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3.14 Rio 2016 and the birth of Brazilian transparency

Andy Spalding, Pat Barr, Albert Flores, Kat Gavin, Shaun Freiman, Tyler Klink, Carter Nichols, Ann Reid and Rina Van Orden¹

Brazil's modern democracy is but three decades old. With the Brazilian people now taking to the streets in protest at public corruption, the government is enacting new laws and learning to effectively enforce them. The nation is thus feeling the growing pains of an emergent commitment to transparency.

In this, the window between Brazil's hosting of the 2014 FIFA World Cup and the 2016 Summer Olympics, it is timely to ask what the spotlight of these two events has revealed about the nation's anti-corruption measures. How is the government responding to exposed corruption risk? Will the Olympics ultimately make good on their promise to be an agent of positive change? This brief article discusses issues related to Brazil's federal anti-corruption laws generally, its changing procurement laws and the Olympic contracts and governance organisations.

A rapidly evolving legal system

After the monarchy was overthrown in the late nineteenth century, Brazil went through four distinct government models before emerging as a democracy in 1985.² The cultural belief that corruption was inherent, acceptable and necessary – the 'jeitinho brasileiro' (loosely translated as the 'Brazilian way') – emerged from the wreckage of a century of unstable and/or authoritarian rule.³

Many Brazilians believe that Brazil is changing culturally, however, and that the people will have a measure of success in rooting out corruption.⁴ Young Brazilians especially are calling for reform both

within the government and society. This movement is exemplified by recent protests against President Dilma Rousseff and the perceived corruption in her administration.⁵

Brazil's system of government is itself designed, at least in part, to curb corruption. Seemingly heeding Lord Acton's famous admonition that "absolute power corrupts absolutely," the constitution grants an extraordinary amount of authority to the states and local governments to govern themselves.⁶ The country's brand of federalism appears to be grounded in an institutional and cultural distrust for centralised power, probably borne of its recent history. To the extent that Brazil's federalism succeeds in preventing the concentration of power, it creates conditions that have historically tended to limit corruption.

In seeking to check corruption, however, Brazilian federalism also creates a distinct corruption risk. This risk is exemplified, perhaps ironically, in Brazil's recent landmark federal statute, referred to variously as the Anti-Corruption Law or the Clean Companies Act. The statute creates corporate liability for bribery, and contains various provisions that incentivise compliance and facilitate public enforcement.⁷ Although the passage of the Clean Companies Act is a watershed moment for Brazil's anti-corruption movement, the law was enacted without an integrated national enforcement system. What exists now is a fragmented enforcement regime consisting of autonomous entities that compete both within and between the federal, state and municipal levels. It remains uncertain as to how the new statute will eventually be enforced, or by whom; it was hardly used at all to curb World Cup corruption. In response both to this uncertainty and to the continuing anti-corruption protests, the Rousseff administration has recently passed a decree that clarifies key areas of the statute.⁸ Many believe that it will be years before scholars, lawyers and judges are able sort it all out, however. Only time will tell

whether the government can effectively enforce this law to reduce corruption in connection with the Olympics.

Brazil's procurement regime is also now evolving, with implications for curbing Olympic corruption that remain unclear. The applicable law for public procurement purposes prior to the 2014 football World Cup was Federal Law no. 8,666/1993.⁹ The main criticism of this law was that it required the government to go through two requests for proposals (RFPs), the first for the project design, called the 'technical project', the second for the actual construction. Typically, different companies would win each of the bids, leading to a misalignment of incentives. Procurement lawyers frequently lamented this messy state of affairs, from which litigators profit handsomely.¹⁰

The Olympics and World Cup gave Brazil a chance to experiment with a new bidding law. In 2011 the government enacted Federal Law no. 12,462, the Regime Diferenciado de Contratações Públicas, or 'RDC'.¹¹ The RDC seeks to make bidding procedures more efficient by removing the requirement for a technical project RFP. Another provision included in the RDC makes the budget for government projects confidential. In theory, a 'blind' bidding process should produce more competitive offers for the government: bidders are forced to set prices without knowing their competitors' prices, potentially preventing bid inflation. Anonymity in bidding may also create corruption risk, however, as bidders cannot keep each other in check. Furthermore, two lawsuits have been filed that challenge the constitutionality of the blind bidding process.¹²

The RDC and the Clean Companies Act, as well as the enforcement mechanisms that give life to each of them, will of course remain long after the Olympic Games are gone. They are part of the legal

infrastructure that will prove an important component of the Games' legacy. Brazil has also adopted a number of measures specifically for the Olympics, however, as discussed below.

