

# THE RELATIONSHIP BETWEEN CORRUPTION AND FOREIGN INVESTMENTS IN BRAZIL: *SOME RESPONSES AGAINST CORRUPTION*

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**Abstract:** Mobilizing investment and ensuring that it contributes to sustainable development should be one of the priority targets for all countries. The financial-economic market growth is one of the key features of contemporary society, where social, political, and economic activities easily acquire worldwide dimension. Investment Law focuses various aspects of such drives, among other rule of law in different jurisdictions which faces recent developments, as well as multilateral agreements and the soft law that serves as a background for legal transplants and innovation. The analysis made by investors includes risk evaluation. Among other jurisdictions, Latin America and specially Brazil may be included among the hot spots for investments. Between other topics, corruption rating and scandals are scrutinized by investors, showing a widespread example of the dynamic and speed of worldwide negative impact of such events. As a result, fighting corruption has become a policy priority for countries over the past two decades and extensive reform efforts have been launched. Corruption undermines policies and programs that aim to reduce poverty; therefore attacking corruption is critical to achieving poverty reduction, and attracting investments. This article aims to discuss the characteristics of a foreign and international investment and underlines some aspects of corruption; worldwide responses against corruption are also reported, taking into account the fact that the world is globalized and interdependent; An overview of anti-corruption efforts in Brazil is provided.

**Keywords:** Investments - corruption - efforts against corruption.

## 1. INTRODUCTION

The growth of the financial-economic market is one of the key features of contemporary society, where social, political, and economic activities easily gain global dimension<sup>1</sup>. In this sense, events and decisions that take place in one part of the world, almost immediately, impact individuals and communities in other parts of the globe, even in distant parts<sup>2</sup>. The global repercussions of the current economic crises, which were, in part, triggered by corruption scandals, are an example of this dynamic.

At the same time, the phenomenon of globalization increases the flows, patterns of interaction, and interconnections between States and societies that constitute the Modern World<sup>3</sup> or the Postmodern World<sup>4 5</sup>

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1 “Theorists of globalization disagree about the precise sources of recent shifts in the spatial and temporal contours of human life. Nonetheless, they generally agree that alterations in humanity’s experiences of space and time are working to undermine the importance of local and even national boundaries in many arenas of human endeavor.” . STANFORD ENCYCLOPEDIA OF PHILOSOPHY. Available at: <<http://plato.stanford.edu/entries/globalization/>> . Accessed in Feb. 8th, 13.

2 BRENDA-BECKMANN, Franz von; BRENDA-BECKMANN, Keebet von; GRIFFITHS, Anne. *Mobile People, Mobile Law: An Introduction*. p. 1 IN: *Mobile People, Mobile Law Expanding Legal Relations in a Contracting World*. Max Planck Institute for Social Anthropology, Germany and University of Edinburgh. UK

3 MCGREW, A. G. Global Legal Interaction and Present-Day Patterns of Globalization, 1998, p. 325. IN GRESSER, V.; BUDAK, A.C. (eds), *Emerging Legal Certainty: Empirical Studies on the Globalization of the Law*, Aldershot and Brookfield: Ashgate and Dartmouth, pp. 325-345 Apud BRENDA-BECKMANN, Franz von; BRENDA-BECKMANN, Keebet von; GRIFFITHS, Anne. *Mobile People, Mobile Law: An Introduction*. p. 1 IN: *Mobile People, Mobile Law Expanding Legal Relations in a Contracting World*. Max Planck Institute for Social Anthropology, Germany and University of Edinburgh. UK

4 For Erik Jayme four characteristic features of postmodernity in the law are: pluralism, communication, storytelling and return the feelings. Pluralism in this sense would be the ability of postmodern tolerance; acceptance of cultural differences. The communication would be the speed of information and willingness to communicate with other cultures, breaking traditional frames. The account would be the emergence of standards that do not require, but simply describe values, it is expected that the text should be interpreted according to a statement of values, the will of the legislature. The fourth element, ‘return to the feelings’, is characterized by the fact that purely legal foundations are no longer sufficient, because foreign elements to the legal world, with innovative responses, appear revising the existing law. It is the choice for the respect of the human rights. MOROSINI, Fabio. *Globalização e Novas tendências em Filosofia do Direito Internacional: a Dicotomia entre o Público e o Privado da Cláusula de Estabilização*, p. 552. IN: *O novo direito internacional – estudos em homenagem a Erik Jayme* / Claudia Lima Marques, Nadia de Araújo, organizadoras. – Rio de Janeiro: Renovar, 2005.

5 For Fabio Morosini the modern world is characterized by the idea of rationality, loaded with ideology committed to Enlightenment ideals of the French Revolution: liberty, equality and solidarity, which occupies the central rationale, objective reason. MOROSINI, Fabio.

<sup>6</sup>, which clearly triggers new perceptions by Law.

The world has experienced, throughout the last decades, an astonishing process of internationalization. Notwithstanding the fact that communication vehicles and transports have improved since Ancient History, only now technology does, in fact, enable the unveiling of the entire Globe.

The increase of mobility has led to a growing international market; but even more than goods, investments rush, with great speed, in and out of any given territory.

