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Brazil in the Fight against Transnational Bribery: Lessons from the Odebrecht and Petrobras Cases

Anne-Sophie Korb[1]

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Abstract

With the expansion of globalization throughout the world during the 20th century, transnational bribery practices increased as more and more financial and commercial transactions were conducted across borders. Transnational bribery refers to illegal payments to foreign government officials to obtain or retain business. In Latin America, Brazil is the leading country in resolving transnational bribery cases, having concluded several cases, including one with substantial penalties in 2016. The study question focuses on the factors that may explain,

[1] PhD. in Law. at Panthéon-Assas University (Paris – France). Master of Laws in International Private Law, International Trade Law and European Law at Panthéon-Assas University (Paris – France). Advanced Master in International Business Law and Management at Essec Business School (Cergy – France). Orcid: https://orcid.org/0000-0003-2124-6360. E-mail: asophie.korb@gmail.com

from a legal point of view, Brazil's performance in such resolution of transnational bribery cases. The analysis of the resolution of cases in Brazil shows that several main factors explain Brazil's success. In fact, Brazilian authorities are involved in a coordinated resolution with other authorities, such as the U.S. authorities. This was the scenario in some well-known bribery cases, such as the Odebrecht and Petrobras cases. In a coordinated resolution, the authorities justify their actions on their own legal grounds, use tools to resolve cases without having to go to trial, through negotiations, and create a final agreement that allows the fine paid by the legal entity to be divided among the countries involved.

Keywords:
Transnational bribery, out-of-court settlement, Odebrecht, Petrobras, Brazil..

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Brasil en la Lucha contra el Soborno Trasnacional: Lecciones de los casos Odebrecht y Petrobras

Resumen

Con la expansión de la globalización en todo el mundo durante el siglo XX, las prácticas de soborno trasnacional aumentaron debido a que cada vez se realizaron más transacciones financieras y comerciales a través de las fronteras. El soborno trasnacional se refiere a pagos ilegales a funcionarios de gobiernos extranjeros para obtener o retener negocios. En América Latina, Brasil es el país líder en la resolución de casos de soborno trasnacional, habiendo concluido varios casos, incluido uno con sanciones sustanciales en 2016. La pregunta del estudio se centra en los factores que pueden explicar, desde un punto de vista

jurídico, los resultados de Brasil en tal resolución de casos de soborno trasnacional. El análisis de la resolución de casos en Brasil muestra que varios factores principales explican el éxito de Brasil. De hecho, las autoridades brasileñas participan en una resolución coordinada con otras autoridades, como las estadounidenses. Este fue el escenario en algunos casos de soborno muy conocidos, como los casos Odebrecht y Petrobras. En una resolución coordinada, las autoridades justifican sus acciones con sus propias bases legales, utilizan instrumentos para resolver casos sin tener que ir a juicio, a través de negociaciones, y crean un acuerdo final que permite dividir la multa pagada por la entidad jurídica entre los países involucrados.

Palabras clave:
Soborno trasnacional, solución extrajudicial, Odebrecht, Petrobras, Brasil.

O Brasil no Combate à Corrupção Transnacional: Lições dos casos Odebrecht e Petrobrás

Resumo

Com a disseminação da globalização em todo o mundo durante o século 20, as práticas transnacionais de suborno aumentaram à medida que mais e mais transações financeiras e comerciais ocorreram além das fronteiras. O suborno estrangeiro refere-se a pagamentos ilegais a funcionários de governos estrangeiros para obter ou reter negócios. Na América Latina, o Brasil é o país líder na resolução de casos de suborno estrangeiro, tendo concluído diversos casos, inclusive um com sanções substanciais em 2016. A questão do estudo se concentra nos fatores que podem explicar, do ponto de vista jurídico, os resultados do Brasil em tal resolução de casos de suborno estrangeiro. A análise da resolução de casos no Brasil mostra que vários fatores principais explicam o sucesso do Brasil. De fato, às autoridades brasileiras participam de uma resolução coordenada com outras autoridades,

como os Estados Unidos. Esse foi o cenário de alguns casos de suborno conhecidos, como os casos da Odebrecht e da Petrobrás. Em resolução coordenada, as autoridades justificam suas ações com bases jurídicas próprias, utilizam instrumentos para resolver casos sem ir a julgamento, por meio de negociações, e fazem um acordo final que permite que a multa paga pela pessoa jurídica seja dividida entre os países envolvidos.

Palavras chave:
Corrupção transnacional, solução extrajudicial, Odebrecht, Petrobrás, Brasil.

Introduction

Most Latin American countries have always been perceived to have high levels of corruption. Some factors, including socio-cultural characteristics, encourage corruption practices. In some Latin American countries, local behaviors favor relationships to the detriment of merit when doing business. For example, in Brazil we can cite the *jeitinho*, concept that refers to the ways in which the rules are circumvented when they come into conflict with someone's self-interest (Arrieta, 2014); or the *capitalism de amigos*, in Argentina, Brazil, and Mexico, when government officials tend to do business directly with entities with which they have a personal relationship (Ellis, 2016, Chapter 3).

Besides Latin America, corruption practices are widespread worldwide. According to the General Secretary of the United Nations, "[o]ne trillion dollars are paid in bribes annually, while another 2.6 trillion are stolen, due to corruption" (United Nations, 2018). The term corruption covers a variety of acts and has a variable meaning, depending on the era and the world region.

Corruption is defined by Transparency International (TI), a non-governmental organization (NGO), as, "[t]he abuse of entrusted power for private gain" (Transparency International, 2022). TI makes

a distinction between grand corruption, implying “the abuse of high-level power that benefits the few at the expense of the many” (Transparency International, 2022); petty corruption, covering “[...] everyday abuse of entrusted power by public officials in their interactions with ordinary citizens” (Transparency International, 2022), when accessing basic goods or services; and political corruption, which is the “[...] manipulation of policies, institutions, and rules of procedure in the allocation of resources and financing by political decision-makers, who abuse their position to sustain their power, status and wealth”(Transparency International, 2022).

Another form of corruption is bribery of foreign public officials or foreign bribery. According to the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, bribery of foreign public officials in international business transactions is committed by

> any person [who] intentionally offers, promises or gives any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business. (Article 1)

With globalization expanding around the world during the 20th century, foreign bribery practices increased accordingly due to more and more financial and commercial transactions concluded across borders. If corruption locally affects democratic institutions and economic development, and increases inequality and poverty, foreign bribery has decoupled political, economic, environmental, and social effects, with a risk of financial destabilization on a global scale.

Nevertheless, worldwide foreign bribery practices were tolerated until the Watergate and Lockheed scandals in the United States of America and the adoption of the *Foreign Corrupt Practices Act* (FCPA). This act aims to sanction practices of grand corruption beyond borders.

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The FCPA is the first law criminalizing the bribery of foreign public officials. The purpose was to make it "unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business" (Department of Justice, 2017).

With the favorable geopolitical context in the 1990s and with the input of the United States of America and Transparency International, the international community took action. Several international conventions were adopted by the Organization of American States (OAS), the OECD (OECD, 1997), and the United Nations (United Nations, 2003).

These international instruments criminalized foreign bribery in multiple countries. More recently, anti-corruption laws have been adopted and reinforced. For example, these laws established the responsibility of legal entities for acts of bribery, for compliance with international commitments, and to respond to the sanctions imposed by the American authorities on foreign companies engaged in foreign bribery practices[2].

Regarding the offence of foreign bribery, to date, the United States of America continues to be the country that has prosecuted the most cases (Transparency International, 2020, p. 13). Several other authorities including France and the United Kingdom have started to take action outside the American continent (Transparency International, 2020, p. 13). In Latin America, Brazil is the leading country in the prosecution and sanction of foreign bribery, having concluded several cases of foreign bribery, including a major one with substantial sanctions in 2016 (Transparency International, 2020, p. 13), and has also commenced several investigations in the last few years (Transparency International, 2020, p. 12).