Olympic anti-corruption measures

Brazil has implemented a number of anti-corruption laws and institutions specifically for the Olympics. The Autoridade Pública Olímpica (APO) is the primary Olympic authority in Rio de Janeiro, and it integrates the federal, state and municipal governments in the planning of the Games.¹³ This is a unique body in Brazil – the first and only public body to bring all three levels of the government together – and it was one of the strongest points of Rio's bid.¹⁴ The organisation allocates responsibilities and coordinates preparation for the Games among the many entities, public and private, that are overseeing the construction infrastructure, and revitalization projects taking place around Rio. These entities include the Empresa Olímpica Municipal (the municipal body in charge of many of the stadium and infrastructure projects and operating out of the Rio mayor's office)¹⁵ and Rio 2016 (the private organisation responsible for the events and athletes during the Olympic Games),¹⁶ as well as the participating offices of the federal and state governments.¹⁷

Given the large sums of money at play in preparation for the Olympics, and Brazil's rank as the 69th perceived least corrupt country in the world,¹⁸ speculation involving construction-related corruption for the games is prevalent. This speculation is only compounded by the recent corruption scandals involving Petrobras and the construction industry.¹⁹ The two overarching features providing public transparency and hedging against corruption for the games are the Responsibility Matrix (Matriz de Responsibilidades) provided by the APO and the auditing provided by the Tribunal de Contas do Município do Rio de Janeiro (TCMRJ).²⁰

The Responsibility Matrix, as mentioned above, tracks all commitments of government agencies for projects directly related to the Rio 2016 Games, be they the responsibility of the federal government, the state government or the municipal government. Although a useful tool in tracking construction progress, the document has its limits: it is effectively available only in Portuguese, as the English version²¹ is updated infrequently; it lists a budget and deadlines only for those projects with a ‘maturation level’ of 3, on a scale from 1 to 6; and it tracks projects only within its third of the budget.²²

The TCMRJ is one of two municipal auditing oversight courts in Brazil. In this capacity, it monitors government procurement activities by analysing construction bidding documents, before the execution of the contract and during inspections, and it also examines the rendering of accounts.²³ It is the body responsible for ensuring that the people of Rio have fair government contracting and that these contracts are completed on time and on budget. One of the major issues that the TCMRJ faces leading up to 2016 is the sheer volume of contracts that it has to oversee. In one of the largest cities in the world, already overseeing all government expenditures, the body must now add to its administrative burden all municipal contracting arising from the Olympic Games.

These infrastructure projects create an additional corruption risk of a very different kind. As with the 2014 World Cup, the Olympics will almost inevitably elicit protests by Brazilian citizens living in the favelas, and other disaffected citizens, who have grown tired of corruption. Corruption is particularly prevalent within the Pacifying Police Units, whose purpose is to bring security to favelas. These officers are reported to steal personal and residential property to sell and make a profit from, without any kind of accountability.²⁴

An additional source of Olympic law relevant to corruption risk is the contractual obligations that the bid city undertakes with the International Olympic Committee (IOC). When a city is selected to host the Games, the promises made in the course of the bid become contractual obligations. The pressure to deliver on these obligations has the potential to encourage corner-cutting, and to open the way for corruption. Some of the promises made in Rio's *Candidature File* are the expansion of the capacity of Rio International Airport, a renovation of Rio's port and a guarantee that all three of Brazil's levels of government (federal, state and municipal) will cover any economic shortfall encountered by the Organising Committee.²⁵ The Committee has estimated that more than 30 million items are needed to meet the demands of the 2016 Olympic and Paralympic Games.²⁶

Despite these myriad risks, the IOC does not appear to be helping much to reduce Olympic corruption in Rio. In contrast to the highly detailed sponsor- and trademark-related guarantees that the IOC typically demands from host cities, none of the host city documents contains an anti-corruption guarantee. Similarly, our interviews with various individuals doing Olympics-related work revealed a widely held perception that the IOC simply is not concerned about host city corruption. While insisting on protecting the commercial interests of its sponsors, the IOC does not seem to have a comparable insistence on protecting the host city's citizens from corruption.

Conclusion

This short article has provided just a cursory discussion of Brazil's anti-corruption framework in advance of Rio2016. Ultimately, it remains to be seen whether enforcement will prove more robust for the Olympics than it was for the World Cup. A full report, to be released in the spring of 2016, will discuss these and many other issues in substantial detail. The world deserves to know all that Brazil has done to curb public corruption, and all it still has to do.

Box 3.3 Projeto Jogos Limpos: the Clean Games project in Brazil

Instituto Ethos²⁷

When Brazil was chosen to host the Fédération Internationale de Football Association (FIFA) 2014 World Cup and the 2016 Olympic and Paralympic Games, the Ethos Institute of Business and Social Responsibility launched the 'Clean Games: Inside and Outside Stadiums' project, with the goal of increasing transparency and preventing corruption in the preparation of the events.²⁸ Companies and public officials signed transparency and anti-corruption agreements, and the project also created tools for government and civil society to monitor public expenditure related to both events.

Following the approval of the federal Anti-Corruption Law²⁹ and the Access to Information Law in recent years,³⁰ both of which the project campaigned for, the Ethos Institute has seen greater transparency in the dealings between among local governments and an increase in the willingness of companies to engage in collaboration towards integrity.

Engaging governments

The Ethos Institute has employed three strategies to pressure local governments to increase transparency in public expenditure. First, it set up a network of local branches in each of the 12 World Cup host cities. Second, it secured the commitment of mayoral candidates in these cities to increase transparency and engaged them to ensure that anti-corruption measures were on their agendas for the 2012 municipal elections (in which 89 per cent of the candidates committed themselves to 'transparency pacts').

The project also developed 'Transparency Indicators for Local and State Governments', which

enabled media and civil society to monitor governments' expenditure effectively, and governments to improve transparency by using the indicators as a checklist. The success of these strategies is visible in the improved performance of cities and states according to the Transparency Indicators; in one year 11 of the 12 cities improved their performance, as well as 10 of the 11 states (the Federal District was counted only as a city). Moreover, the Ethos Institute was able to engage governments by holding high-level meetings in seven cities in three different states.

Engaging companies

There have been two main approaches for engaging and supporting companies. The first is the publication *Fighting Corruption in Sport Sponsorship and Hospitality: A Practical Guide for Companies* (and the discussions organised around it), developed in collaboration with the UN Global Compact to prevent corruption by providing a practical framework for managing sports sponsorship in a transparent and responsible manner.³¹ The second approach consists of 'sectoral agreements': voluntary anti-corruption agreements signed by individual companies from given sectors. This collective action model was inspired by a similar initiative in Colombia, whereby companies commit to observe various transparency and anti-corruption principles.

Although there was considerable difficulty at first in persuading companies to commit to these agreements, two sectoral agreements have now been secured since the Anti-Corruption Law entered into force. The first, among companies from the health product sector and headed by the Ethos Institute with the support of the Brazilian Association of Importers and Distributors of Implants (Abraidi), was signed in mid-2015. The second, involving a number of sports sponsorship companies, has been led by Ethos in partnership with the Atletas pelo Brasil (Athletes for Brazil, composed of current and former athletes) non-governmental organisation. Several sponsors of FIFA and the Confederação Brasileira de Futebol are due to sign in a ceremony in August 2015.

Notes

¹ The authors are a professor and eight students from the University of Richmond School of Law, Virginia studying Brazil's anti-corruption reforms. Their complete report should be available in the spring of 2016.

² From 1889 to 1930 the country was a 'democracy-in-kind', influenced by the coffee and rubber industries in an oligarchical form. Between 1930 and 1945 a military junta led to Getúlio Vargas was installed after a successful coup. After another coup in 1945 a weak democratic government ruled from Rio de Janeiro, and later Brasília, before falling to a third coup in 1964. From then a series of five generals controlled the country as dictator until democracy was again restored in 1985. A new constitution was drafted in 1988. See *The New York Times* (US), 'A Brief History of Brazil',

www.nytimes.com/fodors/top/features/travel/destinations/centralandsouthamerica/brazil/riodejaneiro/fdrs_feat_129_9.html?pagewanted=1&n=Top/Features/Travel/Destinations/Central%20and%20South%20America/Brazil/Rio%20de%20Janeiro.

³ Fernando Prestes Motta and Rafael Alcadipani, 'Jeitinho Brasileiro, Controle Social e Competição', *Revista de Administração de Empresas*, vol. 39 (1999), www.scielo.br/pdf/rae/v39n1/v39n1a02.pdf.

⁴ This includes the Autoridade Pública Olímpica (APO), which in a presentation reiterated the fact that Brazil is an emerging young nation that is changing in order to adapt to Western norms. This includes the implementation of the Transparency Matrix, which the APO argued was a sign of Brazil's changing approach to corruption.

⁵ Beginning in the middle of March 2015, several nationwide protests have called for the president's impeachment.

⁶ For an English translation of the constitution of the Federative Republic of Brazil, see

www.stf.jus.br/repositorio/cms/portalstfinternacional/portalstfsobrecorte_en_us/anexo/constituicao_ingles_3ed2010.pdf.

⁷ Brazilian Anti-Corruption Act, Lei no. 12.846 (Federal Law no. 12,846/2013).