If, on the one hand, globalization has enabled the enlargement of production and wealth; on the other hand, the world is now much more complex than it used to be. The years of a rigid bipolar order, during which only a few States were granted the ability to shape international order, are past. One of the benchmarks of the present era is the existence of multiple actors, with sufficient power to influence international relations, in different areas.

Emerging markets, recognized as the fastest developing nations, have, in particular, contributed to increment global demand, as well as to render more complex the ties that bind nations.

Acknowledging that new founding role, traditional international organizations (World Bank, MIF) have proceeded to corporate adjustments, so their bureaucratic bodies could reflect, with minimum coherence, the current distribution of political and economic power.

Since the world's largest oil reserves are located outside of central States, in the energy field, the impact of emerging markets' actions and policies is even more profound. The enacting of a rule in a "far Middle Eastern country" may result, and usually do, in a gain or in a loss of multi-billion dollar transactions. In parallel, in such a complex and fast changing world, the rule of law is paramount to provide stability. Only after an accurate analysis of the legal risks associated with a country, will an investor proceed to engage its capital.

Another characteristic of contemporary society is the interdependence of the various actors of the system. In an interdependent relationship States are mutually dependent, moving away from the *hard power*<sup>7</sup> approach, to come along with concepts such as international

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*Globalização e Novas tendências em Filosofia do Direito Internacional: a Dicotomia entre o Público e o Privado da Cláusula de Estabilização.* p. 551. IN: *O novo direito internacional – estudos em homenagem a Erik Jayme* / Claudia Lima Marques, Nadia de Araújo, organizadoras. – Rio de Janeiro: Renovar, 2005.

6 MIRAGEM, Bruno. *Conteúdo da ordem pública e os direitos humanos. Elementos para um direito internacional pós-moderno*, p. 307. IN *O novo direito internacional – estudos em homenagem a Erik Jayme* / Claudia Lima Marques, Nadia de Araújo, organizadoras. – Rio de Janeiro: Renovar, 2005.

7 The concept of Hard Power stems from the realism. Hard power resources include coercive

cooperation and respect for fundamental rights in order to gain their legitimacy.

According to 2012 *World Investment Report*<sup>8</sup> of UNCTAD<sup>9</sup>, “mobilizing investment and ensuring that it contributes to sustainable development is a priority for all countries”<sup>10</sup>. The report stresses that “a new generation of investment policies is emerging, as governments pursue a broader and more intricate development policy agenda, while building or maintaining a generally favorable investment climate”<sup>11</sup>.

In the Oil and Gas industry some key issues have emerged as priority. Among other topics, corruption scandals and rating are scrutinized by investors, showing a widespread example of the dynamic and speed of worldwide negative impact of such events. As a result, fighting corruption has become, as indicated, a policy priority for Host countries that wish to attract and keep foreign investment. The need for extensive reform efforts have been identified and implemented in many countries.

The following quotation highlights the awareness by global actors that security and stability of worldwide investments depend not simply on the use of military forces and diplomacy, but also on an interaction of economic and political factors<sup>12</sup>: “*the end of Cold War and the emergence of a truly integrated international economy have also contributed to the widespread perception of corruption as a problem with inherently global ramifications*”<sup>13</sup>. Several studies about investments have focused on the overall negative effects of corruption. And according to the Konrad-Adenauer Foundation, corruption causes,

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capabilities such as military and economic means whereas the soft power resources are based on culture, values and institutions. NYE, Joseph S. Jr. *The Changing Nature of World Politics*. Political Science Quarterly. Vol. 105, No. 2, Summer, 1990. Pp 177-192. p 182. Available at: <<http://www.jstor.org/stable/2151022>>. Accessed in February 11th, 2013.

8 The *World Investment Report* is an annual publication on the global and regional trends in FDI and policy developments related to national and international levels.

9 UNCTAD: *United Nations Conference of trade and development* : Established in 1964, UNCTAD promotes the development-friendly integration of developing countries into the world economy. UNCTAD has progressively evolved into an authoritative knowledge-based institution whose work aims to help shape current policy debates and thinking on development, with a particular focus on ensuring that domestic policies and international action are mutually supportive in bringing about sustainable development.

10 UNCTAD. 2012 *World Investment Report*. Available at: <<http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>>. Accessed February 7th, 2013.

11 UNCTAD. 2012 *World Investment Report*. Available at: <<http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>>. Accessed February 7th, 2013.

12 GLYNN, Patrick; KOBRIN, Stephen J.; NAÏM, Moisés. *The Globalization of Corruption*. p. 10. Available at: <[http://www.iie.com/publications/chapters\\_preview/12/1iie2334.pdf](http://www.iie.com/publications/chapters_preview/12/1iie2334.pdf)> . Accessed Feb.26th, 2012.

13 Ibidem. p. 9.

among other effects, anti-competitive practices<sup>14</sup>.

The interdependence of global economy has broadened in the contemporary world. Therefore, as previously mentioned, the chances of corruption effects impact economies of different countries are higher<sup>15</sup>.

The United Nations definition of corruption is adopted as a paradigm for this article:

*Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.*

*This evil phenomenon is found in all countries (...).*<sup>16</sup>

The non-governmental organization Transparency International<sup>17</sup> gave Brazil the 69th position in the corruption index<sup>18</sup>, with a score of 3.7, where 10 (ten) is the most reliable and 0 (zero) is the most corrupt<sup>19</sup>. Nonetheless, the *World Investment Report* for the year of 2011 indicates Brazil as the fifth in the ranking of countries that received Foreign

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14 FUNDAÇÃO KONRAD-ADENAUER. *Os custos da corrupção*. Cadernos Adenauer. São Paulo, n.10, 2000, p. 7. Apud: CHAIA, Vera. TEIXEIRA, Marco Antonio. Democracia e Escândalos Políticos. *Revista São Paulo em Perspectiva*. vol.15 no.4 São Paulo Oct./Dec. 2001. p. 62

15 GLYNN, Patrick; KOBRIN, Stephen J.; NAÍM, Moisés. *Ibidem*. p. 12.

16 UNITED NATIONS. Available at: <[http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)>. Accessed: Ago. 28th, 11

17 *Transparency International* (TI) is one global movement sharing one vision: a world in which government, business, civil society and the daily lives of people are free of corruption. In 1993, a few individuals decided to take a stance against corruption and created Transparency International. Now present in more than 100 countries, the movement works relentlessly to stir the world's collective conscience and bring about change. Much remains to be done to stop corruption, but much has also been achieved, including: (1) the creation of international anti-corruption conventions; (2) the prosecution of corrupt leaders and seizures of their illicitly gained riches; (3) national elections won and lost on tackling corruption; (4) companies held accountable for their behaviour both at home and abroad. Available at: <<http://www.transparency.org/whoweare/organisation>>. Accessed February 2nd, 2013.

18 According the data of 2010 *Transparency International Report* more than 91,500 people in 86 countrys and territories were consulted. p. 83. Available at: <<http://www.transparency.org/>>. Accessed February 2nd, 2013.

19 According the data of 2010 *Transparency International Report* more than 91,500 people in 86 countrys and territories were consulted. p. 83. Available at: <<http://www.transparency.org/>>. Accessed February 2nd, 2013.

Direct Investment (FDI), only behind the United States, China, Hong Kong and Belgium.

We intend to draw the attention to this contradiction: despite the records of corruption Brazil still receives a great deal of foreign investment. This article addresses the characteristics of a foreign and international investment as related to some aspects of corruption. It also surveys the worldwide responses against corruption and the anti-corruption legislation and regulatory in Brazil. Such efforts aimed, on the one hand, at complying with international treaties, but may also be viewed a drive towards attracting investments.

## 2. INVESTMENTS

The economic notion of investment may be defined as: monetary asset purchased with the idea that the asset will provide income or any gain in the present or in the future<sup>20</sup>; or also as the use of resources through revenue allocation or costs assimilation. It can also be implemented through the rise of productive assets, considering the probability that the proceeds of the investment exceed the costs<sup>21</sup>.

The term “foreign” may allude to the personality of its owner—according to the nationality or domicile—or because of transboundary movement by means of registration of entrance in certain jurisdictions, as it is the case in Brazil<sup>22</sup>.

However, the legal definitions may not be limited to economic ones<sup>23</sup>. The lack of any multilateral agreement on FDI renders it virtually impossible the adoption of an uniform concept<sup>24</sup>. Therefore, we refer to the notion stemming from Brazil’s internal legal sources. The first relevant distinction should be made between direct and portfolio investment. The Federal Revenue of Brazil defines direct investment as the one made when the investor owns 10% or more of the shares or voting rights in a company “and” it results of long-term decisions<sup>25</sup>; on the other hand, when the investor owns a percentage of less than 10% of

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20 DORNBUSCH, Rüdiger; FISCHER, Stanley. *Macroeconomia*. 2. ed. São Paulo: Makon, MacGraw Hill, 1991, p. 349 Apud COSTA, José Augusto Fontoura. *Direito Internacional do Investimento Estrangeiro*. Curitiba: Editora Juruá, 2010. p. 30.

21 SAMUELSON, Paul A.; NORDHAUS, William D. *Economia*. 16 ed. Lisboa: MacGraw-Hill, 1999 Apud COSTA, José Augusto Fontoura. *Direito Internacional do Investimento Estrangeiro*. Curitiba: Editora Juruá, 2010. p. 30.

22 COSTA, José Augusto Fontoura. *Direito Internacional do Investimento Estrangeiro*. Curitiba: Editora Juruá, 2010. p. 32.

23 Ibidem, p.30.

24 Ibidem, p. 29.

25 RECEITA FEDERAL. Consultation on the definition of foreign direct investment. Source: <<http://www.receita.fazenda.gov.br/>>. Accessed August 15th , 2011.



the shares or the voting rights it is considered a portfolio investment<sup>26</sup>.  
Brazil's law establishes a broad concept to foreign capital:

*Law n.º 4131 of 1962*

*Art. 1º Foreign capital is considered, for the purposes of this law, property, machinery, and equipment that enters Brazil's boundary with no initial disbursement of foreign exchange, intended for production of goods or services, as well as the financial resources or money, that comes into the country for application in economic activities since, in both cases, they belong to resident individuals or entities, domiciled or with headquartered abroad.*

*Art. 2º The foreign capital invested in the country will have the same legal treatment given to national capital on equal terms, all discrimination not mentioned under this law is prohibited.*

*(Free Translation)*

As for international sources, we may refer to the definition of foreign investment, according to the Organization for Economic Cooperation and Development (OECD)<sup>27</sup>, and the International Monetary Fund (IMF)<sup>28</sup>. Thereunder for a FDI to exist, strictly speaking, one should consider not only that there is a company's control by a foreigner, but also that it is made on a long-term basis.

Another possible classification is an international investment, which occurs when conducted between States, or through international organizations, such as the World Bank, and the Interamerican Development Bank<sup>29</sup>.

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26 Ibidem.

27 The Organization for Economic Cooperation and Development (OECD) is an intergovernmental international organization that brings together the major industrialized market economy. It is headquartered in Paris, France. In the OECD, representatives of member countries meet to exchange information and set policies in order to maximize economic growth and development of member countries. Source: <<http://www.oecd.org>>. Accessed February 2nd, 2013.

28 The International Monetary Fund (IMF) is an organization of 188 countries, working to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world. Source: <<http://www.imf.org/external/about.htm>>. Accessed February 2nd, 2013.

29 COSTA, José Augusto Fontoura. *Direito Internacional do Investimento Estrangeiro*.

The 2011 *World Investment Report* of UNCTAD pointed Brazil as one of the main destination of FDI, being above the global average.

All the same, due to the fact that Rio de Janeiro has been the most successful city in raising funds from the World Bank system, it also rendered the city a record in prospecting international investments<sup>30</sup>.

Finally, foreign capital is also important for the Brazilian securities market, i.e., the foreign capital represented one-third of the portfolio investment participation in BMF & BOVESPA<sup>31</sup> businesses in August 2011<sup>32</sup>.

It is true these results are closely related to major sporting events to be hosted in Rio de Janeiro and in Brazil: FIFA Confederations Soccer Cup in 2013<sup>33</sup>, World Cup in 2014<sup>34</sup>, Copa America in 2015<sup>35</sup> and, finally, the Olympics in 2016<sup>36</sup>, but it is not only because of these events that FDI is so high. The analysis of its legal framework may provide some clues to understanding why the country holds the above referred position, of one of the major recipients of foreign investments in the world, in spite of its lack of participation in the international regime of foreign investment regulation<sup>37</sup>.

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Curitiba: Editora Juruá, 2010. p. 32

30 Segundo COSTA, José Augusto Fontoura. *Direito Internacional do Investimento Estrangeiro*. Curitiba: Editora Juruá, 2010. p. 32, Investimento internacional é “entendido como feito entre Estados, deve ser utilizado apenas para o caso de ajuda pública oferecida por um ente soberano a outro – diretamente ou por intermédio de agências públicas – ou do investimento de organizações internacionais, como o Banco Mundial e o banco Interamericano de Desenvolvimento, bem como as garantias de Agência Multilateral de Garantia de Investimentos.”

31 BMF&BOVESPA is a Brazilian company, created in 2008, through the integration between the São Paulo Stock Exchange (Bolsa de Valores de São Paulo) and the Brazilian Mercantile & Futures Exchange (Bolsa de Mercadorias e Futuros). It is the most important Brazilian institution to intermediate equity market transactions and the only securities, commodities and futures exchange in Brazil. BM&FBOVESPA further acts as a driver for the Brazilian capital markets. See at: <<http://www.bmfbovespa.com.br/en-us/intros/intro-about-us.aspx?idioma=en-us>>

32 INVESTMAX. Data about business volume in BMF&BOVESPA Available at: <<http://www.investmax.com.br/iM/content.asp?contentid=567>>. Accessed September 5, 2011.

33 PREFEITURA DO RIO DE JANEIRO. SERIO - Secretaria Especial Copa 2014 e Rio 2016. Available at: <<http://www.rio.rj.gov.br/web/serio/exibeconteudo?article-id=106002>>. Accessed August 4, 2011.

34 Ibidem.

35 CONMEBOL. Copa das Confederações no Rio de Janeiro em 2015. Available at: <<http://www.conmebol.com/pages/Calendario.html>>. Accessed August 4, 2011.

36 PREFEITURA DO RIO DE JANEIRO. Prefeito sanciona pacote para copa do mundo e olimpíadas. Available at: <<http://www.rio.rj.gov.br/web/gbp/exibeconteudo?article-id=1335050>>. Accessed August 4, 2011.

37 RIBEIRO, Marilda Rosado de Sá; XAVIER JUNIOR, Ely Caetano. *International Investment Law in Brazil*. In: DAN, Wei (Ed.). *Laws of Large International Contracts in Brazil*. Springer, 2013 (in press).



According to the latest statistics of the United Nations Conference on Trade and Development (UNCTAD), global foreign direct investment reached US\$ 1.5 trillion in 2011, despite the recent crisis in the global economy. UNCTAD statistics also included estimates that world foreign direct investment flows would grow moderately to about US\$ 1.6 trillion in 2012<sup>38</sup>. As stated above, Brazil seems to be among key investment destinations, obtaining a higher than average contribution to their economies per unit of FDI. Moreover, transnational companies selected Brazil as the fifth most likely target for their foreign direct investment in the medium term<sup>39</sup>. According to the Central Bank of Brazil, foreign direct investment stock reached US\$ 650.5 billion in December 2010, corresponding to 30.8% of Brazil's gross domestic product.

Further to the investment records displayed by UNCTAD, indicators such as the FDI Confidence Index (*FDI Confidence Index*), published by A. T. Kearney, kept Brazil among the 10 top destinations for FDI in the last decade and, in 2010, moved the country to fourth place, behind China, the U.S., and India, its best position since 2001<sup>40</sup>. This translates into more than one decade of predisposition for investments in Brazil.

All these data shows that the future is also promising for investments in Brazil. Brazil has entered, at 5th position, in a list of 21 countries ranked by international companies as top prospective investment destinations for 2012 to 2014, according to the 2012 *World*

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38 UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. World Investment Report 2012: towards a new generation of investment policies. New York: UNCTAD, 2012, p. 2.

39 In the top five ranking, Brazil is preceded by China, United States, India and Indonesia. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. World Investment Report 2012: towards a new generation of investment policies. New York: UNCTAD, 2012, p. 22. The 2012 World Investment Report also identified the trend that many transnational companies from developing and transition economies continued to invest in other emerging markets. For example, 65% of foreign direct investment projects by value from BRIC countries were invested in developing and transition economies.

40 The *FDI Confidence Index* (Índice de Confiança dos IED) of A. T. Kearney was made using primary data from a survey of senior executives of the largest corporations. Respondents were selected totaling a global population 1000, in 44 countries. According to the 2011 report of that institution, Brazil's abundant agricultural commodities linked to the energy sector have fueled economic growth in the country during the "commodities super-cycle." As the largest economy in Latin America, Brazil climbed to 4th place in the Index, having taken place in 2007 of 6th and 7th in 2005, and is at its highest ranking since the 3rd place in 2001. Moreover, according to this index, Brazil is the third most popular destination among investors in heavy industry, and the fifth for the light industry. Source: <<http://www.atkearney.com/index.php/Publications/foreign-direct-investment-confidence-index.html>>. Accessed May 05, 2011.

*Investment Report* by the UN Conference on Trade and Development<sup>41</sup>. It should also be mentioned that the 6th Business Survey by PriceWaterhouseCoopers—“*The Power of the State of Rio de Janeiro*”—, conducted in December 2009, found that 83.9% of entrepreneurs interviewed wanted to invest in state of Rio de Janeiro in the year 2010<sup>42</sup>.

If this ranking is to be kept other elements examined hereunder show that further efforts need to be made.

### 3. CORRUPTION

Bribery and corruption are damaging to democratic institutions and corporate governance, substantially impairing the flow of investments. They discourage investment and distort international competitive conditions. According to the World Bank report,

*“[f]ighting corruption has become a policy priority for the development community over the past two decades and extensive reform efforts have been launched. These reforms build on the idea that corruption is a dysfunction of public administration that emerges in the presence of monopoly and discretion, which in turn can be curbed by promoting accountability and transparency. Corruption undermines policies and programs that aim to reduce poverty, so attacking corruption is critical to the achievement of the Bank’s overarching mission of poverty reduction<sup>43</sup>.”*

Corruption can be expressed in different ways: social<sup>44</sup>, political, economic, legal<sup>45</sup>, religious, etc., depending on the institutional

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41 UNCTAD; World Investment Report 2012 - *Towards a New Generation of Investment Policies* - United Nations: July 2012, p.53. Available at <<http://www.unctad-docs.org/UNCTAD-WIR2012-Full-en.pdf>>. Accessed August 19th, 2012.

42 PRICEWATERHOUSECOOPERS. This is a questionnaire answered by approximately 30 companies about investment perspective. Available at: <<http://www.pwc.com/br/pt/estudos-pesquisas/4-sondagem-rj.html>>. Accessed August 10th, 2011.

43 WORLD BANK. Available in: <<http://www.worldbank.org/anticorruption>>. Accessed in January 28th, 2013.

44 In the parish called corruption, kinship and affection ensejaram favoritism by those in power. For more information: BEZERRA, Marcos Otávio, *Corrupção – Um estudo sobre o poder público e relações pessoais no Brasil*. Rio de Janeiro, Relume-Dumará e Anpocs, 1995. p. 34.

45 Work specifically on legal corruption: MAIRAL, Héctor. *A las raíces legales de la corrupción: o de cómo el derecho público fomenta la corrupción em lugar de combatirla*. Buenos Aires: RAP, 2007. Apud: SILVA, Rogério Augusto Reis; MACHADO, Sulamita Crespo Carrilho. Aspectos jurídicos da prevenção e do controle da corrupção. *Revista Eletrônica Newton Paiva*.

environment, the agent, and the content of the action<sup>46</sup>.

One definition of corruption or fraud would be the abuse of control over resources and power of the government, for the purpose of personal gain or for a political party. This profit can be made through power or through an organization within political party, or even through political support from various individuals<sup>47</sup>.

Zaffaroni defines corruption as the relationship between a person with public decision-making power and another that operates outside such power, under which benefits are exchanged for both parties to obtain increase of earnings or illegitimate benefits or advantages of any sort:

*suele entenderse como la relación que se establece entre una persona con poder decisório estatal y otra que opera fuera deste poder; en virtud de lo cual se cambian ventajas, obteniendo ambas un incremento patrimonial, en función de un acto (u omisión) de la esfera de poder de la primera en beneficio de la segunda.*<sup>48</sup>

Corruption may be also defined as something not restricted to the public sector, since it can also take place in the private sector<sup>49</sup>. In this sense, fraud against businesses are torts committed by one or more individuals, whether or not in collusion with third parties, in order to obtain benefits by false representation the reality of economic and financial transactions recorded<sup>50</sup>.

Consequently, the definition of corruption may be stretched beyond the use of public property for private purposes, to include the fraud carried out by individuals or private firms within the realm of private business.

Hence, corruption is a phenomenon difficult to define—whatever

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p 1.

46 Ibidem.

47 GEDDES, Barbara; RIBEIRO NETO, Artur. Institutional Source of Corruption in Brazil. IN: *Corruption and Political Reform in Brazil: The impact of Collor Impeachment*. Edited by Keith S. Rosenn and Richard Downes. North-south center press at the University of Miami, 1999. p.23

48 ZAFFARONI, E.R. *La corrupción*; su perspectiva latinoamericana. In: OLIVEIRA, E. (org.). *Criminologia crítica*. Belém, Edições Cejup, 1990, p.371.

49 BARDHAN, Pranab. *Corruption and development*: a review of issues. *Journal of economic literature*, v. 35, n. 3, 1997, p. 1320-1346.

50 GOMES, Marcelo A. C. Uma contribuição à prevenção de fraudes contra as empresas. Tese (Doutorado em Contabilidade) – Faculdade de Economia, Administração e Contabilidade, Universidade de São Paulo, São Paulo, 2000. p. 25

the definition one chooses for corruption, it can be questioned.

The following list of crimes is usually established as corruption by different countries: trafficking of influence; payment of bribes within the country or in international business transactions; embezzlement; abuse of power; bribery in the private sector; money laundering; and obstruction of justice.

Corruption, in any of its manifestations, represents an unsustainable burden for any society, especially for those that have large social inequalities, as it happens in Brazil.

#### **4. EFFECTS OF CORRUPTION IN INVESTMENTS**

The effects of corruption are taken into account by several studies related to investments. According to the Konrad-Adenauer Foundation corruption is the largest obstacle to the development of a society, since it deepens the gap between rich and poor, while rapacious elites devastate the public budget. Corruption causes distortions in competition because it forces companies to divert increasing amounts of money in order to obtain new contracts. Corruption also undermines democracy, the trust in the state, the legitimacy of governments, and public morality. Experience shows that corruption can undermine an entire society<sup>51</sup>.

Consequently, the fact that the global economy has dynamic and almost sequential effects increases the negative impacts of corruption, which echo throughout the world economy<sup>52 53</sup>. One recent and good example of that is the Eurozone financial crisis, which may yet drag most of countries in the world into an unprecedented recession. This is the already quoted example, collected by the non-governmental organization Transparency International (TI) (which also considers and measures public opinion about global corruption level of perception of corruption) concerning ranking of Portugal and Greece as two of the

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51 FUNDAÇÃO KONRAD-ADENAUER. Os custos da corrupção. *Cadernos Adenauer*. São Paulo, n.10, 2000, p. 7. Apud: CHAIA, Vera. TEIXEIRA, Marco Antonio. Democracia e Escândalos Políticos. *Revista São Paulo em Perspectiva*. vol.15 no.4 São Paulo Oct./Dec. 2001. p. 62

52 GLYNN, Patrick; KOBRIN, Stephen J.; NAÍM, Moisés. *The Globalization of Corruption*. p. 12. Available at: <[http://www.iie.com/publications/chapters\\_preview/12/1iie2334.pdf](http://www.iie.com/publications/chapters_preview/12/1iie2334.pdf)> . Accessed Feb. 26th , 12.

53 The authors points that when the corrupt Bank of Credit Commerce International went belly-up in 1991 the entire social security fund of Gabon was wiped out. IN: GLYNN, Patrick; KOBRIN, Stephen J.; NAÍM, Moisés. *The Globalization of Corruption*. P. 12. Available at: <[http://www.iie.com/publications/chapters\\_preview/12/1iie2334.pdf](http://www.iie.com/publications/chapters_preview/12/1iie2334.pdf)> . Accessed Feb. 26th , 12.

four most corrupt countries in the Eurozone<sup>54</sup>.

The European Commission points out that corruption costs the EU economy EUR 120 billion each year, which is comparable to the entire annual EU budget<sup>55</sup>.

Brazil holds the 69th position in the TI corruption index<sup>56</sup>. Data collected by FIESP<sup>57</sup> show that Brazil's output per capita would increase from US\$ 7,954 to US\$ 9,184 if the country had a level of perception of corruption equal to the average of countries selected by them. In other words, if Brazil had the score of 7.45 rather than 3.7 it would increase more than 10% in its output per capita.

The Global Agenda Council on Anti-Corruption of the World Economic Forum shows that the cost of corruption equals more than 5% of global Gross domestic product (GDP), which represents the amount of US\$ 2.6 trillion, over which US\$ 1 trillion is paid in bribes each year<sup>58</sup>.

This discussion is called the “*cost of corruption*” and it is defined by the “amount of resources that are diverted from productive activities to corrupt practices. It is a cost because it reduces the efficiency of investment”. That is, money that could be used to buy goods and equipment useful for the country or invest in innovation is spent on bribes, kickbacks and other illegal corrupt activities<sup>59</sup>.

The recently released *World Competitiveness Yearbook* for 2011-2012 pointed out that Brazil has advanced to 52nd among 142 countries, with a score of 4.3. This report defines competitiveness as the set of institutions, policies, and factors that determine the level of productivity of a country, and in an unprecedented way, Brazil came out of stage 2, which is a transition position, to the best stage of the

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54 BILLITER Insight and Intelligence. *EU Anti-Corruption Report: A Next Step in Europe's Fight Against Corruption*. Available at: <<http://www.billiterpartners.com/wp-content/uploads/2011/06/Billiter-Anti-Corruption-Report-A-Next-Step-in-the-EUs-Fight-Against-Corruption.pdf>>. > . Accessed Feb. 26th , 12.

55 European Commission. Available at: <[http://ec.europa.eu/commission\\_2010-2014/malmstrom/news/default\\_en.htm#20110606](http://ec.europa.eu/commission_2010-2014/malmstrom/news/default_en.htm#20110606)>. > . Accessed Feb. 26th , 12.

56 According the data of 2010 *Transparency International Report* more than 91,500 people in 86 countrys and territories were consulted. p. 83. Available at: <<http://www.transparency.org/>>. Accessed February 2nd , 2013.

57 FIESP is the Federação das Indústrias do Estado de São Paulo (São Paulo Industry Federation).

58 WORLD ECONOMIC FORUM. p. 7. Available at: <[https://members.weforum.org/pdf/gac/next\\_steps.pdf](https://members.weforum.org/pdf/gac/next_steps.pdf)>. Accessed Feb. 26th , 12.

59 FIESP, Federação das Indústrias do Estado de São Paulo. DECOMTEC: Área de Competitividade. Relatório Corrupção: custos econômicos e propostas de combate. Março de 2010. p. 22. Available at: <<http://www.fiesp.com.br/competitividade/downloads/custo-economico-da-corrupcao-final.pdf>>. Accessed: Ago. 28th , 11

report, which is the stage 3, surpassing all the BRICS<sup>60</sup> countries<sup>61</sup>. Despite the improvement, an important topic raised by the Annual World Competitiveness Report for 2012 shows that Brazil is in a very low ranking in the category “*Burden of government regulation*”. This category care about how burdensome is it for businesses in the country to comply with: (i) governmental administrative requirements (e.g., permits, regulations, reporting); (ii) the time for government’s response on information; (iii) administrative barriers; (iv) lack of customer service; (v) delays, uncertainties, and frustrations involving public bureaucracy<sup>62</sup>.

Similarly, 6th Business Survey by PriceWaterhouseCoopers–“*The Power of the State of Rio de Janeiro*”–, conducted in December 2009, noted that, for 16.1% of the investors interviewed, corruption is the main problem in economic terms in the state of Rio de Janeiro, and it should had been one of the main concerns of the government for the year of 2010. This number is 60% higher than the PriceWaterhouseCoopers 5th Business Survey<sup>63</sup> conducted one year before.

Moreover, the existing dynamic for internationalization of Brazilian companies increases the need for fighting corruption. When the company targets the foreign market, the assertion: “everyone is in the same boat” no longer applies. Competitors of Brazil’s exporters are located in countries that are not always subject to the same bureaucratic system, and may have different levels of corruption. Excessive bureaucracy and other administrative barriers are very negative also for Brazilian companies moving abroad, not only to potential investors analyzing potential investments in Brazil<sup>64</sup>.

## **5. CORRUPTION RESPONSES WORLDWIDE**

In the view of all the data collected about the evil effects of corruption the United Nations pronounces:

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60 BRICS: Brasil, Russia, India, China e Africa do Sul. Available at: ITAMARATY <<http://www.itamaraty.gov.br/temas/mecanismos-inter-regionais/agrupamento-bric>>. Accessed: Sep. 4th, 2011.

61 WORLD ECONOMIC FORUM. *World Competitiveness Yearbook* 2011-2012. Available at: <<http://reports.weforum.org/global-competitiveness-2011-2012/>>. Accessed: Sep. 7 th, 2011.

62 Loc. Cit.

63 PRICEWATERHOUSECOOPERS. This is a questionnaire answered by approximately 30 companies about investment perspective. Available at: <<http://www.pwc.com/br/pt/estudos-pesquisas/4-sondagem-rj.jhtml>>. Accessed August 10th, 2011.

64 FIAS, Corporação Financeira Internacional; BANCO MUNDIAL. *Barreiras Jurídicas, Administrativas e Políticas aos Investimentos no Brasil. Volume II Barreiras Administrativas aos Investimentos no Brasil: O caso de São Paulo e Rio de Janeiro*. May 2001. p. ix



*Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.*

*This evil phenomenon is found in all countries (...).*<sup>65</sup>

The international effort against corruption can be exemplified by the Inter-American Convention against Corruption (1996)<sup>66</sup>; the UN Convention against Corruption (2003); The Council of Europe Criminal Law Convention (1998)<sup>67</sup> and the Council of Europe Civil Law Convention (2003)<sup>68</sup>; The African Union Convention on Preventing and Combating Corruption (2003)<sup>69</sup>; the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and its Recommendations (1997)<sup>70</sup>; the OECD Guidelines for Multinational Enterprises<sup>71</sup>; World Bank Procurement & Consultant Guidelines<sup>72</sup>; ICC Rules of Conduct and Recommendations for Combating Extortion and Bribery (1977, followed by revisions)<sup>73</sup>; United Nations Global Compact (UNGC), Principle 10 (2004)<sup>74</sup>;

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65 UNITED NATIONS. Available at: <[http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)>. Accessed: Ago. 28th , 11

66 OAS. Organization of Americans States. Available at: <<http://www.oas.org/juridico/english/fightcur.html>> Accessed: Ago. 28th , 11

67 Council of Europe Criminal Law Convention on Corruption: Available at: <<http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm>>. Accessed: Ago. 28th , 11

68 Council of Europe Civil Law Convention on Corruption . Available at: <<http://conventions.coe.int/Treaty/EN/treaties/html/174.htm>>

69 The African Union Convention on Preventing and Combating Corruption: Available at: <[http://www.africaunion.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Convention%20on%20Combating%20Corruption.pdf](http://www.africaunion.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf)> . Accessed: Ago. 28th , 11

70 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Available at: <[http://www.oecd.org/document/21/0,3343,en\\_2649\\_34859\\_2017813\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html)>. Accessed: Ago. 28th , 11.

71 OECD. Available at : <<http://www.oecd.org/dataoecd/4/18/38028044.pdf>>. Accessed: Ago. 28th , 11

72 WORLD BANK. Available at: <[http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:22526443~pagePK:84271~piPK:84287~resourceurlname:SiemensFactSheetNov11%5E\\$%5Epdf~theSitePK:84266,00.html](http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:22526443~pagePK:84271~piPK:84287~resourceurlname:SiemensFactSheetNov11%5E$%5Epdf~theSitePK:84266,00.html)>. Accessed: Feb. 16th, 13.

73 Combating Extortion and Bribery: ICC Rules of Conduct and Recommendations: Available at <[http://www.iccwbo.org/uploadedFiles/ICC/policy/anticorruption/Statements/ICC\\_Rules\\_of\\_Conduct\\_and\\_Recommendations%20\\_2005%20Revision.pdf](http://www.iccwbo.org/uploadedFiles/ICC/policy/anticorruption/Statements/ICC_Rules_of_Conduct_and_Recommendations%20_2005%20Revision.pdf)>. Accessed: Sep. 28th , 11

74 UN. United Nations Global Compact; Principle 10: “Businesses should work against

World Economic Forum Partnering Against Corruption Initiatives (PACI) Principles for Countering Bribery (2004)<sup>75</sup>; the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003)<sup>76</sup>; Global Reporting Initiative (GRI) (1997)<sup>77</sup>; and NGO Transparency International (TI): Business Principles for Countering Bribery (2003 followed by revisions)<sup>78</sup>;

In its preamble the UN Convention Against Corruption reinforces the fact that corruption is no longer a local problem, it has become a transnational phenomenon that affects all societies and economies, necessitating international cooperation in order to prevent and combat it. It is an interdependent society.

Indeed, once a government ratifies any one of these treaties, both the government and the private actors faces greater pressure to comply with the treaty provisions<sup>79</sup>.

Enforcements of extraterritorial legislation such as the “Foreign Corrupt Practices Act of 1977” (FCPA) in the United States, and the newly approved “Bribery Act 2010” in England, which came into force on July 1st 2011, are effecting also important ways of struggling against corruption.

So-called corporate governance, which consists of a series of principles and rules used in the management of the company<sup>80</sup>, is also an important tool to fight corruption. Through this new way of managing business it is possible to increase the value of the company,

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corruption in all its forms, including extortion and bribery.” Available at: <<http://www.unglobalcompact.org/AbouttheGC/TheTENPrinciples/principle10.html>>. Accessed: Feb. 25th , 12.

75 World Economic Forum Partnering Against Corruption Initiative. Available at: <<http://www.weforum.org/en/initiatives/paci/index.htm>>. Accessed: Feb. 25th , 12.

76 UNITED NATION. Available at: <<http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.Sub.2.2003.12.Rev.2.En>>. Accessed: Feb. 25th , 12.

77 GLOBAL REPORTING. Available at : <<https://www.globalreporting.org/Pages/default.aspx>>. Accessed: Feb. 24th , 12.

78 TI. Transparency International: Business Principles for Countering Bribery. Available at <[http://www.transparency.org/global\\_priorities/private\\_sector/business\\_principles](http://www.transparency.org/global_priorities/private_sector/business_principles)>. Accessed: Feb. 25th, 12.

79 This does not necessarily mean, however, that compliance will result (Hafner-Burton and Tsutsui 2005) Apud LIM, Alwyn; TSUTSUI, Kiyoteru. *The Globalization of Corporate Social Responsibility: Cross-National Analyses on Global CSR Framework Commitment The Globalization of Corporate Social Responsibility: Cross-National Analyses on Global CSR Framework Commitment. Department of Sociology University of Michigan* p. 14

80 Luiz Alberto Colonna Rosman indicates that the corporate governance movement began in the U.S. as a means of separating preponderant interests of executives and owners and shareholders of the company. IN ROSMAN, