

Study on Brazil's institutional compliance with the OAS Inter-American Convention against Corruption

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Introduction

The purpose of this study is to conduct a new review of Brazil's legislative and institutional compliance with the Convention, with particular emphasis on several articles and sections, at the request of the Committee of Experts of MESICIC (Follow-up Mechanism for the Inter-American Convention against Corruption). Articles chosen for review include: Article III, sections 1, 4, 9 and 11, and Article XIV, section 1 and 2.

Transparência Brasil previously conducted a study on the country's legislative and institutional compliance with the Inter-American Convention against Corruption in April 2003,¹ which reviewed all aspects of the instrument so as to determine the level of compliance of Brazil's legislation and those institutions tasked with its implementation, at that time.

We now seek to formally assess the institutional context, as legislated, but also in terms of its functioning in practice. It is a difficult detail to analyze primarily due to a lack of information and statistics on the performance of oversight agencies. We sought to gather as much information as possible, and that which was collected is included in this study. If a law that fulfills the requirements of the Convention is indicated, it means that the formal conditions for compliance are in place; however, this does not mean that in practice there is actually compliance in all cases. Specifying the will to do something in the law serves very little purpose if the State does not coordinate the actual means to carry out what is stipulated by law.

This holds true in the case of the obligations contained in the articles selected for review and specifically in the case of Articles III.1 (Standards of conduct for the correct, honorable, and proper fulfillment of public functions, III.4 (Systems for registering income, assets, and liabilities for those who perform public functions), and III.9 (Oversight bodies, to develop modern mechanisms for preventing, detecting, punishing, and eradicating corrupt practices).

Federation

First, several core features of the Brazilian State must be kept in mind when reviewing what **Brazil** (the nation, as opposed to the federal government) has achieved in the fight against

1 Leovegildo Morais et al.: "Estudo de conformidade do ambiente institucional brasileiro com a Convenção Interamericana Contra a Corrupção da Organização dos Estados Americanos, 2003". [Study on Brazil's institutional compliance with the Inter-American Convention against Corruption of the Organization of American States, 2003] Transparência Brasil, 2003 (<http://www.transparencia.org.br/docs/OEA.html>) (in Portuguese).

corruption. Brazil is a federal state that is highly decentralized, demonstrated by the fact that it has three levels of federated entities: the Union, 27 member-states and 5561 municipalities.

Each state has a Legislative Assembly and each municipality a Chamber of Councilmen – with specific competencies as defined by the Federal Constitution. As such, each state and each municipality has an executive branch body. In addition, a State Judiciary exists in each state and addresses most cases while a Federal Judiciary addresses cases in which the federal government or its entities are involved.

The decentralization or division of powers makes it difficult to establish uniform anticorruption policies since such powers are shared to a large extent by policy-making entities at the three levels of government. With a view toward establishing uniform rules and regulations, our alternatives reside with the penal or civil code, for example, which fall under the exclusive competency of the federal government and thus apply to all, or amendments to the Federal Constitution itself. The latter option, however, requires enormous political efforts to quell any opposition, which is difficult when unpopular topics in the political world are addressed such as the fight against corruption – an activity in which the beneficiary is always someone who controls the government body.

To have an idea of what such decentralization implies for the efforts relating to the topic of this study, it suffices to mention that the largest Gross Domestic Product (and consequently, the budget) of the federation is, naturally, that of the federal government² (R\$ 1,556 trillion); the second and third GDPs derive from the two largest states (Sao Paulo: R\$ 494,814 billion; Rio de Janeiro: 190,384 billion); but the fourth largest GDP in the country belongs to a municipality (Municipality of Sao Paulo: R\$ 146,855 billion).

Sao Paulo's budget, the second largest in the country, totaled R\$ 69.6 billion in 2005³ while the city of Sao Paulo, fourth largest in the country, totaled R\$ 16.7 billion⁴. Understandably, the problems related to corruption plague the federal administration much in the same way that they do in the case of the states and larger municipalities as well. All are empowered to adopt laws and administrative measures within their spheres of power in terms of oversight of their procedures and government employees.

To gauge the extent of municipal autonomy in Brazil, for example, it is enough to note the high number of municipalities (over 90%) that have the four legally required financial instruments: the Municipal Organic Law, the Multiple Year Investment Budget, the Budgetary Directives Law, and the Annual Budget Law.⁵

Two studies conducted by Transparência Brasil among private companies in 2002

² IBGE, “Contas regionais do Brasil 2003” [Regional Accounts in Brazil 2003] (<http://www.ibge.gov.br/home/estatistica/economia/contasregionais/2003/tabela02.pdf>) and (<http://www.ibge.gov.br/home/estatistica/economia/pibmunicipios/2003/tab02.pdf>). (in Portuguese)

³ According to the article posted on the website of the Sao Paulo State Government: (<http://www.saopaulo.sp.gov.br/sis/lenoticia.php?id=59680>). (in Portuguese)

⁴ According to the website of the Office of the Mayor of Sao Paulo: (http://www.prefeitura.sp.gov.br/porta/a_cidade/noticias/index.php?p=4803). (in Portuguese)