We do not find such data for other Latin American countries. Some emerging countries of Latin America such as Colombia and Chile experience limited enforcement (Transparency International, 2020, p. 12), while others like Mexico and Peru have no enforcement of these infractions (Transparency International, 2020, p. 12). In Chile and Colombia, the authorities have started taking action

[2] In the case of France, the sanctions imposed to French companies, as Alstom and BNP Paribas, contributed to the adoption of Law 2016-1691 (the "Sapin II Law").

in this area. In Colombia, for example, the Superintendencia de Sociedades (Superintendent of Companies) resolved its first case of transnational corruption based on Law 1778 of 2016 that established the responsibility of legal persons for acts of transnational corruption. Based upon Resolution N° 200-002899, of July 6, 2018, the Colombian company Inassa was fined 5.078.073.000 COP, nearly US$ 1.3 million, for bribing Ecuadorian public officials in 2016 (Superintendencia de Sociedades, 2018). Although this resolution is very positive and surely constitutes a step forward in the fight against corruption, it remains exceptional in practice.

Given the multiple economic, political and social challenges that corruption presents both locally and globally, it is necessary to fight against impunity and to recover the money diverted by illicit practices to the detriment of the community. In this context, we are convinced that the study of Brazil's action in the fight against foreign bribery would be helpful to understand what is working in the region in the fight against bribery.

In Brazil, several collective actions were implemented to prevent corruption. In this country, integrity pacts were used in two projects, one in 2014 and one in 2016. As a result, the Ethos Institute launched a collective action entitled "Clean games" with the aim of promoting integrity during the FIFA World Cup and the Olympic Games infrastructure projects (United Nations Global Compact, 2015, p. 21 and 71). A local government transparency pact was signed by the mayors of the host cities of the 2014 World Cup with a view to improving transparency in the use of public funds. The development of agreements in the health, construction, energy, and transport sectors was also initiated. In this context, several companies participating in calls for tenders have signed integrity pacts with the Ethos Institute (United Nations Global Compact, 2015, p. 21).

Besides these preventative actions, the central question of the study from a legal point of view is what factors can explain Brazil's results in prosecuting and sanctioning foreign bribery.

The analysis of the resolution of bribery cases in Brazil shows that several main factors explain Brazil's success in prosecuting and sanctioning foreign bribery from a legal perspective. In fact,

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Brazilian authorities participate in a coordinated resolution with other authorities, such as the American authorities. This was the scenario in some well-known bribery cases, such as the Odebrecht and Petrobras cases. In a coordinated resolution, authorities justify their actions with their own legal basis (I); they use instruments to resolve cases without trial (II); they create a final agreement that permits dividing the fine between the countries involved (III) and some lessons may be learned from this practice (IV).

Legal Basis

Various legal bases are used. Brazilian authorities' action is based on the foreign bribery incrimination in the Brazil Criminal Code for prosecuting individuals as well as the administrative and civil liability of legal entities. American authorities justify their action based on the anti-bribery provisions of the Foreign Corrupt Practices Act and an extensive jurisdictional criterion.

Foreign Bribery Incrimination in the Brazil Criminal Code

Brazil created the offense of active bribery of foreign public officials in international business transactions with Law 10.467 of June 11, 2002, to comply with its international commitments. This law transposes the OECD Anti-Bribery Convention and amends the Brazilian Criminal Code accordingly (OCDE, 2004, p. 2). The offence, in Article 337-B of the Brazilian Criminal Code, covers all natural persons but not legal entities, since the Brazilian legal system does not provide for criminal liability for legal entities. However, Brazil took an important step in 2013, by implementing administrative and civil liability for legal entities, which represents a key element in law enforcement (OECD, 2016, p. 13).

Administrative and Civil Liability of Legal Entities in the Clean Company Act

Following the example of other Latin American countries such as Chile that have already taken the step to criminalize the liability of legal entities with Law 20.393 of 2009, Brazil passed Law 12.846 of August 1, 2013, also called the *Clean Company Act*, introducing a strict administrative and civil liability regime for legal entities for the practice of acts against the public administration, whether national or foreign. In Brazil, the civil and administrative nature of liability has been considered more effective than a criminal regime due to the inefficiency of the Brazilian judicial system and the length of proceedings (OECD, 2014, p. 17). According to Law 12.846, proving the intent of the company, its directors, or employees is not required (OECD, 2014, p. 18). Legal entities are liable for "wrongful acts" (*atos lesivos*). These acts may include the offer, promise or giving of an "undue advantage" to a "public official", "to the detriment of [...] foreign public assets, of public administration principles, or to Brazil's international commitments" (Article 5)[3], "performed in (the legal person's) interest or for their benefit" (Article 2)[4].

The foreign bribery incrimination in Brazilian Law, and more importantly the liability of legal entities for these practices, including incorporated, unincorporated, and state-owned entities, either fully or partially owned (OECD, 2014, p. 18; OECD, 2016, p. 37), represents a huge step in the fight against corruption. On one hand, the foreign bribery offense targets the supply side of bribery and focuses on sanctioning the bribers. On the other hand, Brazil is the home state of many of the region's multinational companies, including Braskem, a Brazilian company operating in the chemical and petrochemical industry (Boston Consulting Group, 2018)[5]. It is also the territory in which foreign companies have

[3] Art. 5: Constituem atos lesivos à administração pública, nacional ou estrangeira, para os fins desta Lei, todos aqueles praticados pelas pessoas jurídicas mencionadas no parágrafo único do art. 1º, que atentem contra o patrimônio público nacional ou estrangeiro, contra princípios da administração pública ou contra os compromissos internacionais assumidos pelo Brasil, assim definidos: I - prometer, oferecer ou dar, direta ou indiretamente, vantagem indevida a agente público, ou a terceira pessoa a ele relacionada.

[4] Art. 2: As pessoas jurídicas serão responsabilizadas objetivamente, nos âmbitos administrativo e civil, pelos atos lesivos previstos nesta Lei praticados em seu interesse ou benefício, exclusivo ou não.

[5] See Exhibit 1: The 2018 BCG Multilatinas.

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their headquarters, a subsidiary, or representation. And finally, it has huge state-owned companies, such as Petroleo Brasileiro S.A. (Petrobras) and Electrobras, operating in the oil and energy sector, one of the most corrupt sectors in Latin America, after the construction industry, financial and insurance sectors (Yepes-Lopez et al., 2019, p. 74).

FCPA Offenses and Extensive Jurisdictional Criterion

Some of these Brazilian companies have faced huge fines, imposed by American and Brazilian authorities, for acts of foreign bribery. For example, Petrobras and Odebrecht with its subsidiary Braskem S.A., are in the top ten of the largest U.S. Monetary Sanctions by Entity Group imposed by the American authorities for violations of the anti-bribery provisions of the FCPA, based on extensive jurisdictional criteria (Stanford, 2022).

On one hand, Petrobras and Braskem were liable under the FCPA as *issuers* listed in the United States for acts of foreign bribery committed by the "[...] use of mails or any means or instrumentality of interstate commerce corruptly" (§ dd-1). On the other hand, Odebrecht S.A., a Brazilian conglomerate operating in the field of construction, engineering, and chemicals, was liable under the FCPA because it was covered by the jurisdictional criteria of §dd-3 enacted by the amendment of 1998. It covers foreign companies or persons that directly or through agents, "made use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance", "while in the territory of the United States".

Regarding the offense, in the Petrobras case, bribery schemes were in place that allowed contractors to obtain contracts from Petrobras and maintain the favor of Brazilian politicians. At the same time contractors paid bribes, representing a percentage of the value of the contracts obtained from Petrobras, which were split among executives, managers, and politicians. There was also a violation of the books and records, and internal control provisions of the FCPA as the payments and inflated contracts were recorded by Petrobras as legitimate expenses and assets (Department of Justice, Petroleo Brasileiro S.A., 2018)[6].

[6] See Attachment A, A-4 "Statements of Facts".

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In the Odebrecht case, the company paid $788 million in bribes to government officials in over a hundred projects in twelve countries around the world[7] for 15 years. The company created a Division of Structured Operations, functioning as a bribe department. In the United States of America, Odebrecht was charged with conspiracy to violate the anti-bribery provisions of the FCPA and pleaded guilty to this charge in its plea agreement with the Department of Justice (DOJ) (United States of America vs. Odebrecht S.A., 2016)[8].

In fact, these resolutions of foreign bribery cases, such as Petrobras, Odebrecht and Braskem, are the result of a non-trial resolution process coordinated between American and Brazilian authorities, using non-trial instruments.

The Use of Non-Trial Instruments

One of the factors for the successful resolution of foreign bribery is the use of non-trial instruments in the resolution of cases. According to a Brazilian prosecutor (Fontana, 2017), the investigations have returned approximately 1 billion euros to Brazil, adding that two resolution instruments without trial were decisive in this situation. On one hand, agreements consisting in a plea bargain (delação premiada), used in criminal matters for individuals, based upon Law 9613 of 1998, modified in 2013, and on the other hand, leniency agreements (acordo de leniência), in civil and administrative matters for legal entities, contained in Law 12.846 of 2013. These instruments facilitated information gathering that would probably not have been disclosed in a classic investigation (Fontana, 2017).

Plea Agreement-Like Agreement for Individuals

In Brazil, plea bargaining was used for the first time in 2003 in a case of money laundering. It was considered a huge step in the Brazilian

[7]Angola, Argentina, Brazil, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, Venezuela.

[8] See Attachment B, B-7: "Overview of the Bribery Scheme".

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procedure, and Brazilian judges started to manifest interest in the use of an Italian instrument, named patteggiamento, because the Italian and the Brazilian system are very similar, and in the United States (Laforge, 2017, p. 12), where the use of the plea bargain is widespread since 1970 (United States Supreme Court, 1971)[9].

Law 12.850 on organized crime, Section 1[10], finally implemented the practice of plea bargains (colaboração premiada) in the Brazilian system, in a manner similar to what existed in the United States, with the objective to reward collaboration from individuals. In the United States, according to Rule 11 of the Federal Rules of Criminal Procedure, plea agreements are used with legal persons and individuals who generally admit to the facts, admit guilt, and are convicted of the charged crimes when the plea agreement is presented and accepted by the court. This instrument allows a resolution of a criminal case without a trial, by negotiating the nature and the amount of the sentence.

Some differences exist between the instruments. In the United States, a guilty plea can constitute proof of guilt. However, in Brazil, it is not proof of guilt, since the law indicates that no conviction can be based solely on the existence of such a guilty plea. According to Law 12.850, Article 3-A, it is an instrument used to collect evidence, which presupposes public utility and interest, in exchange for a reduced sentence, or even a full release (Janot, 2017a). Article 4 states that in order to negotiate a less restrictive sentence, the defendant, who must be assisted by his lawyer, must help identify the persons engaged in illicit practices, reveal the structure, the hierarchy, and roles of the criminal organization, allow the recovery of illicit profits, and more generally dismantle criminal organizations (Janot, 2017b, p. 2). If judges do not intervene in the negotiation, the written agreement must be approved by the court (Janot 2017b, p. 2).

In practice, the use of this instrument made it possible to make considerable progress in the resolution of cases related to the "Car Wash operation" (Lava Jato), gradually dismantling the connivance

[9] For more information on pleas, see: Rule 11, Federal Rules of Criminal Procedure.
[10] Lei n°12.850 de 2 de agosto de 2013 "Define organização criminosa e dispõe sobre a investigação criminal, os meios de obtenção da prova, infrações penais correlatas e o procedimento criminal".

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relationships and revealing a whole system of illicit practices. For example, in his plea agreement (delação premiada), Alberto Youssef revealed that he had received more than 180 million Brazilian reals (about 27 million euros) in bribes, disclosed the existence of the bribery system, and revealed which politicians and companies were involved (Ministério Público Federal, 2014)[11]. In exchange, he benefited from a reduction of his prison sentence to five years and from a home-detention (Ministério Público Federal, 2014).

Leniency Agreements for Legal Entities

Apart from delação premiada, leniency agreements are "a kind of conventional legal act which links a special investigative technique and a defense" (Ministério Público Federal, 2017, p. 49)[12]. They are used by Brazilian Authorities to resolve foreign bribery cases with legal entities. Law 12.846 of 2013 on civil and administrative responsibility of legal entities for acts of corruption[13] implemented the possibility for Brazilian authorities, in particular the Controller General of the Union (Controladoria-Geral da União), a branch of the executive power, to conclude leniency agreements with legal entities in an administrative procedure[14]. The federal public ministry (ministério publico federal) can also conclude these agreements with legal entities.

