of the offence, the advantage gained or intended by the offender, whether the offence was fully completed, the degree of damage or risk of damage, the effects of the offence, the company's economic strength, its cooperation with investigating authorities, and the existence of internal compliance controls.⁷² The 2015 Decree that complements the *Act*⁷³ 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.⁷⁴

66. *Supra* note 16, art 19.

67. OECD Working Group (2013), *supra* note 63.

68. FCPA, *supra* note 31, §§ 78dd-2(g)(1)(A)-(B), 78dd-3(e)(1)(A)-(B), 78ff(c)(1)(A)-(B); 18 USC § 3571(d).

69. OECD/The World Bank, *Identification and Quantification of the Proceeds of Bribery*, revised ed (2012) at 20.

70. *Ibid.*

71. While debarment is discretionary in countries like the United States and Australia, conviction under the CFPOA results in mandatory debarment. See Public Works and Government Services Canada, *Ineligibility and Suspension Policy* (Ottawa: Public Works, 2015) Part C, ss 3(e), 5(e). See also Stuart H Deming, *Anti-Bribery Laws in Common Law Jurisdictions* (Oxford: Oxford University Press, 2014) at 12.

72. *Supra* note 16, art 6(6).

73. Brazilian Decree 2015, No 8.420, *supra* note 58.

74. *Ibid.*

It further establishes that the specific factors that can be applied to a given case must be determined during the administrative proceeding.⁷⁵

The *Clean Company Act* also allows authorities to conclude “leniency agreements” with companies accused of misconduct as a means to mitigate potential sanctions.⁷⁶ 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.⁷⁷ 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: exemption from publication of the administrative decision sanctioning its misconduct; exemption from the prohibition on receiving public funding and assistance; up to a two-thirds reduction of the fine imposed; and exemption from or mitigation of administrative sanctions set out in certain statutes governing public tenders and government contracts.⁷⁸

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 other sanctions to be imposed in corruption cases.⁷⁹ In addition, jurisdictions

75. *Ibid* at art 20.

76. *Supra* note 16, art 16.

77. *Ibid*, art 16; Brazilian Decree 2015, No 8.420, *supra* note 58, art 28.

78. See Brazilian Decree 2015, No 8.420, *supra* note 58 at art 40:

Once the leniency agreement has been signed by the cooperative legal person, one or more of the following effects will be declared in favor of the signing legal person: I - exemption of the extraordinary publication of the sanctioning administrative decision; II - exemption from the ban to receiving incentives, subsidies, grants, donations or government loans from public entities and from public financial institutions or from those controlled by the Government; III - reduction of the final amount of the financial penalty, subject to the provisions in art. 23; or IV - exemption or reduction of the administrative penalties defined in art. 86 to Art. 88 of Law N. 8666, 1993, or in other norms of procurement and contracts.

The effects of the leniency agreement will be extended to the legal persons who are part of the same economic group, in fact and in law, provided that they have signed the agreement together, respected the conditions established on it.

79. OECD Anti-Corruption Network, *supra* note 43; Ministry of Justice, “The Bribery Act 2010: Guidance” (2011) at 8; US Department of Justice, “Resource Guide,” *supra* note 39 at 52-53; *Her Majesty the Queen v Griffiths Energy International*, [2013] AJ No 412 (Transcript of Proceedings).

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. These agreements, called deferred-prosecution agreements or non-prosecution agreements, 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.⁸⁰

II. 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.⁸¹ In this regard, these institutions should perform three primary functions: first, oversight, which entails monitoring those in positions of power or engaged in activities carrying a high risk of corruption to identify quickly anything suspicious or atypical; second, investigation, which is the process of obtaining more detailed information about acts or activities once suspicion has been raised; and third, punishment, which is the effective application of sanctions in those cases in which there is sufficient evidence to prove misconduct.⁸²

Brazil possesses an extensive stock of anti-corruption legislation. It also boasts a wealth of accountability institutions charged with monitoring, investigating, and sanctioning those involved in corruption.⁸³ 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 in Part II(B), below,

80. See *e.g.* US Department of Justice, "Resource Guide," *supra* note 38; *Crime and Courts Act 2013 (UK)*, Schedule 17 at s 45.

81. Pope, *supra* note 12; Scott Mainwaring & Christopher Welna, eds, *Democratic Accountability in Latin America* (Oxford: Oxford University Press, 2003).

82. Matthew M Taylor & Vinícius C Buranelli, "Ending Up in Pizza: Accountability as a Problem of Institutional Arrangement in Brazil" (2007) 49:1 *Latin Am Pol & Soc'y* 59; Power & Taylor, "Introduction," *supra* note 4.

83. Stocker, *supra* note 13; Carson & Prado, "Mapping," *supra* note 14.

the judiciary remains a core weakness in Brazil's accountability system.⁸⁴ 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."⁸⁵ Largely relying on previous work that has been done on this concept, this article explores the instances of institutional multiplicity in Brazil's systems of corruption oversight (the TCU and CGU), investigation (Public Ministry, Federal Police Department, and the CGU), and punishment (the CGU, 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 the accountability system as a whole suffers from inefficiency, ineffectiveness, or other flaws.

A. 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 mechanisms, patterns, and processes of institutional change and stability.⁸⁶

84. Leonardo Avritzer, "O real combate à corrupção," *Carta Capital* (3 September 2011), online: <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) 133; Matthew M Taylor, "Corruption, Accountability Reforms, and Democracy in Brazil" in Charles H Blake & Stephen D Morris, eds, *Corruption and Democracy in Latin America* (Pittsburgh: University of Pittsburgh Press, 2009) 150.

85. For an analysis of the recent progress, see Bruno W Speck, "Auditing Institutions" in Timothy J Power & Matthew M Taylor, eds, *Corruption and Democracy in Brazil: The Struggle for Accountability* (Notre Dame: University of Notre Dame Press, 2011) 127; Arantes, *supra* note 2. Prado and Carson have analyzed the concept of institutional multiplicity in the context of anti-corruption legislation. See Prado & Carson, "Brazilian Anti-Corruption," *supra* note 15.

86. 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 & Kathleen Thelen, *Explaining Institutional Change: Ambiguity, Agency, and Power* (New York: Cambridge University Press, 2010); Wolfgang Streeck & Kathleen Thelen, *Beyond Continuity: Institutional Change in Advanced Political Economies* (New York: Oxford University Press, 2005).

Many sociologists, in contrast, have relied on the concept to analyze heterogeneity in models of action, especially in processes that culminate in the loss of social order or growth of social entropy.⁸⁷ While political scientists aim to explain change in formal rules and in organizations, sociologists tend to focus on explaining behavioural and social change. The concept of institutional multiplicity used in this article is closer to the sociological viewpoint for two reasons.

First, economists and political scientists have often adopted the widely popular definition of institutions provided by Douglass C. 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.⁸⁸

However, as Michael J. Trebilcock and Mariana Mota Prado have argued, this definition of institutions generally strikes lawyers and legal scholars as odd and overly broad:

[T]he 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.⁸⁹

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 with making, administering, enforcing, or adjudicating its laws or policies.”⁹⁰ This is the definition adopted by organizational and economic sociologists and is endorsed in this article.⁹¹

87. Elizabeth S Clemens & James M Cook, “Politics and Institutionalism: Explaining Durability and Change” (1999) 25 *Ann Rev Soc* 441.

88. Douglass C North, “The New Institutional Economics and Third World Development” in John Hariss, Janet Hunter & Colin M Lewis, eds, *The New Institutional Economics and Third World Development* (London: Routledge, 1995) 17 at 23.

89. Michael J Trebilcock & Mariana Mota Prado, *Advanced Introduction to Law and Development* (Cheltenham, UK: Edward Elgar, 2014) 32 at 34.

90. Michael J Trebilcock & Mariana Mota Prado, *What Makes Poor Countries Poor? Institutional Determinants of Development* (Cheltenham, UK: Edward Elgar, 2011) at 27-28.

91. Clemens & Cook, *supra* note 87 at 442.

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),⁹² our analysis focuses on the potential for behavioural change in environments in which institutional and legal changes have already taken place. As Elizabeth S. Clemens and James M. Cook explain, a lack of institutional alternatives can generate regularities of social action, which are then taken for granted.⁹³ 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.⁹⁴ 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. The new institution can create space for effective accountability by creating different incentives and operating under a different culture. The impact of this new institution can be even more drastic—once those in the old and inefficient institution start to observe their counterparts in another institution proactively investigating or prosecuting corruption, they may begin to question their negative assumptions about their own institution's potential role in combatting corruption.

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, this article looks beyond those factors identified in the sociological

92. For an article focused on this, see Sérgio Praça & Matthew M Taylor, "Inching Toward Accountability: The Evolution of Brazil's Anticorruption Institutions, 1985–2010" (2014) 56:2 *Latin Am Pol & Soc'y* 27.

93. *Supra* note 87 at 446.

94. See Myeong-Gu Seo & WE Douglas Creed, "Institutional Contradictions, Praxis, and Institutional Change: A Dialectical Perspective" (2002) 27:2 *Academy Mgmt Rev* 222; Tamar B Zilber, "Institutional Multiplicity in Practice: A Tale of Two High-Tech Conferences in Israel" (2011) 22:6 *Org Sci* 1539.

literature in order to embrace a wide array of potential causal explanations as to how institutional multiplicity can generate change. As discussed by Clemens and Cook, two potential mechanisms 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 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.⁹⁵

Thus, while the focus of our analysis is on the creation of formal institutions that offer alternative paths and how this new “maze” may modify behaviour, we do not dismiss the possibility that the causal mechanism that allows changes to take place in such alternative institutional pathways may also include informal mechanisms, such as socialization of 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,⁹⁶ 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 the institution entirely), even when institutional 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 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

95. Clemens & Cook, *supra* note 87 at 446 [emphasis in original].

96. For a review of the political science literature on path dependency, see Paul Pierson, “Increasing Returns, Path Dependence, and the Study of Politics” (2000) 94:2 *Am Pol Sc Rev* 251 at 252-57. See also Mariana Prado & Michael Trebilcock, “Path Dependence, Development, and the Dynamics of Institutional Reform” (2009) 59:3 *UTLJ* 341; W Brian Arthur, “Increasing Returns and Path Dependence in the Economy” (Ann Arbor: University of Michigan Press, 1994).

dramatic change is possible.”⁹⁷ However, the literature on institutional change has increasingly challenged this dualist view of institutional development, emphasizing instead that institutional transformation is often incremental.⁹⁸

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”⁹⁹ 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.¹⁰⁰ An institutional bypass has three characteristics: First, it keeps the traditional institution in place; second, it creates an alternative pathway through which to deliver government services or discharge governmental functions; and third, its creators intend it to be more efficient or functionally effective than the traditional institution.¹⁰¹ 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,¹⁰² institutional bypass is limited to situations in which newly-established institutions operate independently of, and parallel to, pre-existing institutions, while performing essentially the same functions.¹⁰³

While institutional multiplicity is not necessarily the same as layering or bypass, it shares some important characteristics with both. The idea of institutional multiplicity is broad enough to embrace the cases of layering in

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97. Giovanni Capoccia & R Daniel Kelemen, “The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism” (2007) 59:3 *Wld Pol* 341 at 341.
98. See e.g. Mahoney & Thelen, *supra* note 86 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; Streeck & Thelen, *supra* note 86 at 1-39.
99. Mahoney & Thelen, *supra* note 86 at 35-37.
100. Graham Denyer Willis & Mariana Mota Prado, “Process and Pattern in Institutional Reforms: A Case Study of the Police Pacifying Units (UPPs) in Brazil” (2014) 64 *World Dev* 232 at 235.
101. Mariana Mota Prado, “Institutional Bypass: An Alternative for Development Reform” (2011), online: <ssrn.com/abstract=1815442>.
102. Schickler, *supra* note 98 at 16. Schickler is describing how the superimposition of new budget committees on a decades-old structure of authorization, appropriations, and revenue committees in the US Congress altered the process of developing fiscal policy.
103. Willis and Prado discuss the distinction between institutional bypass and institutional layering. See Willis & Prado, *supra* note 100 at 235. See also Thelen, *supra* note 86 at 39-91. Thelen details how the establishment of an alternate accreditation committee by Germany’s machine industry bypassed the pre-existing handicraft chambers without directly changing the rules or operation of that organization.

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.”¹⁰⁴ An example of layering in the Brazilian context is the creation of specialized benches (*varas especializadas*) to hear money-laundering cases. The initiative was implemented as an option for federal tribunals in 2003,¹⁰⁵ and after showing significant results, these specialized benches became mandatory for federal appeals tribunals in 2013.¹⁰⁶ 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.¹⁰⁷ 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 office, and negative media coverage, as well as formal legal sanctions, such as criminal or civil judgments.¹⁰⁸

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104. Kathleen Thelen, “The Political Economy of Business and Labor in the Developed Democracies” in Ira Katznelson & Helen V Milner, eds, *Political Science: The State of the Discipline* (New York: WW Norton & Company, 2002) 371.
105. Conselho da Justiça Federal, 24 October 2014, (2014), Lex Magister 126, No 314 (Brazil); Conselho da Justiça Federal, 30 June 2006, (2006), Tribunal Regional Federal 111, No 517 (Brazil).
106. Conselho da Justiça Federal, 18 December 2013, (2014), Official Gazette, 159, No 273 (Brazil).
107. Simon Butt, “Indonesia’s Anti-Corruption Drive and the Constitutional Court” (2009) 4:2 J Comp L 186 at 186; Sofie Arjon Schütte, “Appointing Top Officials in a Democratic Indonesia: The Corruption Eradication Commission” (2011) 47:3 Bull Indonesian Econ Stud 355; Sofie Arjon Schütte, “Against the Odds: Anti-Corruption Reform in Indonesia” (2012) 32 Pub Admin & Dev 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?” (2011) 47:3 Bull Indonesian Econ Stud 381; Sofie Arjon Schütte & Simon Butt, “The Indonesian Court for Corruption Crimes: Circumventing Judicial Impropriety?” (2013) 5 U4 Brief.
108. Power & Taylor, “Introduction,” *supra* note 4 at 14.