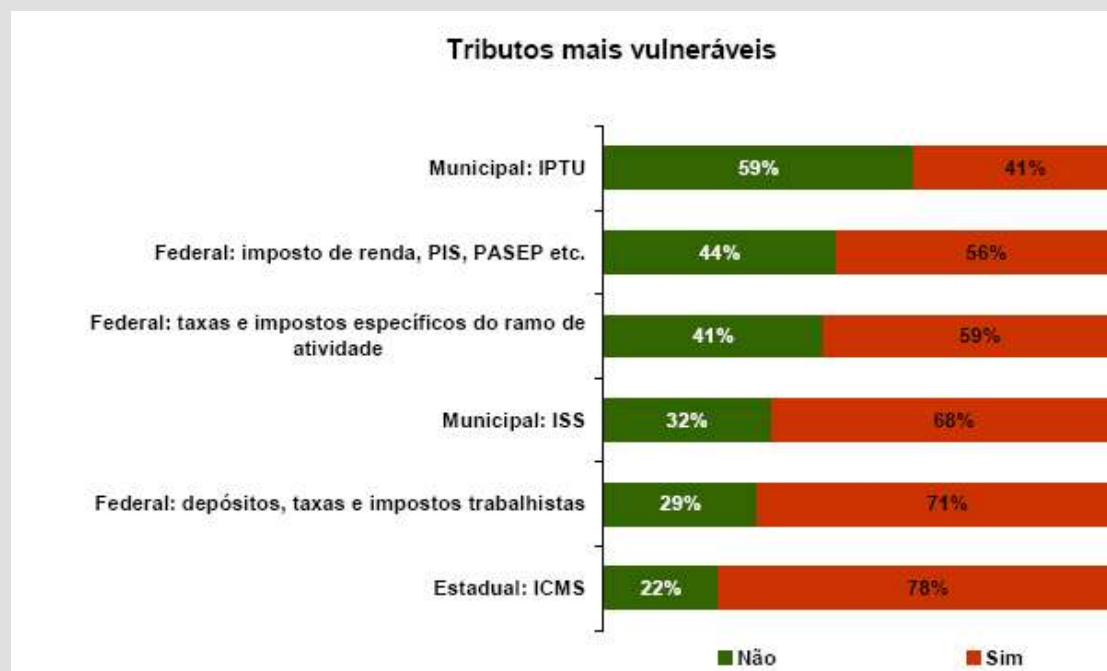
⁵ IBGE, “Perfil dos Municípios Brasileiros - Gestão Pública 2001” [Profile of Brazilian Municipalities – Public Administration 2001] (<http://www.ibge.gov.br/home/presidencia/noticias/12112003munic2001html.shtml>) (in Portuguese)

and 2003 showed that problems with corruption in competitive bidding processes are judged as more serious at the state level than at the federal. The results from the 2003 study were:

In your experience, are corrupt practices in competitive bidding processes a serious problem at the municipal, state or federal level?

	<i>Municipal</i>	<i>State</i>	<i>Federal</i>
No	10%	3%	8%
Yes	90%	98%	93%

Furthermore, corruption in the area of tax collection was determined to be more prevalent at the state level.⁶ Note the vulnerability of the Tax on Services (municipal), the third on the list.



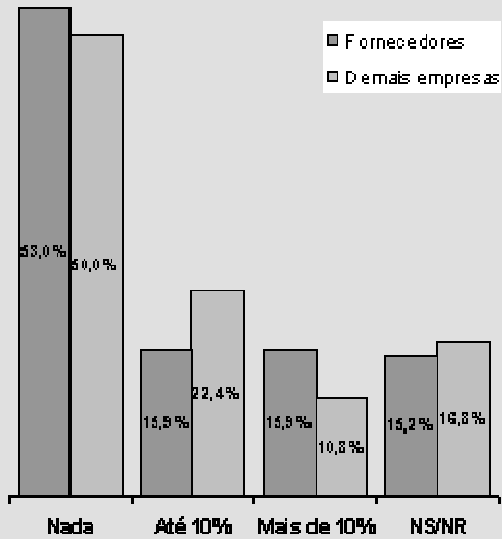
All empirical data available indicates the seriousness of the problem of corruption at the three levels. An extensive study conducted in the municipality of Sao Paulo in 2002, under the auspices of the Mayor’s Office, the World Bank and Transparência Brasil, helped unveil where and how corruption affects relations between the administration and the community. For example, it surveyed the

6 Claudio Weber Abramo: “Corrupção no Brasil: A perspectiva do setor privado, 2003”. [Corruption in Brazil: A private sector perspective, 2003] Transparência Brasil & Kroll (April 2004). (<http://www.transparencia.org.br/docs/perspec-privado-2003.pdf>.) (in Portuguese)

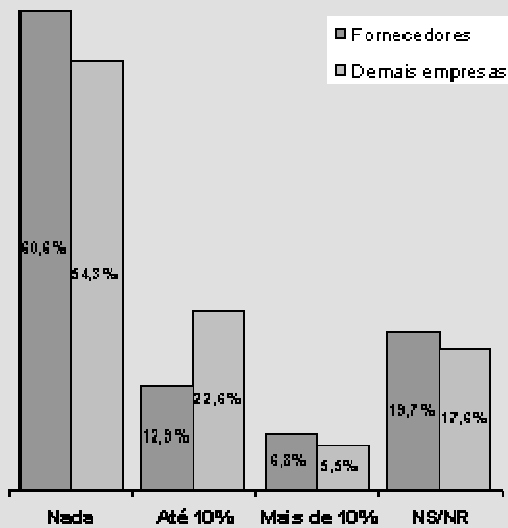
7 Bruno Wilhelm Speck and Claudio Weber Abramo (coords.): “Corrupção na municipalidade de São Paulo – Levantamento de percepções, experiências e valores”. [Corruption in the municipality of Sao Paulo – Survey of perceptions, experiences and values] Sao Paulo Mayor’s Office, World Bank and Transparência Brasil, 2003. (<http://www.transparencia.org.br/docs/PMSP.pdf>; also available on the World Bank Group website). (in Portuguese)

companies headquartered in the city regarding the total resources – in terms of time and figures – used by firms to obtain preferential treatment in dealings with the Mayor’s Office. The following charts provide an overview of the situation:⁷

Percentage of time spent with respect to public officials



Percentage of funds spent with respect to public officials



If such is the case for the Sao Paulo Mayor’s Office, which receives constant media attention, imagine what the situation must be like in the case of the rest of Brazilian municipalities, which are subject to much less scrutiny.