Leniency agreements (acordo de leniência) aim to impose a commitment and responsibility on legal entities that voluntarily propose to cooperate effectively in the investigations, end their involvement in illicit practices, and adopt measures to maintain their activities in a more ethical manner, in exchange for a sanction reduced by two thirds[15].

Depending on the circumstances, these instruments can constitute an equivalent of a plea agreement. As they can lead to a suspension of proceedings, under certain conditions, or to the termination of

[11] See Cláusula 5.
[12] Free translation by the author.
[13] Lei 12.846, de 1 de agosto de 2013, "Dispõe sobre a responsabilização administrativa e civil de pessoas jurídicas pela prática de atos contra a administração pública, nacional ou estrangeira, e dá outras providências".
[14] See article 16§10.
[15] See article 16.

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proceedings, they also have some characteristics of Deferred Prosecution Agreements (DPA), and Non-Prosecutions Agreements (NPA) used by American Authorities (OECD, 2019, p. 59).

DPAs and NPAs are instruments born in practice in the United States and are commonly used by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) in the application of the FCPA. When there is a suspicion of illicit practices from a legal entity, American authorities usually propose to enter into DPAs, NPAs, or plea agreements, because in this context, their investigations would be supported by the cooperation of the legal entity which can make internal investigations and gather evidence on the alleged illicit practices, with the help of law firms (Miller, 2014).

Under NPAs, the DOJ "maintains the right to file charges but refrains from doing so to allow the company to demonstrate its good conduct during the term of the NPA" (DOJ and SEC, 2012, p. 76). If the legal entity complies with the NPA, the DOJ does not file criminal charges. DPAs are different because the "DOJ files a charging document with the court, but requests that the prosecution be deferred" (DOJ and SEC, 2012, p. 75), to allow the legal entity to demonstrate its good conduct and to comply with the terms of the agreement. These agreements often require the payment of a monetary penalty, full and effective cooperation with the authorities, the admission of the facts, and taking remedial measures to prevent acts of corruption. If the company complies with the agreement, the DOJ will dismiss the filed charges and there will be no criminal conviction.

In Brazil, Leniency Agreements have been used on numerous occasions with Brazilian public companies such as Odebrecht, Braskem and Petrobras, which benefitted both the companies by escaping from a heavier process due to a trial and a conviction, and the authorities by gathering more evidence thanks to the legal entities' cooperation during the investigations. In this context, Petrobras hired a Brazilian law firm, Trench, Rossi e Watanabe Advogados, and an American law firm, Gibson, Dunn & Crutcher LLP to conduct internal investigations to clarify certain facts and carry out interviews with employees and third parties (Kiernan, 2014; Caiado, 2019). The findings were then disclosed to Brazilian and American authorities, especially concerning the individuals involved (Kiernan, 2014; Caiado, 2019).

Besides internal investigations, information and evidence sharing between implied authorities conducting parallel investigations was key to achieving a coordinated resolution (OECD, 2019, p. 18).

Respective Agreements and Coordinated Resolution

At the end of the process during the Odebrecht and Petrobras cases, a coordinated resolution was achieved between the different authorities involved. Even if the companies had concluded several agreements, both in the United States and in Brazil, these agreements were part of a global settlement between the authorities which agreed to a global fine and other conditions proposed to the company.

In the Petrobras case, Petroleo Brasileiro S.A. (Petrobras) was sanctioned for concealing bribes totaling US$2 billion (SEC, 2018). The non-prosecution agreement (NPA) entered into with the U.S. Department of Justice (DOJ) is part of global agreement between the legal entity with the U.S. authorities and with the Brazilian authorities. As part of the NPA, Petrobras agreed to pay US$ 853,200,000, including $85,320,000 to the DOJ, $85,320,000 to the Securities and Exchange Commission (SEC), and $682,560,000 to the Brazilian authorities. This amount was determined based on the individual facts and circumstances, and even if the company did not receive voluntary disclosure credit, it received full credit for its cooperation with the American authorities, especially for proactively conducting an internal investigation that led to the disclosure of precious information to the American authorities (Department of Justice, 2018, p. 1).

The NPA finalized between Petrobras and the DOJ states that 80% of the total amount of the fine will be paid to the Brazilian authorities (Department of Justice, 2018, pp. 3 and 6). It adds that the obligations to pay the fine in the United States will be fulfilled when the company pays 10% of the total amount of the fine, after the company pays 90% to Brazil and the remaining 10% to the SEC, as provided for in the respective agreements (Department of Justice, 2018, pp. 3-6).

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Other elements contained in the American deal take into account that the company entered into a resolution with Brazilian authorities. For example, American authorities considered the appointment of an independent compliance monitor as unnecessary in the NPA, because Petrobras committed to reporting to the American authorities on its compliance program, internal controls, and policies, and the company will be overseen by Brazilian authorities (Department of Justice, 2018, p. 3).

As part of Odebrecht's negotiated agreements with various authorities, namely the plea agreement with the DOJ, its leniency agreement with the Brazilian Federal Public Prosecutor's Office (Ministério Publico Federal), and the Criminal Ordinance with Switzerland[16], Odebrecht agreed to pay a fine of US$2.6 billion, divided among the Brazilian, U.S. and Swiss authorities, consisting of the repartition of 80%, 10% and 10% respectively, which was subsequently reduced due to the company's inability to pay this amount (United States of America vs. Odebrecht S.A., 2016)[17]. In this case, the DOJ considered several factors for determining the level of the fine, including the fact that the company cooperated with the investigation and adopted remedial measures after the alleged bribery surfaced.

As stipulated in the leniency agreement entered into by Odebrecht with the Brazilian authorities, it is a resolution "that forms part of a coordinated global agreement, in which the collaborating company agrees to pay the equivalent global value". It contains the specific terms of the payment to Brazil, and it stipulates that 97,5% of the amount corresponds to the compensation for material and immaterial damages caused by the illegal practices in Brazil (Ministério Público Federal, Odebrecht, 2016) [18].

Besides the payment of the fine, Odebrecht made a commitment to address the deficiencies in its internal controls, as well as to develop compliance policies and procedures, to adopt a new compliance program, and agreed to the appointment of

[16] We can note that Switzerland legislation provides for the use of a non-trial instrument, the Criminal Ordinance, which could lead to a global resolution of the case with foreign authorities, using similar non-trial instruments.
[17] See n°20 b).
[18] See Clausula 7.

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an independent control monitor (United States of America vs. Odebrecht S.A., 2016)[19].

As for Braskem, Odebrecht's U.S. listed subsidiary, it agreed in its plea agreement to pay a fine of US$632 million, of which 70% will be paid to Brazil, 15% to the United States of America, and 15% to Switzerland (Department of Justice, 2016, p. 2). As before, the specific terms of the payment to Brazil are detailed in the leniency agreement in a specific section dedicated to the value (Ministério Público Federal, Braskem, 2016)[20]. Besides the global penalty, the company agreed to strengthen its anti-bribery policies and procedures, and hire an independent compliance monitor for three years.

Lessons Learned

We can summarize several lessons from the cases developed in the study.

A Way to Remedy Impunity

First, the use of non-trial instruments can be a way to remedy impunity and contribute positively to the fight against corruption practices. Before 2016, Brazil was characterized by lack of enforcement in the field of foreign bribery (OECD, 2017, p. 4 para 2).

The legal possibility of using plea agreements like non-trial instruments and leniency agreements changed this scenario and helped Brazilian authorities resolve some foreign bribery cases, in coordination with foreign authorities, especially American authorities. Even if the use of these instruments implies a negotiation and a collaboration with the persons implicated in illegal practices, which can be viewed as favorable to the malefactors instead of achieving justice, it should be noted that individuals, and especially legal entities, have faced important fines as the result of the action of several authorities using non-trial instruments (OECD, 2017, p. 4 para 2).

[19] See n°30, and attachment C.
[20] See Clausula 7.

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Table 1

Legal entities - Three more important financial sanctions[21]			
Rank	**Brazilian Company**	**Financial sanction ($)**	**Year**
1	Petroleo Brasileiro S.A. (Petrobras)	2,639,873,797	2018
2	Odebrecht S.A.	2,600,000,400	2016
3	Braskem S.A.	1,282,625,737	2016

The Share of a Global Penalty

Second, the use of non-trial instruments can lead to the conclusion of a final agreement between several authorities, which leads to the sharing of the global penalty between them. We can note that a large amount of the penalties was returned to Brazil. This would probably not be the case if Brazilian authorities had investigated the alleged cases alone. When the prosecution is coordinated with other authorities, more pressure can be exerted on the company allegedly implicated and more information can be extracted from the company's activities.

The Development of a Close Cooperation Between States in the Fight against Foreign Bribery

Third, since the Petrobras case, Brazilian and American authorities have developed a close working relationship based on cooperation. In the prosecution of individuals and legal entities involved in illicit practices, they facilitate information sharing and help each other to obtain cooperation agreements with those involved. This close cooperation would probably facilitate other investigations in the field of bribery, as in the current suspicion of bribe payments to government officials by several foreign companies in Brazil in the health industry (Brooks, 2019).

[21] Data compiled by the author from the datas figuring on www.fcpa.stanford.edu

Responsibility of Legal Entities in the Prevention of any Recurrence of Bribery Practices

Fourth, the use of non-trial instruments and the resulting final agreements generate an important commitment to legal entities when they agree to adopt a compliance program and internal control measures, as well as strengthen existing measures to prevent bribery practices. In certain cases, an independent compliance monitor is appointed by the American authorities in order to verify if the company complies with the terms of the agreement and especially if the compliance program can effectively reduce the risk of any recurrence of the illicit practice.

More generally, corruption scandals and associated fines are linked to the increase of disclosed anti-corruption programs in Brazil (Transparência Internacional Brasil, 2018, p. 20). According to the Transparency in Corporate Reporting (TRAC), published in 2018 by Transparência Internacional Brasil, compiling the public information of the one hundred largest companies and the ten largest banks operating in Brazil, on a scale of 0 to 100%, 65% of legal entities disclosed anti-corruption programs (Transparência Internacional Brasil, 2018, p. 22). This percentage rises to 74% when legal entities have operations overseas.

A Way to Encourage other Actions

Last but not least, the resolution of these cases represents a way to encourage other actions. For example, in Brazil, after the Odebrecht case, the United Nations Global Compact wanted to take collective action with various actors in the construction sector. A guide on integrity was created and launched in this sector (Cartilha Integridade no Setor da Construção). It contains a compilation of fictional scenarios depicting the main challenges, risks, and regulatory issues that companies face daily to guide them in preventing the risk of corruption. The guide received the support of the four most important companies in the construction sector in Brazil, linked to recent corruption cases (United Nations Global Compact, 2018).

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The message from companies that contributed to the publication is the following:

> We learned with the past, and we are highly committed and engaged to transform this market. Therefore, we understand that a Collective Action is an effective tool to combat corruption in the private sector, and that it may be applied to suggest changes in the legislation and in the bidding system, by promoting good practices, awareness, creation of trust, and fair competition. (United Nations Global Compact, 2018, p. 15)

Conclusion

Brazil's action in the resolution of corruption cases is based on the use of non-trial instruments and cooperation with foreign authorities, individuals, and legal entities. Brazil has become an effective partner alongside the United States in the resolution of several corruption cases concerning Brazilian companies.

There is no doubt that these actions, which materialize in a coordinated resolution, have several positive impacts. On one hand, regarding the repression of corruption, they are a way to remedy impunity in the field, as they lead to the payment of a penalty by the legal entity and allow a penalty share between the States involved. On the other hand, concerning the prevention of corruption, these actions create a commitment for legal entities to take internal actions to prevent corrupt practices and their recurrence. Moreover, these resolutions, even if they happen outside of courts, constitute a way to encourage other actions, for example, collective actions.

This kind of non-trial resolution involving several authorities raises many legal questions in terms of protecting defendants' rights as they exist in a procedure with a trial, but also in terms of legitimacy and sovereignty, regarding what some practitioners may denounce as American imperialism (Garapon & Servan, 2013).

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