⁸ Leonardo Ruiz Machado, 'President Dilma Rousseff regulates the Brazilian Anti-Corruption Act' (São Paulo: Machado, Meyer, Sendacz e Opice Advogados, 2015) (on file with lead author).

⁹ Lei no. 8.666 (Federal Law no. 8,666/1993), www.planalto.gov.br/ccivil_03/leis/l8666cons.htm.

¹⁰ Interview with lawyers at Machado Meyer, March 2015 (on file with lead author).

¹¹ Lei no. 12.462 (Federal Law no. 12,462/2011), www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/Lei/L12462.htm.

¹² For the lawsuit filed by various political parties, see (in Portuguese)

www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=4131802. For a lawsuit filed by the Attorney General of the Republic, see

www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=4138546. See also Daniel Teixeira, 'The differential public procurement regime ('RDC') for the 2014 Brazil FIFA World Cup and the 2016 Rio Olympics' paper presented at 6th International Public Procurement Conference, 15 August 2014.

¹³ Autoridade Pública Olímpica, 'About APO', www.apo.gov.br/index.php/about-apo.

¹⁴ Interview with the Autoridade Pública Olímpica, Rio de Janeiro, 13 March 2015 (notes on file with lead author).

¹⁵ See Cidade Olímpica, 'Empresa Olímpica Municipal', www.cidadeolimpica.com.br/empresaolimpica.

¹⁶ See Rio 2016, *Candidature File for Rio de Janeiro to Host the 2016 Olympic and Paralympic Games* (Brasília: Ministério do Esporte, 2009), vol. I, p. 53, www.rio2016.com/en/organising-committee/transparency/documents.

¹⁷ Interview with the APO, 13 March 2015.

¹⁸ This ranking is according to the Corruption Perceptions Index: www.transparency.org/cpi2014/results.

¹⁹ The Guardian (UK), 'Petrobras scandal: Brazilian oil executives among 35 charged', 12 December 2014,

<http://www.theguardian.com/world/2014/dec/12/petrobras-scandal-brazilian-oil-executives-among-35-charged>

²⁰ Brasil 2016, 'Matriz de Responsabilidades',

www.brasil2016.gov.br/en/paraolimpiadas/governan%C3%A7a/matriz-de-responsabilidades; and see the website of Tribunal de Contas do Município do Rio de Janeiro: www.tcm.rj.gov.br.

²¹ See <http://brasil2016.gov.br/en/noticias/olympic-public-authority-apo-publishes-update-responsibility-matrix>.

²² Brasil 2016, 'Matriz de Responsabilidades'.

²³ Lei no. 289 (Federal Law no. 289/1981).

²⁴ Rio Olympics Neighborhood Watch (Brazil), 'Pacifying Police Unit (UPP Installations) Part 3: 2012', www.rioonwatch.org/?p=20694 (accessed 10 April 2015). RioOnWatch is a programme managed by Catalytic Communities (CatComm), a non-profit organisation with a US 501(c)(3) charitable status based in Rio de Janeiro that advocates for the rights of favela communities impacted by the upcoming 2016 Summer Olympic Games in

the city. The website RioOnWatch.org is the principle means whereby CatComm publishes reports and relevant news stories.

²⁵ Rio 2016 (2009).

²⁶ João Saravia, 'Procurement for Rio 2016™ Olympic and Paralympic Games' (São Paulo: Rio 2016, 2012), www.brazilcouncil.org/sites/default/files/OlympicCommittee_Procurement%20Presentation2012.pdf, Rio 2016, 'Rio 2016 launches procurement portal in order to meet Games demands', 8 August 2013, www.rio2016.org/en/news/news/rio-2016-launches-procurement-portal-in-order-to-meet-games-demands.

²⁷ Instituto Ethos is based in São Paulo, and seeks to mobilize, encourage and help companies manage their business socially responsible manner.

²⁸ See the Glean Games website: www.jogoslimpos.org.br.

²⁹ Law no. 12.846, Lei anticorrupção, entered into force on 1 August 2013; see www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/12846.htm.

³⁰ Law no. 12.527, Lei de acesso à informação, entered into force on 18 November 2011; see www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/12527.htm.

³¹ United Nations Global Compact, *Combatendo a Corrupção no Patrocínio Esportivo e nas Ações de Hospitalidade: Um Guia Prático para Empresas* [*Fighting Corruption in Sport Sponsorship and Hospitality: A Practical Guide for Companies*] (New York: UN Global Compact Office, 2014), www.jogoslimpos.org.br/wp-content/uploads/2014/06/Guia_Combate_Corruptao_no_Patrocinio.pdf.