In order to analyze anticorruption programs and policies undertaken, it is essential to understand Brazil’s decentralized structure and know that such dispersion poses challenges for the implementation of any policy at the national level.

The existence of a recent legislative effort, which has gained currency over the past five years or perhaps a bit longer, must be mentioned. The purpose of said effort was to establish a more appropriate formal structure to oversee the activities of the federal administration and several regional or local governments.

The effort includes, for example, within the federal government, a “Federal Executive Branch Honor System”, established by executive decree in 2005, and the “Code of Conduct for High-Level Administration”, published by decree in 2000. These regulations only extend to one level of the government alone – the Federal level, and only one branch – the Executive.

They do not affect the administrations of 27 states, not a single municipality of the over 5,000 that exist in the country, or apply to civil servants belonging to the Legislature (at any of its three levels) or Judiciary (at a federal or state level).

An oversight action performed by the Office of the Controller General (CGU) in the municipalities, decided by lottery, reflects the magnitude of the challenge: among the sixty municipalities surveyed during the 17th lottery (08/16/2005), irregularities were found in thirty reports analyzed by Transparência Brasil – in competitive bidding processes, storage of medicine and snacks, and the execution of budgets reviewed by the federal government, etc.⁸

As such, it can be said that more needs to be done at the three levels of the Executive in Brazil than what has been accomplished in order to establish anticorruption mechanisms. What it doesn't mean, necessarily, is that the federal, state or municipal governments have stopped publishing standards of conduct or implementing reversed bureaucratic mechanisms to put them to use at their respective level of government. This apparent contradiction is resolved if one understands that the Brazilian State is complex, and thus requires complex actions.

Although it is incumbent upon the federal government to avoid interfering at other levels of government, we must consider if in order to ensure the full implementation of the Convention alongside the other federated entities (states and municipalities) and branches (legislative and judicial), it is not directly responsible for the Convention's implementation at other levels of government and within other branches – especially given the fact that the body that does commit itself internationally to the Convention is in fact the federal government.

In this regard, the creation in January 2006 of the National Secretariat of Corruption Prevention and Strategic Information, which is responsible to the Office of the Controller General, is promising. Its competences include increasing transparency within the administration, promoting social oversight, preventing conflicts of interest and intelligently approaching strategic information, in addition to tracking any changes in the wealth of federal public officials. With this, approaching the fight against corruption as a strategic issue has begun – a stance always defended by Transparência Brasil.

Additional measures are still needed. By way of financial incentives provided to entities that prepare instruments to combat corruption within the framework adopted under the Inter-American Convention, for example, the federal government could make it clear to society and civil servants in the country what each entity's responsibilities are in reference to the issue and promote the implementation of the Convention throughout the country, thereby facilitating the adoption, even, of a more uniform anticorruption policy.

⁸ See: <http://www.cgu.gov.br/index.htm>. (in Portuguese)

Norms and Regulations

Broadly speaking, many of the most important laws aimed at fulfilling the Convention have been enacted and are in force. In fact, there are general regulations, which apply to all government employees at all federated entities and all branches, that outline standards of conduct for the correct fulfillment of public functions; there are also others applicable to civil servants within the federal administration that are worth mentioning.

The most important standards valid in the case of all civil servants in Brazil can be identified as follows:

→ the Penal Code, which typifies the crimes perpetrated by a public official against the administration in general, among which figure activities relating to misappropriation of resources to which access was gained through a public position (Article 312, crime of embezzlement), abusing a public position to demand undue preferential treatment (Article 316, crime of impact), using a public position to request or receive undue preferential (passive corruption, Article 317), not holding, on the basis of leniency, a subordinate public official responsible for committing a crime in their capacity as a public official or, when not within the superior's realm of competence, failing to bring the matter to the attention of the competent authority (criminal condescendence, Article 320), sponsoring private interests before the administration (administrative advocacy, Article 321) etc.

It is important to mention that the federal government spearheaded in June 2005 a bill submitted to Congress – yet to be passed – outlining the activity of illicit enrichment as a crime against the administration, incorporating Article 317-A into the Penal Code:

(Art. 317-A. A public employee must not possess, maintain or acquire for himself or for any other individual, unjustifiably, assets or objects of any kind, that are inconsistent with their income or the growth of their wealth: Sanction – imprisonment, three to eight years, and fine. Single paragraph. The same sanctions shall be faced by any public employee who unjustifiably uses any assets or objects, even though their name does not appear as the owner or possessor of such in their own records, in such a way that it is possible to attribute their actual possession or ownership to that public employee.

→ The Administrative Improbity Law (Law No. 8.429/1992), which defines and establishes the sanctions for engaging in acts of illicit enrichment while exercising a public function, acts that compromise the treasury and acts that violate the constitutional principles (values) of the public administration – which can be practiced by all civil servants in any capacity.

→ And Supplementary Law 101, of 2002, known as the “Fiscal Responsibility Law,” which sets requirements for transparency, oversight and inspection of fiscal management and, among other measures, requires accounts presented by the Chief of the executive branch to remain available during the entire year for consultation and review by citizens and society-based groups (Article 49).