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 that have engaged in corruption is a case of multiplicity that is neither layering or bypass. As in cases involving layering and bypass, the establishment of administrative processes and sanctions do not affect the existing sanctioning institution—the judiciary. Similar to electoral or political sanctions, the administrative sanction is complementary to and independent of the judicial sanction. However, 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. Nevertheless, as we argue in Part III, 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 advantages in overcoming entrenched barriers to institutional change. The establishment of an alternative institution communicates to parties both within and outside the pre-existing institution that the status quo is not inevitable or necessarily interminable.¹⁰⁹ It thus introduces the possibility of a new institutional framework that may lead to stronger performance and outcomes. Moreover, outright and abrupt institutional displacement of one institution by a new one may generate intense opposition from constituencies invested in (or benefitting from) 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 existing institutions intact and merely provide alternative paths for achieving the same or similar objectives.¹¹⁰ For this reason, these three arrangements may ignite less direct antagonism.¹¹¹ Finally, the presence of multiple institutional referents “enlarges

109. See Zilber, *supra* note 94 at 1540.

110. See Mahoney & Thelen, *supra* note 86 at 16. Mahoney and Thelen describe slow-moving displacement [emphasis in original]:

[D]isplacement is present 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.

111. See Schickler, *supra* note 98 at 252.

the toolbox from which reformers can draw in crafting new solutions, facilitating deeper change.”¹¹²

Broadly, institutional multiplicity can combat corruption by limiting opportunities for corruption (proactive institutional multiplicity) or by increasing the likelihood of catching and sanctioning corrupt behaviour (reactive institutional multiplicity). Examples of proactive institutional multiplicity 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 licence 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.¹¹³ While intuitively compelling, this strategy is subject to several drawbacks and qualifications. First, there is a risk of unintended consequences: While competing jurisdiction may decrease bribes, the amount of total theft from the government may increase.¹¹⁴ Second, institutional competition can create more opportunities for corruption: If I want to obtain a licence for which I do not qualify, having two officials to approach with a bribe, rather than one, may increase the chances that I will be successful. Third, implementing 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, effective institutional multiplicity 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.¹¹⁵

Institutional multiplicity as a reactive tool for combatting corruption 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, and

112. Matt Andrews, *The Limits of Institutional Reform in Development: Changing Rules for Realistic Solutions* (New York: Cambridge University Press, 2013) at 182, citing Elinor Ostrom, “Design Principles of Robust Property-Rights Institutions: What Have We Learned?” in Gregory K Ingram & Yu-Hung Hong, eds, *Property Rights and Land Policies* (Cambridge, Mass: Lincoln Institute of Land Policy, 2009) 25.

113. Susan Rose-Ackerman, *Corruption: A Study in Political Economy* (New York: Academic Press, 1978).

114. Andrei Shleifer & Robert W Vishny, “Corruption” (1993) 108:3 QJ Econ 599.

115. Pranab Bardhan, “Corruption and Development: A Review of Issues” (1997) 35:3 J Econ Lit 1320.

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 by fostering institutional competition.¹¹⁶

Institutional multiplicity as a reactive tool has a number of potential benefits. First, it arguably fosters competition to improve institutional efficiency.¹¹⁷ 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.¹¹⁸ Effective change in established organizations, Heller argues, can only come about when organizations are motivated by incentives that come with competition. Heller also argues that 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 to investigate and punish corrupt activity.¹¹⁹ 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 at each step of the corruption accountability process. Third, institutional multiplicity could result in collaboration and complementarity.¹²⁰ To the extent that institutional multiplicity means that more human, financial, and other resources are mobilized to fight corruption, enforcement may improve. Alternatively, cooperation between institutions could result in specialization, where different institutions contribute different and complementary skills to perform a particular task, improving overall effectiveness in tackling corruption. These advantages suggest that institutional multiplicity may, in some instances, be an effective strategy for combatting corruption.

116. Prado & Carson, “Brazilian Anti-Corruption,” *supra* note 15.

117. *Ibid.*

118. Thomas C Heller, “An Immodest Postscript” in Erik G Jensen & Thomas C Heller, eds, *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford: Stanford University Press, 2003) 382.

119. Prado & Carson, “Brazilian Anti-Corruption,” *supra* note 15.

120. *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. This concern is particularly relevant in low-income developing countries with scarce fiscal resources—countries 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 of 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 account 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.

B. INSTITUTIONAL MULTIPLICITY IN BRAZIL

Since 2005, there have been a considerable number of high profile and widely publicized anti-corruption operations in Brazil. These operations typically involve the execution of arrest or search warrants, and participation by the Public Prosecutors' Office (*Ministério Público*) or other bodies such as the Revenue Service, the Social Security Ministry, the state police, and regulatory agencies.¹²¹ In addition to these criminal and civil investigations, there have also been a number of administrative investigations, including those related to the various

121. Arantes, *supra* note 2 at 200.

audits regularly conducted by the CGU.¹²² This heightened activity by Brazilian authorities in the realm of corruption over the past decade has been particularly notable given its contrast to the previous weakness and paucity of anti-corruption initiatives in the country. What could explain such apparently significant changes in the system, and what lessons can be learned from them?

While increases in the number of investigations could be interpreted as evidence that corruption spiked dramatically over that period, the specialized literature has suggested that the escalations may reflect changes in Brazilian anti-corruption institutions' capacity, resources, policies, or procedures.¹²³ 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."¹²⁴ Nevertheless, Prado and Carson argue that institutional multiplicity may at least partially explain why the Brazilian federal government's accountability system has demonstrated strong vitality, especially in monitoring and investigating corruption.¹²⁵

1. INSTITUTIONAL MULTIPLICITY IN OVERSIGHT

At the federal level, a multitude of institutions perform constant monitoring of the Brazilian government, but our analysis focuses on two core oversight institutions: the TCU and the CGU. As the external oversight body for the legislative and executive branches, the TCU possesses institutional guarantees of autonomy

122. Internal auditing 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.

See OECD Public Governance Reviews, *Integrity Review of Brazil: Managing Risks for a Cleaner Public Service* (Paris: OECD Publishing, 2012) at 203.

123. Praça & Taylor, *supra* note 92

124. Bruno W Speck, "Mensurando a Corrupção: Uma Revisão de Dados Provenientes de Pesquisas Empíricas" in *Os Custos da Corrupção*, Cadernos Adenauer 10 (São Paulo: Fundação Konrad Adenauer, 2000) at 11.

125. Prado & Carson, "Brazilian Anti-Corruption," *supra* note 15.

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.¹²⁶ Each year, the TCU's staff of 2,400 people inspects roughly 3,000 annual financial reports from various government offices, and processes several thousands of cases involving the employment and retirement of civil servants.¹²⁷

The CGU is part of the executive branch of government. Despite being responsible for internal accountability within the executive branch, the CGU can be considered an instrument of horizontal accountability.¹²⁸ 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. It audits all municipalities with a population under 500,000 and conducts a lottery twice a year to select a random sample of smaller municipalities for auditing.¹²⁹ It audits on average 60 smaller municipalities per lottery via this Random Audits Program (*Programa de Fiscalização a partir de Sorteios Públicos*).¹³⁰ Studies indicate that such audits have been effective in reducing corruption at the local level (especially with regard to education and health), and reducing the likelihood that corrupt mayors are

126. Constitution of the Federative Republic of Brazil, 1988, art 7, I-III, online: <<http://english.tse.jus.br/arquivos/federal-constitution>>.

127. Speck, *supra* note 85 at 137; Marcus A. Melo, "Brazil: Democracy and Corruption" (Working paper delivered at the Democracy Works Project seminar, Rio de Janeiro, Legatum Institute, 15 May 2013) [unpublished] at 21 [Melo].

128. Cecília Olivieri, "O Controle Interno Como Instrumento de Accountability Horizontal: Uma Análise Exploratória da Controladoria Geral da União" (Paper delivered at the Meeting of Public Administration and Governance, November 2006), Encontro de Administração Pública e Governança, online: <www.admsp20061.wikispaces.com/file/view/O+Controle+Interno+como+Instrumento+de+Accountability+Horizontal+-+Cec%C3%ADlia+Olivieri.pdf>.

129. Melo, *supra* note 127 at 23.

130. For a description of the Random Audits Program, see Claudio Ferraz & Frederico Finan, "Exposing Corrupt Politicians: The Effects of Brazil's Publicly Released Audits on Electoral Outcomes" (2008) 123:2 Q J Econ 703 [Ferraz & Finan, "Exposing"]; Controladoria-Geral da União, "Sorteios Públicos" (2014), Presidência Da República, online: <www.cgu.gov.br/assuntos/auditoria-e-fiscalizacao/avaliacao-de-programas-de-governo/programa-de-fiscalizacao-em-entes-federativos/sorteios-publicos>.

re-elected.¹³¹ Another important initiative is the Observatory of Public Expenses (*Observatório de Despesa Pública*),¹³² 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 2011.¹³³ The CGU's Directorate of Strategic Information also conducts a less publicly visible monitoring program that cross-checks data in publicly available databases in search of evidence of misuse or misappropriation of federal government funds.¹³⁴ The institutional multiplicity created by the coexistence of these two separate monitoring authorities appears to have helped to redress some of the internal weaknesses of each organization—especially the TCU—and to improve general oversight within the country.

Three characteristics of the TCU undermine its efficacy in fighting corruption, despite it being formally touted as an archetypical auditing institution.¹³⁵ Firstly, TCU officials spend most of their time on routine monitoring tasks such as preparing audit statements of the government's annual accounts, reviewing annual financial reports from all units of government that manage public funds, and approving policies related to civil servants' employment and retirement, rather than detecting irregularities or systematically analyzing areas in which there are greater risks of corruption.¹³⁶ Secondly, 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.¹³⁷ Thus, as illustrated by a labour court case known as the "TRT case," the TCU is vulnerable

131. See Ferraz & Finan, "Exposing," *supra* note 130; Claudio Ferraz & Frederico Finan, "Electoral Accountability and Corruption: Evidence from the Audits of Local Governments" (2011) 101:4 *Amer Econ Rev* 1274. But see also Yves Zamboni & Stephan Litschig, "Audit Risk and Rent Extraction: Evidence from a Randomized Evaluation in Brazil" (2013), Universitat Pompeu Fabra Working Paper No 1270, online: <www.econ.upf.edu/docs/papers/downloads/1270.pdf>.

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

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

134. See CGU, online: <<http://www.cgu.gov.br/PrevencaoDaCorrupcao/InformacoesEstrategicas/index.asp>>.

135. Carlos Santiso, "Eyes Wide Shut? The Politics of Autonomous Audit Agencies in Emerging Economies" (2007) Centro de Implementación de Políticas Públicas para la Equidad y el Crecimiento Working Paper at 23, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=982663>; Melo, *supra* note 127 at 20-21.

136. Speck, *supra* note 85; Melo, *supra* note 127 at 21.

137. *Ibid.*

to political capture.¹³⁸ Thirdly, the liberal availability of judicial appeals limits the ability of the TCU to punish those involved in wrongdoing effectively. While the TCU may impose administrative and civil penalties, regular courts often strike down such sanctions or take so long to decide these cases that they end up being closed due to the statute of limitations.¹³⁹

The municipal ambulance kickback scheme eventually uncovered through “Operation Bloodsucker” provides an illustrative example of how institutional multiplicity has proven to be 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, in 2004, as part of the aforementioned program of random municipal audits,¹⁴⁰ 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 being used.¹⁴¹ Upon discovering 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 necessary measures to address 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 under this scheme, for a total of \$55 million USD. 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

138. See Santiso, *supra* note 135; Alexandre Rocha, “Especialização e autonomia funcional no âmbito do Tribunal de Contas da União” (2003) 40:157 *Revista de Informação Legislativa* 223 at 223-51. The TRT case is discussed in this Part, below.

139. See generally Santiso, *supra* note 135; Speck, *supra* note 85; Melo, *supra* note 127.

140. See Ferraz & Finan, “Exposing,” *supra* note 130.

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

from office for involvement in the scheme, but none were expelled or faced any other penalty.¹⁴² We address the problem of the lack of sanctioning below.

The CGU's ability to catch irregularities undetected by the TCU is partially due to the fact that the CGU analyzes the effectiveness of government programs, not just the formalities associated with expenditures.¹⁴³ 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 more effective. If so, this would be a case of compensation, in which the strengths of one institution compensate for the weaknesses of another. On the other hand, this might be a case of complementarity, in which two distinct but sound institutions complement one another. 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.¹⁴⁴ The CGU auditors' detection of irregularities not captured by the TCU's analysis would therefore be an example of complementarity. But regardless of whether the Bloodsucker incident is interpreted as a case of compensation or complementarity, that the corrupt scheme was uncovered by authorities illustrates how overlapping oversight functions may increase the chances that wrongdoing will be detected.

Institutional multiplicity has also been effective in overcoming the TCU's second problem, which Marcus A. Melo describes as "a lack of connection between the professional work produced by its cadre of auditors and the political logic that underlies decision-making at its top decision-making body."¹⁴⁵ There is some dispute about the degree to which this disconnect affects the functioning

142. Power & Taylor "Introduction," *supra* note 4 at 3; Marcelo Rocha, "Como se Desvia Dinheiro no Brasil," *Revista Época* (22 July 2012), online: <revistaepoca.globo.com/ideias/noticia/2012/01/como-se-desvia-dinheiro-no-brasil.html>.

143. Maria R Loureiro et al, "Do Controle Interno ao Controle Social: A Múltipla Atuação Da CGU na Democracia Brasileira" (2012) 17:60 *Cadernos Gestão Pública e Cidadania* 54 at 57.

144. Prado & Carson, "Brazilian Anti-Corruption," *supra* note 15 (citing interviews conducted with the TCU in April 2014).

145. Melo, *supra* note 127 at 21.

of TCU.¹⁴⁶ Argelina C. Figueiredo claims that it has a major impact: “[T]he recommendations contained in the reports prepared by the TCU’s technical personnel are usually not followed by its board of ministers for political reasons.”¹⁴⁷ Another political scientist concludes that because of this gap between the TCU’s technical and political organs, “[the TCU’s] effectiveness depends primarily on the extent to which other actors, such as opposition legislators or the media, can publicize its audits.”¹⁴⁸ This is a case of compensation, as other institutions are stepping in to compensate for the failures of the original institution.

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 a corruption scandal involving the labour court in the state of São Paulo, also known as the TRT case. As Power and Taylor describe:

[T]he 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.¹⁴⁹

The scandal came to the fore in 1998, but TCU auditors had called attention to numerous irregularities in 1992, when the building was proposed.

The 1992 audit revealed so many irregularities that the TCU suggested cancelling the contract with the construction company, withholding any future

146. In an interview, a high-level official at the 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 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. See Prado & Carson, “Brazilian Anti-Corruption,” *supra* note 15 at 13.

147. Argelina C. Figueiredo, “The Role of Congress as an Agency of Horizontal Accountability: Lessons from the Brazilian Experience” in Scott Mainwaring & Christopher Welna, eds, *Democratic Accountability in Latin America* (Oxford: Oxford University Press, 2003) 170 at 185.

148. Melo, *supra* note 127 at 23.

149. Power & Taylor, “Introduction,” *supra* note 4 at 2.

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. The audit report reached the highest echelon of the TCU in 1993, but the minister assigned to the case slowed its progression to a glacial pace, allowing construction (and the corruption scheme) to move forward. In 1995, that minister 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, interrupting the project would be costlier than allowing it to be concluded. It is estimated that those involved in the scheme embezzled approximately \$35,000 USD per day, which included kickbacks to senators who approved the transfer of federal funds to the construction project.¹⁵⁰

The TCU's failure in monitoring this project was finally remedied by a member of Congress, the Public Prosecutor's office, and the media.¹⁵¹ In 1996, Senator Giovanni Queiroz, during a regular congressional session, blocked a special transfer to the TRT project amounting to \$5.5 million USD, only to discover that the same transfer was eventually approved in December, when Congress was in recess and only a few representatives remained behind to deal with urgent matters. Queiroz approached the Public Prosecutors' Office to suggest an investigation of the project. After determining that Lalau's assets and lifestyle—including a \$1 million USD apartment in Miami, luxury cars, and lavish parties in expensive restaurants—exceeded his legitimate means, the Public Prosecutors'

150. Mauricio Lima & Rodrigo Vergara, "A Anatomia do Crime," *Revista Veja* (2 August 2000) at 28-29, online: <http://veja.abril.com.br/020800/p_038.html>.

151. Brazil has witnessed a dramatic increase in investigative journalism since its return to democracy, and the press has made valuable contributions to the discovery and investigation of incidents of political corruption. See Venício Artur de Lima, *Midia: Crise Política e Poder no Brasil* (São Paulo: Editora 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. See 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 & Matthew M Taylor, eds, *Corruption and Democracy in Brazil: The Struggle for Accountability* (Notre Dame: University of Notre Dame Press, 2011) at 107; Freedom House, "Freedom of the Press: Brazil", online: <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. See Elana Beiser, Committee to Protect Journalists, "Syria, Iraq, Egypt Most Deadly Nations for Journalists" (30 Dec 2013), online: <www.cpj.org/reports/2013/12/syria-iraq-egypt-most-deadly-nations-for-journalis.php>.

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.¹⁵²

By 1998, the Public Prosecutors' Office had collected enough evidence to request that the judiciary sequester Lalau's assets, as well as those belonging to all others involved in the scheme. The scheme subsequently became public news and was covered heavily by the media. Under public pressure, the judiciary ordered Lalau's removal from his position as chief justice of the labour tribunal in September of that year, and directed the TCU to conduct a new audit of the project. This time, the TCU reached a quick decision that there were irregularities and that the construction should be suspended. It was only then that Congress suspended transfers of federal funds to the project, as the TCU auditors recommended back in 1992. In 1999, in a move motivated by electoral pressures, Congress set up a Commission of Public Inquiry to investigate corruption in the judiciary, with special attention to the labour law court. The Inquiry found that Lalau alone had embezzled more than \$50 million USD in the course of the scheme.¹⁵³

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

Finally, the TCU has increased its activity since the creation of the CGU in 2001. The Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption ("MESICIC") notes that the total number of processes conducted by the TCU—including audits, inspections, consultations, and complaints—rose from 6,135 in 2006 to 8,019 in 2010.¹⁵⁴ These two events suggest that institutional multiplicity and the mechanisms through which it may impact the operation of accountability institutions deserve further investigation, even if no causal connection between the events can be empirically tested or proven.

152. Lima & Vergara, *supra* note 150 at 28-29.

153. Santiso, *supra* note 135 at 26.

154. OAS, Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption (MESICIC), *Federative Republic of Brazil Final Report*, OEA/Ser.L/SG/MESICIC/doc.330/12, rev. 4 (2012) at 20 [MESICIC].

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*) ("DPF"). The MPF typically conducts investigations into criminal matters in conjunction with the DPF. Indeed, the rise in the number of DPF investigations over the last 5 to 10 years¹⁵⁵ appears to be the result not only of an increase in resources for the police but also increased cooperation between the DPF, the MPF, and other investigative bodies such as state public prosecutors, Revenue Service Inspectors, and government ministries.¹⁵⁶ In many cases, joint task forces have been formed to better coordinate investigations. The results appear positive,¹⁵⁷ providing strong evidence that institutional multiplicity has led to productive collaboration.

While the MPF and DPF collaborate frequently on high profile cases and operations,¹⁵⁸ the same is not true for day-to-day investigations, in which 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 memoranda. 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 memoranda, 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 an investigation on its own, but such inquiries are rare. In addition, the constitutionality of the MPF's investigations into potential criminal matters remains unresolved. A case involving the issue has been pending before the Brazilian Supreme Court ("STF") since 2008,¹⁵⁹ and, in the absence of a firm resolution regarding the legal status of such independent investigations, the STF has made it clear that 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 the MPF's investigative authority was introduced but voted down by

155. See generally Carson & Prado, "Mapping," *supra* note 14.

156. Arantes, *supra* note 2 at 200, 205.

157. *Ibid.*

158. *Ibid.*

159. REExt. 593727, Supremo Tribunal Federal, em 02.10.2008.

the Brazilian Congress in 2013.¹⁶⁰ Given these legal and legislative developments, public prosecutors are careful and selective about the cases in which they proceed alone.¹⁶¹

Despite being the exception rather than the rule, in a few cases the investigative powers of the MPF have compensated for the lack of police action. Cases in which the 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.¹⁶² Given the current legal and political climate, however, 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 article. Such a change could allow for assessment of the impact that institutional multiplicity may have on the overall level of criminal investigations in Brazil and their success.

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. 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 the MPF frequently share similarities with the investigative efforts of the Internal Affairs Division of the Union (*Corregedoria Geral da União*) ("CGR"), the arm of the CGU in charge of administrative investigations. Similarly, civil and administrative investigations can feed into criminal investigations and vice versa. Indeed, the CGU has worked closely with the DPF in most of its operations.¹⁶³ 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 Two-Way Road (*Mão Dupla*) and 13th of May (*13 de maio*) investigations, which respectively

160. Isabel Braga, *Newspaper O Globo*, "PEC 37 é votada e rejeitada na Câmara dos Deputados" (25 June 2013), online: <www.oglobo.globo.com/pais/pec-37-votada-rejeitada-na-camara-dos-deputados-8806597>.

161. Prado & Carson, "Brazilian Anti-Corruption," *supra* note 15 at 16.

162. Gustavo Gantois, Terra, "Gurgel: Sem Investigação do MP, Ação do Mensalão Não Teria Existido" (11 March 2013), online: <noticias.terra.com.br/brasil/politica/julgamento-do-mensalao/gurgel-sem-investigacao-do-mp-acao-do-mensalao-nao-teria-existido,d3b5f2532da5d310VgnVCM5000009ccceb0aRCRD.html>.

163. Prado & Carson, "Brazilian Anti-Corruption," *supra* note 15 at 16.

concerned a company hired by the government to build roads and the embezzlement of education funds by municipal officials. In the Two-Way Road case, cooperation between the DPF and the CGU in 2010 uncovered a scheme in which civil servants from the Department of Roads and Transportation of the State of Ceará accepted bribes from Delta, a company contracted by the Federal Department of Infrastructure and Transportation, 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 course of the 13th of May investigation, 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 goods and services to the municipality (*e.g.*, school buses and event organization services) but were actually redirecting federal funds to their own personal bank accounts.

The expansion of 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.¹⁶⁴ 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, across all branches of government, and into the private sector as well. Other factors have likely also contributed to these performance improvements, however, including in particular initiatives undertaken in 1998 and enhanced after 2003 to strengthen the DPF.¹⁶⁵ 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 corruption in Brazil. Nevertheless, it is notable that the increase in criminal investigations and operations at the DPF between 2005 and 2009¹⁶⁶ was followed by an increase in civil investigations initiated by the MPF on corruption and administrative impropriety between 2007 and 2011.¹⁶⁷ Although we cannot prove a causal connection, our hypothesis

164. Arantes, *supra* note 2 at 200.

165. *Ibid.*

166. MESICIC, *supra* note 154 at 27.

167. *Ibid.* at 36.

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 with the ability to conduct investigations that will lead to criminal corruption charges (inter-institutional multiplicity), there is also a degree of multiplicity in the fact that individual actors are independent to act within each of these institutions (intra-institutional multiplicity). For example, while Part II(B)(1) of this article, above, 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 the MPF's power to act as an effective anti-corruption body.¹⁶⁸

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 for these reforms 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 MPF'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 Professor Rogério Bastos Arantes explains, this law provides an alternative to rather burdensome criminal trials because the burden of proof is lower in civil cases.¹⁶⁹ 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.

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 have reached a conclusion and resulted in any sanction.¹⁷⁰

168. Maria Tereza Sadek & Rosangela Batista 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) 201 at 208-09.

169. Arantes, *supra* note 2 at 198-99.

170. *Ibid.*

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 the 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.¹⁷¹

Indeed, the average time for trying cases concerning administrative improbity was approximately five years in the regional federal courts, which is quite lengthy.¹⁷²

More recently, the situation seems to have changed significantly. The CGU was created in 2001 to "provide effective and efficient sanction of administrative misconduct by public officials while criminal investigations and prosecution were being processed in the federal judiciary."¹⁷³ 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.¹⁷⁴ 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.¹⁷⁵

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

171. *Ibid.*

172. MESICIC, *supra* note 154 at 47.

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

174. *Ibid.* at 56-57.

175. The structure of the Brazilian Office of the Comptroller General was changed in September 2013 by Decree 8109, notably to accommodate new mandates, but the structure maintained previous ones nonetheless. See Controladoria-Geral da União, "CGU Tem Nova Estrutura Administrativa" (September 2013), online: <www.cgu.gov.br/noticias/2013/09/cgu-tem-nova-estrutura-administrativa>.

administrative investigations and disciplinary procedures and to forward such proceedings 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 the 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 2014.¹⁷⁶

As discussed in Part I(B), above, under the new *Clean Company Act*, corporations and other legal entities 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 construction company Gautama from government contracting, and suspended all 50 contracts in which audits revealed misconduct. 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.¹⁷⁷ In addition to the cancellation of existing contracts and debarment of the company involved in the scandal, the investigation 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 of the 420.3 million BRL (\$146.8 million CAD) paid by the federal government to the Gautama Company, around 36.5% (153.4 million BRL or \$53.5 million CAD) was misappropriated by private parties.

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

177. Andrea Michael, "CGU Proibe Contratos da União com a Gautama," *Folha de São Paulo* (24 July 2007), online: <www1.folha.uol.com.br/fsp/brasil/fc2407200708.htm>.

In 2008, the CGU created the National Registry of Ineligible and Suspended Contractors, a public database that consolidates and disseminates information on companies debarred from contracting with federal or state administrations. Inclusion in the Registry was initially voluntary, but became mandatory under the *Clean Company Act*. As of November 2015, 12,103 sanctioned suppliers and contractors were listed on the Registry, including some from the states and one from a municipality.¹⁷⁸

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, Carlos H.R. de Alencar found that nearly two-thirds of employees administratively discharged between 1993 and 2005 had been removed for reasons linked to corruption.¹⁷⁹ Furthermore, while 333 of 441 of the discharged employees in his study appealed their terminations to the judiciary, extremely few of those applications (4.53%) were successful. That said, 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 prosecuted, and the conviction rate in those cases (3.17%) was notably low. Nonetheless, the high and rising number of administrative sanctions imposed, and the anecdotal evidence provided by the Gautama case, suggest that the CGU is one the most important institutions involved in the punishment of corruption-related offences in Brazil today.

Authority to impose administrative sanctions is not limited to the CGU and individual government ministries, however. As an external oversight body, the TCU also has the power to impose fines or order other administrative penalties for corruption-related offences, including compensation for losses caused to the public administration, removal from office, temporary suspension of political rights, and debarment from public contracting. The TCU's legal authority to apply sanctions for misconduct is particularly strong compared to autonomous audit agencies in other Latin American countries.¹⁸⁰ In recent years, the institution has demonstrated an increased willingness to exert those powers. In 2006, the TCU disqualified thirteen individuals from holding commissioned or trust positions

178. See Portal da Transparencia, online: <<http://www.portaldatransparencia.gov.br/ceis/>>.

179. Carlos HR de Alencar, *Prevenção e Combate à Corrupção e Eficácia Judicial no Brasil* (Brasília: 5º Concurso de Monografias da CGU, 2010) 1 at 52.

180. See generally Santiso, *supra* note 135.

and barred twenty-three firms from participating in competitive federal bidding, but by 2010, these figures increased to 103 and 109, respectively.¹⁸¹

Bruno W. Speck argues that the authority of the judiciary to hear appeals and possibly revise or overturn the TCU's sanctions reduces their overall effectiveness, however.¹⁸² While acknowledging the need to protect against potential abuses of the administrative sanctioning system, Speck asserts that such judicial appeals are disruptive rather than salutary 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 to those that would be followed in court. Some cases argue that the judiciary can review the substance of TCU's decisions, while others affirm that the review is only procedural.¹⁸³ This dispute has generated much uncertainty regarding the finality of TCU decisions, negatively impacting the effectiveness of TCU sanctions. Moreover, the courts overturn TCU decisions at a somewhat higher rate than they would if judicial review were 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 many years to be decided and either run up against statutes of limitations or, in some cases, become moot (for example, because the accused leaves public office or dies).

CGU orders are also subject to judicial review, but unlike TCU decisions, they are rarely overturned by the courts. When asked about the discrepancy, a CGU official indicated that the CGU has a team of lawyers that makes sure that every step in the administrative process is in absolute conformity with the courts' most recent proclamations concerning the scope of their review. In short,

181. MESICIC, *supra* note 154 at 20.

182. Speck, *supra* note 85 at 144.

183. For judicial decisions declaring that the judiciary may only conduct a 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 Barros, 1ª Turma), Diário da Justiça, em 09.03.93, at 2533. For decisions holding that the judiciary may perform a substantive review, see Supremo Tribunal Federal, Mandado, de Segurança (MS) nº 28745, Liminar emitida em 06.05.2010 (Rel. Ministra Ellen Gracie); Tribunal Regional Federal 5a. Região, Apelação Cível: AC 380126 PE 2005.83.02.000431-8, em 11.07.2007. For doctrinal analyses, see Roberto Mateus (2009) at 37-39; Aguiar Filho (2009) at 21-22 (arguing that the judiciary can only perform procedural reviews of the TCU decisions). But see also Bandeira de Mello (1974) at 172; Cretella Junior (1986) at 9; Di Pietro (1996) at 29; Alexandre Pacheco Lopes Filho (2012) (arguing that the judiciary can also perform substantive reviews of TCU decisions).

the CGU is “making the administrative processes bullet proof” to minimize the chances that its decisions will be struck down by courts afterwards.¹⁸⁴

As 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.”¹⁸⁵ Along the same lines, a 2012 report by a MESICIC committee of experts documented the judiciary’s poor rates of resolution in corruption-related cases.¹⁸⁶

The Brazilian judiciary’s underperformance relates not to sporadic errors in execution but rather to fundamental structural problems such as corruption and excessively formalistic, burdensome procedural rules.¹⁸⁷ Our discussion 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. We do not address the problem of corruption in the judiciary.

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 a lack of rationality in management of the judicial system.¹⁸⁸ At the operational level, as of 2012, the judiciary utilized at least 210 different, unintegrated computer systems, frustrating attempts at coordination and efficient administration.¹⁸⁹ The National Judicial Council (*Conselho Nacional de Justiça*) (“CNJ”)—created in 2004 with a mandate to exercise 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 promising, some officials within the CNJ have suggested that they reflect an organizational prioritization of simple, uncomplicated cases that shifts more complex cases (such as those involving

184. Prado & Carson, “Brazilian Anti-Corruption,” *supra* note 15 at 19.

185. Matthew M Taylor, “The Federal Judiciary and Electoral Courts” in Timothy J Power & Matthew M Taylor, eds, *Corruption and Democracy in Brazil: The Struggle for Accountability* (Notre Dame: University of Notre Dame Press, 2011) 162 at 162.

186. MESICIC, *supra* note 154 at 46.

187. See generally William C Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* (Westport, Conn: Greenwood Press, 2000); Taylor, *supra* note 185; Power & Taylor, “Introduction,” *supra* note 4.

188. *Ibid*; Sanctis, *supra* note 18 at 1.

189. MESICIC, *supra* note 154 at 37; MR Machado & LMA Ferreira, *Estudos Sobre o Caso TRT* (São Paulo: Direito GV, 2014).

corruption) farther down the list.¹⁹⁰ In addition, while this article was being written, the CNJ decided to abolish the Open Justice (*Justiça Aberta*) initiative, an electronic system created in 2007 for jurisdictional control, corruption prevention, and transparency of the judiciary.¹⁹¹

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—including the Supreme Court—cannot select the cases they will hear, meaning that even unmeritorious 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 and arbitrations), contributes to significant backlogs across the judicial system.¹⁹² 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 CNJ's efforts 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.¹⁹³

Third, the appellate system is overly generous to defendants who can afford to pay for continuous appeals; if all available avenues are pursued, a standard criminal proceeding must exhaust four judicial instances in order to be considered concluded and no longer subject to appeal (*trânsito em julgado*).¹⁹⁴ Because the Constitution prohibits the execution of sanctions before the final resolution of a case,¹⁹⁵ the multiple levels of appeal allow defendants to drag out proceedings and delay punishment for years, if not decades. If defendants and their counsel prolong the appellate process enough, the statute of limitations may toll, thus requiring dismissal of the case and precluding the imposition of any sanctions. The 2012 MESICIC Report notes that Brazil's multiple appeals process “contributes, in practice, to a final (not subject to appeal) judgment being virtually unattainable,

190. Prado & Carson, “Brazilian Anti-Corruption,” *supra* note 15.

191. Ofício Circular nº 25/CNJ/COR/2015.

192. Sanctis, *supra* note 18 at 2.

193. MESICIC, *supra* note 154 at 43.

194. 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, which will review the facts and law. That collegiate body decision may be appealed to the Supreme Court of Justice to examine legal questions under federal law. Finally, the STJ is subject to appeal to the STF under an “extraordinary appeal,” in which constitutional issues are raised. See *ibid.*

195. “[N]o one shall be considered guilty before the issuing of a final and unappealable penal sentence.” See Constitution of the Federative Republic of Brazil, 1988, art 5, LVII, online: <<http://english.tse.jus.br/arquivos/federal-constitution>>.

often leading to the statute of limitations to run on cases and, consequently, impunity for those accused of acts of corruption.”¹⁹⁶ The OECD Report presents criticisms along the same lines.¹⁹⁷

Beyond the lengthy delays that plague Brazil’s courts, the performance and efficiency of the judiciary are 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, the Supreme Court of Justice (“STJ”), the second highest court in the country, dismissed a high profile case, *Operação Castelo de Areia*, 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 formally charged with three counts of corruption-related offences, but a number of 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 24 April 2014—more than twenty years after Congress launched a CPI into the scandal. Due to those delays, two of the three charges against the former President had to be dismissed because the statute of limitations expired. 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,¹⁹⁸ 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 offences, their subordinates, who have often engaged directly in corrupt activities but only at the behest or for

196. MESICIC, *supra* note 154 at 44.

197. OECD *Phase 3 Brazil Report*, *supra* note 46 at 45, 47.

198. AP 465 / DF, em 24.04.2014

the benefit of their superiors, have often been held legally accountable for their misconduct. The 2013 *Mensalão* case represents a potentially significant shift in the assignment of culpability for corruption offences, however. 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, it is too early to know how lower courts will incorporate the decision into their own jurisprudence.

III. 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,¹⁹⁹ there is almost no literature examining the system of accountability as it applies to private actors, and especially companies operating abroad. This lack of scholarship is due partly to the novelty of the *Clean Company Act*, which has only been in force since 2014. Recognizing that the recentness of the *Act* makes it hard to provide empirical evidence about its operation and to assess its effectiveness, this Part analyzes the *Act's* potential. Building on the idea discussed in Parts II(B)(1)-(2), above, that institutional multiplicity is a desirable strategy in accountability systems, this Part argues that the *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 jurisdiction over such cases to the judiciary.

The *Clean Company Act* is not the first initiative to use institutional multiplicity to bypass problems with the Brazilian judiciary. Administrative bodies such as the TCU and CGU have long searched for ways to impose administrative sanctions that take immediate effect and do not depend on judicial authorization for their enforcement. While administrative penalties remain subject to judicial appeal, they differ from criminal or civil penalties imposed by courts in that they may be imposed while the judicial process is pending. Given the judiciary's glacial pace, administrative sanctions may be in place for 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—sanctions that can

199. See e.g. Power & Taylor, "Introduction," *supra* note 4; Prado & Carson, "Mapping," *supra* note 14; Prado & Carson, "Brazilian Anti-Corruption," *supra* note 15.

take effect immediately and generate financial and reputational costs.²⁰⁰ Similarly, the CGU has also been relying on immediately enforceable administrative sanctions. Considering the risk that sanctions may be reversed through judicial appeals, the CGU has also ensured that administrative procedures closely follow the requirements imposed by the judiciary, in order to reduce the chances of the decision being reversed.²⁰¹ These efforts, which have been in place since before the enactment of the *Clean Company Act*, seem to have been proven effective, as the number of administrative decisions reversed on judicial review has been fairly low.²⁰²

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),²⁰³ 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.²⁰⁴ It is interesting to note that the *Act* offers a few innovations over the pre-existing systems of administrative sanctions. Perhaps most important is the strict liability clause, which largely reduces 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*, discussed in Part I(B), above. This breadth reduces the risk of judicial appeals that rely on the narrowness of legal provisions and on formalist statutory interpretation. Indeed, the *Act* made it very hard for the parties to rely on legal loopholes to avoid sanctions. These innovations seem designed to address the problems of the Brazilian judiciary discussed in Part II, above.

In sum, the hypothesis developed here is that the legislation's heavy reliance on administrative investigation and sanctions was deliberately designed to avoid the obstacles that one normally faces with judicial action in Brazil, especially in corruption-related cases. The *Act* relies 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.

200. Speck, *supra* note 83.

201. Prado & Carson, "Brazilian Anti-Corruption," *supra* note 15 at 19.

202. See Alencar, *supra* note 177.

203. *Ibid*; Carlos HR Alencar & Ivo Gico, "When Crime Pays: Measuring Judicial Performance Against Corruption in Brazil" (2011) 17:3 L & Bus Rev Am 415.

204. Interministerial Letter, *supra* note 25; Prado & Carson, "Brazilian Anti-Corruption," *supra* note 15 at 19.

The substance of the new *Clean Company Act's* provisions is not its only innovative feature; as discussed in Part I(B), above, the statute's reliance on a multitude of high-level administrative organizations to conduct investigations and enforce such provisions is also innovative. 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. Centralization could also allow managers and staff to gain specialized experience with and knowledge of the particular issues surrounding corruption.²⁰⁵ 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 cases there may be advantages in coordinating prosecutorial efforts. In the TRT case, discussed in Part II(B)(1), above,²⁰⁶ 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.²⁰⁷ As a result of the simultaneous and separate civil and criminal lawsuits, more than ten different proceedings related to the TRT scandal were pending before Brazilian courts as of May 2014.²⁰⁸ This is a result of what Maira R. 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.²⁰⁹ This compartmentalization has been taken to an extreme in the TRT case, as subdivisions within each of the three spheres have led to an unnecessary repetition of proceedings, evidence, and document production in cases that have included

205. Patrick Meagher, "Anti-Corruption Agencies: Rhetoric Versus Reality" (2005) 8:1 J Pol Ref 69 at 72.

206. See Machado & Ferreira, *supra* note 189.

207. *Ibid.*

208. *Ibid.*

209. 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 Brasil do Século XXI* (Brasília: IPEA/Conpedi, 2013) 177 at 180-83.

criminal trials for the accused individuals, appeals of administrative sanctions, civil restitution proceedings to recover the embezzled funds, and bankruptcy proceedings involving the company at the centre of the scheme.²¹⁰

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 Part II(B), above. Such cooperation seems to build 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.²¹¹ 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 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 case of the *Clean Company Act*, there are no explicit mechanisms to create or foster this kind of collaboration, although it could be potentially useful in corruption cases in which the police are investigating individuals while the CGU is pursuing administrative charges against an implicated company.

The lack of coordination is not only a problem in the judiciary. As discussed in Part II(B)(2), above, 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 not share information about best practices that could enhance efficiency.²¹² Thus, prosecutorial independence may also foster coordination problems that can ultimately impair anti-corruption efforts. In the context of the *Clean Company Act*, the same problem may occur if the highest level of administration in the local, state, or federal government decides to investigate or prosecute the same case independently. As we argue in Part I(B), above, the lack of precision as to which authorities will enforce the *Act* may create multiplicity but may also impair coordination.

An example of an effort to curtail such problems in the public prosecutor's office is the State Strategy to Fight Corruption (*Programa Estratégia Estadual de*

210. Machado & Ferreira, *supra* note 189.

211. Alencar, *supra* note 179 at 31.

212. Prado & Carson, "Brazilian Anti-Corruption," *supra* note 15 at 22.

Combate à Corrupção) (“ECCO”). The ECCO won the Innovare Institute Prize for Best Strategy to Fight Corruption created by the Public Prosecutors office in 2013.²¹³ The 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 country will enhance efficiency by reducing the time each individual prosecutor needs to invest 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 MP offices in the 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 *Clean Company Act*.

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 case, 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 Parts II(A)-(B), above, 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

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

whole is clearly a challenging task. Sergio Praça and Matthew M. Taylor suggest that the evolution of the web of accountability institutions in Brazil has been characterized by self-reinforcing reforms in multiple institutions, which ended up generating what they call an “autocatalytic process of reform.”²¹⁴ 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 *Clean Company Act* 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, the 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, changing the name from “ENCLA” to “ENCCLA.” The ENCCLA promotes the exchange of information, fosters strategic cooperation among different institutions, and pushes for legislative and institutional reforms that can enhance collaboration.²¹⁵ While the 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.²¹⁶ 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 the *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 Part II, above, it can also be uncooperative. Indeed, there are cases in which fierce and unproductive competition between

214. Praça & Taylor, *supra* note 92 at 27.

215. Prado & Carson, “Brazilian Anti-Corruption,” *supra* note 15 at 23.

216. See OECD Working Group (2010), *supra* note 26.

the two institutions has undermined overall investigative efforts.²¹⁷ 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 the 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 large portion of the advances achieved in Brazil in general, and by the ENCCLA in particular, are due to the fact that specialized departments to combat money laundering and fight corruption have been created within the DPF, MPF, the Ministry of Justice, and other institutions. Perhaps the clearest example of the advantages of specialization comes from the creation of specialized judicial benches (*varas especializadas*), discussed in Part II(A), above. Specialized judges seem to be able to process 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 success²¹⁸ and suggests that the enforcement of the *Clean Company Act* could also benefit from some level of specialization. However, it is hard to determine to what extent the specialization in the judiciary alone is the sole factor that can possibly explain 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 defined money laundering as a stand-alone crime, rather than being defined in connection to a pre-defined list of criminal activities.²¹⁹

Based on the perceived success of the money laundering initiative, the ENCCLA is currently advocating for the creation of specialized judicial benches for corruption cases.²²⁰ 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, discussed in Part I(B), above, may be an interesting experiment to be explored in the Brazilian context. More specifically, it may suggest that there are advantages to specialization, but these are only likely to be promising if they do not exclude

217. RG Azevedo & FB Vasconcellos, "O inquérito policial em questão: situação atual e a percepção dos delegados de polícia sobre as fragilidades do modelo Brasileiro de investigação criminal" (2011) 26:1 *Sociedade e Estado* 59; Melo, *supra* note 127 at 29.

218. *Ibid.*

219. Lei nº 9.613, de 3.3.1998.

220. Prado & Carson, "Brazilian Anti-Corruption," *supra* note 15 at 24.

attempts to promote institutional multiplicity (*i.e.*, if 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 Part II(A), above, institutional multiplicity may generate alternative avenues to perform the accountability functions of oversight, investigation, and punishment, but it may also create problems. Both coordination and specialization may be undermined by institutional multiplicity, but this does not necessarily need to be 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.

IV. CONCLUSION

Three types of legal punishment can be imposed on someone engaged in corruption in Brazil: administrative, civil, and criminal. Each is determined by separate judicial or administrative processes that operate independently of one another.²²¹ The institutional multiplicity argument suggests that independence of the processes might be positive: If one process is flawed, another may be able to compensate. As argued in this article, the new Brazilian *Clean Company Act* seems to rely largely 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 in efforts 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.

221. Lei nº 8.112, de 11.12.1990, art 125.