→ No less noteworthy is former Executive Decree no. 201, of 1967, which establishes liable crimes for Municipal Mayor's Offices and “political-administrative illegal” activities engaged in by such leaders, preventing conflicts of interest among other infractions.

There are furthermore many regulations applicable to federal administration civil servants:

- the civil servant statute (Law No. 8.112, of 1990) enumerates various types of conflicts of interest, classifying them as felonies for federal civil servants and providing for dismissal;
- the Code of Conduct for High-Ranking Administration (of 2000), *code of adherence* which establishes basic rules and regulations to prevent any public or private conflicts of interest and limitations on the professional activities that can be engaged in subsequent to holding a government post;
- the Code of Ethics for Federal Civil Servants (Decree no. 1.171/1994);
- Last, the Code of Ethical Conduct for Government Employees while holding the post of President or Vice President of the Republic (Decree 4.081/2002).

Oversight Institutions

To oversee the full range of ethical-regulatory framework imposed on federal workers, there is a bureaucratic system for internal review within the federal administration. The Public Ethics Committee, created by mandate on 26 May 1999, conducts oversight on 1,312 first- and second-ranking authorities on the basis of their asset and income statements, prepared for this purpose.

The Office of the Ombudsman General, created under Decree No. 4.490/2002 within the internal structure of the defunct Office of the Internal Investigator General (which later became the Office of the Controller General), is tasked with issuing opinions on accounts related to the procedures and actions of government employees, bodies and entities of the Federal Executive Branch; proposing the adoption of measures aimed at correcting and preventing errors and omissions on the part of responsible parties in relation to any inadequate provision of a public service; producing statistics indicative of the level of satisfaction of the users of the public services provided within the Federal Executive Branch on the basis of reports received; helping disseminate methods for ensuring grassroots participation for monitoring and inspecting the provision of public services; convening and guiding the activities of other ombudsman units within the bodies and entities of the Federal Executive Branch.

Last year, the “Federal Executive Branch Honor System” (Decree 5480, of 2005), headed by the Office of the Controller General (created under Provisional Measure no. 2.143-31, of 2001) and instituted by an internal investigations unit at each Ministry, with each internal investigator selected by the State Minister of Oversight and Transparency, was established.

Decree 5.483 of 2005 regulated the Review of Wealth, provided for under Law 8.429 of 1993, an oversight measure that seeks to confirm cases of illicit enrichment among civil servants on the basis of external indicators of wealth. It compares the remuneration of the civil servant and their relatives to their wealth or lifestyle in order to identify any discrepancies. This effort will be possible by virtue of an agreement to be signed between the Office of the Controller General and the Federal Revenue Secretariat, in addition to the flagging of suspicious financial transactions by the Financial Activities Oversight Council (COAF), Brazil’s financial intelligence unit.

In January 2006, the federal government created by decree a National Secretariat of Corruption Prevention and Strategic Information, which is part of the restructuring of the Office of the Controller General.

Additional initiatives at the federal level that warrant mention include:

The Office of the Controller General is launching an effort to prepare the criteria for defining “Politically Vulnerable Individuals”, who will be subject to more careful review on the part of banks and oversight bodies, particularly in relation to their finances. Said action is part of efforts to implement the UN Convention against Corruption and Recommendation No. 6 of the Financial Action Task Force on Money Laundering⁹ (FATF). It encompasses the functions and duties of the three branches at all three levels of government and also applies in the case of relatives of civil servants. It corresponds to Objective 1 of the National Anti-Money Laundering and Asset Recovery Strategy (ENCLA), which involves all federal crime prevention and anticrime structures of all three branches and several civil society groups.¹⁰

In January, as stated, the National Secretariat of Corruption Prevention and Strategic Information (Decree 5.683, of 24 January 2006) was created under the umbrella of the CGU. Its competences include increasing transparency within the administration, promoting social oversight, preventing conflicts of interest and treating strategic information with intelligence, in addition to following any shifts in the wealth of federal civil servants, with a view towards observing the existence of external indicators of wealth and identifying potential discrepancies in their income levels reported. In the new Secretary’s structuring process, Transparência Brasil will participate as a consultant, helping the body define its strategic objectives and institutional organization. One of the focuses of the joint work between the CGU and Transparência Brasil, against the backdrop of the new bureaucratic structure, will be to design a “map for corruption risk within government institutions,” on the basis of which priority actions will be able to be identified and implemented.

It supplements the federal government structure known as the Department of Asset Recovery and International Legal Cooperation (DRCI – created by virtue of Decree No. 4.991, of 18 February 2004), responsible to the National Justice Secretariat (SNJ) of the Ministry of Justice. The main functions of the department are to formulate policies and develop an anti-money laundering culture. Its goal is to recover assets sent abroad illegally and ill-gotten assets, such as those derived from drug trafficking, arms running, acts of corruption or misappropriation of funds. Furthermore, the DRCI is responsible for international agreements of international legal cooperation, on both criminal and civil matters, serving as the central authority for the exchange of information and legal requests made by Brazil.

Constitutional oversight structures

The constitutional oversight structures comprise the Federal Court of Accounts (TCU) and the Office of Public Prosecution (MP).

⁹ The FATF - Financial Action Task Force on Money Laundering was created in 1989 by the G-7 within the context of the Organization for Economic Cooperation and Development – OECD, with a view towards reviewing measures, formulating policy and promoting anti-money laundering efforts. For more information, visit <http://www.fatf-gafi.org>.

¹⁰ To view the ENCLA strategy, visit: <http://www.mj.gov.br/drci/documentos/ENCLA%202006.pdf> (in Portuguese)

The TCU aids the National Congress in ensuring direct and indirect external oversight of the Administration by performing accounting, financial, budgetary, revenue-related and operational audits as to the legality, legitimacy, cost-effectiveness, implementation of subsidies and income adjustments (in accordance with Article 70 of the Federal Constitution). States and municipalities shall be audited by the state-level Court of Accounts in conformity with the Constitution: “The rules and regulations established herein govern, as applicable, the organization, composition and oversight of the Court of Accounts for states and the Federal District, as well as that of the Municipal Courts and Councils of Accounts”. There is only one Court of Accounts for one municipality in Rio de Janeiro and in Sao Paulo; in the states of Pará, Goiás and Bahia there is a single Court of Accounts for the municipalities; in the case of the remaining states, the Court of Accounts of the State verifies municipal accounts.

The Courts of Accounts, as such, pose problems relating to their methodology, which verifies only those accounts presented by government agencies and not processes. Therefore, when corruption is formally well done in an area, it will not appear on the books and will not be detected by the Court of Accounts, with its efforts in vain.

An example of this is the Registry of Responsible Parties in Irregular Cases Reviewed¹¹ – CADIRREG – published by the TCU, which identifies the individuals and legal entities whose accounts for the period while they held a government post or performed a public function have been judged as irregular by the Court. Two lists are published: one with the names of those citizens ineligible to perform a public function and another with companies ineligible to participate in competitive bidding processes. Updated as of 02/09/2006, the first list contains the name of 42 ineligible individuals while the second contains the names of 11 companies. The TCU required just over R\$ 782 million in 2005.¹²

The Office of Public Prosecution complements the constitutional oversight structures. It is a permanent institution of the Republic, vital to the judicial function of the State, charged with defending legal order, the democratic system and social and individual interests (pursuant to Article 127 of the Federal Constitution). It also heads the government’s criminal prosecution and civil suits against public, collective or individual interests that are not met.

Local initiatives

There are examples of regional and local initiatives that could have a significant impact. One example is the “Anti-corruption Program in the Subdistricts of Sao Paulo,” which is the result of a partnership between the Mayor’s Office of the Municipality of Sao Paulo and Transparência Brasil¹³. Among the various actions envisioned, some already in place, figure: a Corruption Hotline system; creation of a Listeners system; mapping the areas of corruption risk and other deficiencies in the activities and processes used in subdistricts; the mandatory use of computerized procurement system by subdistricts and development of information systems; development of mechanisms to increase the participation of companies and review of bid processes relating to subdistricts; tools offering detailed information on budget

¹¹ See www.tcu.gov.br/CADIRREG.htm. (in Portuguese)

¹² See the Annual Budgetary Law for 2005 at (http://www.camara.gov.br/internet/comissao/index/mista/orca/orcamento/OR2005/Red_Final/vol3/VOL3-TCU.pdf). (in Portuguese)

¹³ To learn more about the program, visit: (<http://www.transparencia.org.br/miscelanea/subpref.html>); to view the framework for the partnership: (<http://www.transparencia.org.br/docs/TERMO.pdf>). (in Portuguese)

execution in subdistricts; and an integrated database on the performance and oversight of the subdistricts, available online.

Effectiveness

As noted, there is no lack of oversight institutions or standards of conduct for civil servants in Brazil, particularly in the case of those at the federal level.

What is surprising, though, is the determination that the implementation of such norms in Brazil still faces a difficult road ahead. If this were not the case, the National Congress and the Federal Government would not have spent months at a standstill since June 2005 in response to a litany of criminal and parliamentary investigations into reports of corruption involving a dozen public sector companies and government bodies, perpetrated by federal deputies, members of the political parties represented in the government and even the opposition, as well as executives of state-owned companies. Corruption schemes that drained billions and that were installed over the past three years. It is interesting that the schemes under investigation were not uncovered by state anticorruption mechanisms but rather reported by one of the perpetrators, a federal deputy.

Therefore, what factors have led to the partial deficiency of laws already enacted?

End of administrative improbity for first-ranking officials

Before further addressing the flaws of the anticorruption mechanisms, we must note the imminent risk faced by the Administrative Improbity Law (Law 8.429, of 1992), one of the most comprehensive and effective instruments.

The Administrative Improbity Law (Law No. 8.429/92) at present, due to its own stipulations, is applicable to all civil servants of any background with any relationship to the federal administration, whether direct or indirect, at any level of the federation, or to any body belonging to any of the three branches or any entity that receives more than 50% from the government treasury or any subsidy, benefit or tax incentive or credit from a government body – i.e., this law creates civil responsibility for improbity whenever a government resource is involved to any degree. Improbity reports can be made by any individual to a competent administrative authority or submitted directly to the Office of Public Prosecution or the Court of Accounts. In the event there are indications of irregularities, the Public Prosecution or the Attorney General Offices of the bodies involved will have to file an improbity action.

This legislation is enormously important given the breadth of its subjective reach and the prevision of sanctions for mere violations of the administration's principles and illicit enrichment, which is not a crime in Brazil.

Nevertheless, the legislation is poised to lose a good portion of its teeth as a result of a decision made by Brazil's Supreme Court. There is a case underway (Complaint 2138) that has already secured 6 votes in favor (as the Court has 11 justices, the very shift in stance of at least one justice could change the outcome) and centers on the idea that the "public officials" cannot be tried by virtue of this law (President of the Republic, State Justices, Federal Supreme Court Justices, Attorney General of the Republic, State Governors and State Secretaries.) "Public Officials" can only be held responsible on the basis of another law, from 1950, which defines the so-called "accountable crimes" (Law No. 1.079, of 1950). These

crimes are not crimes but rather “political-administrative infractions,” subjected to a political trial by the Legislative Branch at each level. The same could occur in the case of Mayors, for whom infractions of the same sort are provided for under Decree-Law No. 201, of 1967.

If the decision is upheld, the public officials most vulnerable to large-scale corruption will be protected from society and the Office of Public Prosecution, which will not be able to try the case in the event they are accused of improbity. They will have to request the legislative branch of the respective level of government to try and sentence them, which is more difficult, given the nature of relationships within this branch, particularly political ties – which will give rise to political, not technical, decisions.

This notwithstanding, we must return to the question at hand, regarding the issues that have a negative impact on the implementation of anticorruption mechanisms.

Lack of information and oversight among oversight bodies

The progression of a report or oversight action to eventually translate into a sanction or the recovery of public funds must be in and of itself transparent, but this is still not the case, in Brazil.

Bureaucratic oversight structures established in Brazil, which include the ombudsman offices, rest upon existing laws aimed at reducing the possibility of civil servants becoming corrupt. As such, they receive reports (ombudsman or controller offices), take measures (such as conducting oversight on the income or wealth of civil servants, opening case files, etc.), either directly (controller’s office) or by way of higher ranking oversight bodies (such as the Public Prosecution Office and Court of Accounts). If this process is not open and transparent, the risk would be run of the system being effective in some instances (oversight, identification and sanction), lenient in others and, who knows, cover up corruption in others, still – depending on political circumstances – which is as, or more, serious than not having any oversight.

The information that can be obtained regarding the overall anticorruption system within the federal government, for example, is not enough to understand how it works. According to data available online found in the CGU Administration Report, since 2000, and data from early records to February 2006, 1,580 public employees were sanctioned with one of the sanctions available, with 1,254 having been sanctioned with dismissal. You can also see how many were sanctioned by type of sanction. We do not know how many reports were filed, where they originated or what was investigated (the “databank of reports” online was unavailable). Nor do we know how many led to police investigations or court trials, etc.

In order to secure access to data that shows the activities performed by the Office of the Ombudsman General in 2005, for example, Transparência Brasil contacted the agency for seven business days in a row. Four civil servants refused to send the information claiming they did not have the authority to decide if the data could be furnished – and what data could be sent – including the media consultant and head of communications at the office. The interim Ombudsman General was the last to be contacted. She asked us to send the MESICIC questionnaire on the OAS Convention so that she could therefore furnish the data. On the eighth day of contact, the scarce data was finally made available.

The Office of the Ombudsman General received in 2005 a total of 1,625 “complaints;” less than half of the volume received the year prior: 3,454 (according to the Office of the

Ombudsman, stating that the year had been “atypical,” since some of the complaints in 2004 corresponded to previous years) and more than the volume in 2003, during which 1,446 were received. The overwhelming majority of the “complaints” were sent via email (92%). According to the agency, 95% of the “complaints” received in 2005 had been “closed,” 2% had been “forwarded” and 3% were being processed. This was the information cited from the annual report¹⁴.

No aggregate data about a potential pattern across complaints (in which agencies, under what circumstances). Nor was anything mentioned regarding what measures were taken to solve reoccurring problems within the state structures where the problems originated.

At present, it can be said that the Office of the Ombudsman General only partially fulfills its duty, acting as an in-between in a sense (submitting the “complaint” from the public for review, through the ombudsman office), but not in the other (in the sense that the “complaints” offered solutions to be made within the government agency under review, thereby satisfying the public).

The study conducted by Transparência Brasil on the performance of the state ombudsman offices in Sao Paulo found that in almost all cases, the objectives of the instrument are only partially achieved. The study concluded that “some bodies publish generic numbers regarding its work (for example, how many individuals were served), information which does nothing to shed light on the impact of the Ombudsman’s Office on the agency that it should be overseeing. This is a quite common attitude, which reveals a greater interest in the actual performance of the Ombudsman’s Office in terms of receiving complaints than in finding solutions for problems brought to light. The subject of this type of report is the Ombudsman Office itself and not the efficiency of department of which it is a part. As such, despite the superficiality of this topic, this study allows us to conclude that in terms of information from the public regarding its activities, the state ombudsman offices in Sao Paulo fall short of fulfilling their duties.”¹⁵

Therefore, it seems that the ombudsman offices reviewed serve to channel complaints and other grievances regarding services provided by the body requiring oversight, but do not fulfill their duties, since they do not seek out the flaws to be corrected within the body under review. As such, all collected data needed to be organized and consolidated in order to uncover, as has been the experience of citizens, any deficiencies pertaining to the bureaucratic body in question.

How can effective oversight and anticorruption efforts be organized in a system that is not subject to oversight?

If we suppose that some acts of corruption are reported; that some reports filed are investigated; that some investigated reports undergo a verification process; that some administrative hearings arrived at a decision; some of which included a sanction; that some

¹⁴ The CGU site (<http://www.cgu.gov.br/index.htm>) offers access to the Federal Office of the Ombudsman General reports for 2002, 2003 and 2004. The 2005 report was sent to us directly.

¹⁵ Cláudio Weber Abramo and Helena Petridis: “Ouvidorias do Estado de São Paulo – Primeiras impressões”, [State Ombudsman Offices in Sao Paulo – First impressions] Transparência Brasil, (December 2005). <{>(<http://www.transparencia.org.br/docs/ouvidorias-sp.pdf>). (in Portuguese)

administrative hearings decided are forwarded to the Office of Public Prosecution in order for the occurrence of crimes or illicit activities of improbity to be investigated; that some news is received by the Public Prosecution regarding court cases; that some court cases end in a conviction; that some convictions recover funds taken etc. – how then, can we ensure efficiency within this type of oversight system? Based on what data? How can we increase the efficiency of administrative acts that efforts are made to oversee? In short, why conduct oversight?

Brazil is indignant toward interconnected problems relating to access to information. On the one hand, there is a lack of information on all stages at all levels of the various oversight and anticorruption systems. On the other, there needs to be a law that requires the government to furnish, within a reasonable period of time, information of individual, collective or public interest.

The lack of oversight and information regarding anticorruption mechanisms can be traced to an underlying factor rooted in culture. The overall difficulty in defining a category for exactly what is “public” – meaning general interests and assets, belonging to the majority of or all Brazilians, can be seen in the country. This trait emerges in part from the idea of “cultural heritage” – founding and unifying cultural footprints of society in Brazil, which dates back to colonial times, when all belonged to the “families” or “state bureaucracy.” Recognized alternatives to this rarely recognized category of what is “public,” include what is “private” and (apparently) “without ownership,” which is appropriate (in the case of the individual/family) for exactly this reason. The symbolic and actual appropriation of public resources on the part of leaders, at this stage, is a tragic but typical occurrence in terms of this cultural footprint; just as it is natural for, in a society that does not recognize “public” good, there to be no provision of accounts – they don’t provide accounts because the resource belongs to them or does not belong to anyone (it isn’t public).

Law of access to public information

In addition, the lack of a law that requires the government to furnish, within a reasonable period of time, information of individual, collective or public interest, does not allow the principle of access to information enshrined in the Constitution to be upheld (CF, 5, XXXIII). There is a bill underway in Congress (PL 219/03) that was already passed by the Constitution and Justice Committee that regulates the wording of the constitution. A second bill is being drafted by the Council for Public Transparency and the Fight against Corruption, a collegiate and consultative body tied to the Office of the Controller General, in which civil society participates.

The issue of access to public information, if solved, would mean the other issue could begin to be addressed (lack of specific information about the fight against corruption). Nevertheless, the access to information about the fight against corruption can be resolved as part of the oversight process itself through adequate regulations that set specific requirements as to the dissemination of acts of oversight and sanctions.

The lack of transparency for initiatives aimed at fighting the appropriation of government funds by the private sector that exist in Brazil offer society an effort that does not result in effective oversight. This undermines the credibility of such efforts, which reinforce the skepticism in addressing what is public. Without full and continued public access to

information on reports and honesty and anticorruption processes, the effectiveness of such a system can never be assessed.

Information and the Judiciary

A fitting example of the unwillingness of state bureaucracy to oversee its acts is the Judicial Branch. In Brazil, this branch began to be “audited” externally through the creation, by virtue of Constitutional Amendment No. 45 of 2005, of the National Council of Justice (CNJ), comprised by judges, jurists, and members of the Office of Public Prosecution¹⁶. This body is charged with exercising administrative oversight of the Judiciary at all levels, including “preparing and publishing every six months a statistical report on court proceedings and other indicators pertain to judicial activity throughout the country.”

The idea of external oversight was always met with resistance on the part of judges, and still is,¹⁷ despite the fact that the CNJ, an administrative and financial oversight body, had been created recently. The seminar entitled “*A Justiça em Números*” [Justice in Numbers] held by the Federal Supreme Court in 2005, on the basis of studies conducted by the World Bank in 2003, is quite fitting in this regard¹⁸. The seminar showed data that confirms a backlog – and subsequent inefficiency – of the courts: in State Courts, each year almost 2,000 cases are placed on the docket and on average, somewhere around 1,400 are heard; in Federal Courts, approximately 1,300 cases begin and a little over 650 are resolved. The conclusions drawn at the seminar by the Supreme Court Chief Justice were that, *verbatim*, “the tracking system databanks are the best source of information” and that “the coordination and centralization of the data facilitates the calculation of statistics and indicators regarding the quality of justice provided to citizens and the judicial government.”

This notwithstanding, he uses the argument – which defines the sphere of validity for such conclusions, apparently correct – that “traditional statistics center on the study of “cases” and seeking “justice in a specific case” in a very diverse universe of conflicts, where **no two identical cases exist.**” The study, presented by the head of the Judiciary, then states that the following features **are not measurable**: “legal security, procedural rights, equality in the eyes of the law, the economic and social impact of court decisions, judicial independence, and impartiality, access to justice, speediness and efficiency.”

Now, if the data is not uniform, it will not give us insight into anything other than its basic content – as such, we would need to analyze each judgment, each case and each inquiry to formulate a valid hypothesis regarding the legal system. A conclusion that, even if absurd, is

¹⁶ The Judicature Council (CNJ) and Public Prosecution Council (CNMP) are part of the “external oversight” structure of the judicature and the Office of Public Prosecution, and now appear under the recently created articles 103-B and 130-A of the Federal Constitution. The CNJ is comprised by 9 justices, in addition to two public prosecution representatives, two representatives from the Brazilian Bar Association and two representatives from society selected one by the Senate of the Republic and the other by the Chamber of Deputies – they lend the “external” to the function of the oversight body.

¹⁷ For example, the CNJ put a stop to hiring relatives – nepotism – within the Judiciary. Subsequently, the civil servants/relatives took legal action against the CNJ to guarantee their jobs. To be guaranteed, by way of preliminary decisions issued, as to be expected, by second instance magistrates of the Courts – the great defenders of their own family privileges (over 400 preliminary decisions, according to the press). Federal Supreme Court Decision (type of constitutional court) confirmed the CNJ’s jurisdiction for such decisions and the resulting ban on nepotism within the Judiciary.

¹⁸ < } > (www.stf.gov.br/seminario/pdf/banco_mundial.pdf) (in Portuguese)

proposed and carries with it a shared vision regarding the services provided by the jurisdiction: its most fundamental aspects cannot be evaluated – equality in the eyes of the law, impartiality, etc.

It is indeed possible to prepare indicators and consolidate statistics on the performance of the legal system without having to address the issue of justice in a specific case and measuring, fairly, aspects such as equality in the eyes of the law, judicial independence, or access to justice, etc.

In relation to the issue addressed in this study, how can we know that the anticorruption system works without data regarding corruption cases tried in court? How many administrative proceedings were opened, and on what basis were reports filed? And how many administrative proceedings ended in opening a court case? What types? Was a judgment handed down? Was there any sentencing? Were the public resources recovered? These questions must be answered so that society can know if the funds invested in oversight and anticorruption efforts yield results. Even through legal channels.

The study on judges in Brazil, published by the CNJ in February 2006¹⁹, shows that the guidelines voiced by the Federal Supreme Court Chief Justice at the seminar are followed, as there is a lot of interesting data on the administration of justice throughout the country – such as the expense of the legal system per inhabitant, expense in relation to the GDP, number of cases by judge at each level of government for each instance, rate of appeals, rate of reform, number of individuals served etc, which is positive. But there isn't data on the types of proceedings, their content, or how they were resolved.

An investigative study conducted at the Getúlio Vargas Foundation by Luciana Gross Cunha et al.²⁰ on the Judiciary, for example, in terms of furnishing and utilizing data within the legal system, between 2003 and 2004, concluded that: (a) most of the information available is underutilized or even squandered; (b) with the exception of the Worker's Justice and the Federal Justice, no integrated system of legal information exists in Brazil; (c) between the courts there is rarely any communication of information between the first and second instances, nor between the courts and the Office of Public Prosecution and the state and municipal attorney general offices; (d) there is a lack of uniformity when selecting the criteria to be used to classify the information, which makes it difficult both comparative analyses and the formulation of performance indices; (e) in spite of the fact that most courts have computerized systems to monitor proceedings, such systems do not yield data, information or statistics, they simply serve to track the progression of a case.

Information and the Office of Public Prosecution

As regards the Office of Public Prosecution, the situation is not very different: There is no access to sufficient statistical data in order to learn of the actions of the body that represents the People at trial. To combat this problem, among others, the constitutional reform that

¹⁹ “A Justiça em números – Indicadores Estatísticos do Poder Judiciário”, [Justice in Numbers – Statistical Indicators of the Judiciary] Conselho Nacional de Justiça, [National Council of Justice] (<http://www.stf.gov.br/imprensa/pdf/JusticaEmNumeros2004.pdf>). (in Portuguese)

²⁰ “Pesquisa: Sistema Judicial Brasileiro,” [Investigative Study: Brazilian Judicial System] Report – June 2004, Luciana Gross Cunha, Alexandre Santos Cunha, Flávia Scabin, Mariana Macário and Marcelo Issa. <0{>(<http://www.edesp.edu.br/files/artigos/relatorio%20bird%20corrigido.pdf>) (in Portuguese)

created a judicial oversight body established a similar administrative and financial body for the Office of Public Prosecution (National Council of the Office of Public Prosecution²¹).

In an investigation researching class action suits in Brazil (attributed to the Office of Public Prosecution and civil associations and government entities in the case of class-action suits against the government, but not in civil suits), the purpose of which was to determine the incidence with which this body proposes civil suits, the authors turned to three studies conducted by specialized jurists.²² The three studies collected the data used directly from researchers at the Courts, since there was no systematized data available regarding the quantity or the nature of the suits proposed by the Office of Public Prosecution²³. The results show that “Parquet” headed between 60.9% and 70% of the civil suits presented – the aim of which is to defend public and collective wealth. But if we want to know what they studied, what was the differentiation etc. we will have to read each, one by one – as the aforementioned researchers did.

In Brazil, there still are no useful statistics to evaluate the role of the judicial branch or the Office of Public Prosecution in the fight against corruption since neither are collected from the source in the processes and procedures records; also because there is little information regarding how each body and instance involved in judgments intertwine (Office of Public Prosecution for trials; of which those for the Courts, etc.)

As such, the quality of the services provided by the Judiciary cannot be thoroughly evaluated. This is also why we will never know exactly if the anticorruption system is effective – and to what extent. The newly created “external oversight” bodies for the courts and the Office of Public Prosecution are expected to begin changing this scenario.

²¹ The CNMP is presided by the Attorney General of the Republic and is comprised by over 13 members: four from the Federal Office of Public Prosecution, three from the State Office of Public Prosecution, two judges appointed by the Supreme Court and by the Superior Court of Justice, two attorneys appointed by the Brazilian Bar Association and two citizens with noteworthy legal knowledge and an impeccable reputation, one appointed by the Chamber of Deputies and another by the Senate.

²² “As ações coletivas e os novos lugares da democracia no Brasil”, Luis Werneck Vianna and Marcelo Bauman Burgos, Centro de Estudos Direito e Sociedade – IUPERJ [“Class-action suits and new spaces for democracy in Brazil,” Luis Werneck Vianna and Marcelo Bauman Burgos, Center for Studies of Law and Society – IUPERJ] (http://cedes.iuperj.br/PDF/cadernos_acoescoletivas.pdf) (Available 03/01/06) (in Portuguese)

²³ The researchers are: Barbosa Moreira (1993), Lopes (1998) and Carneiro (1999), cited in this fashion in the study, p. 7.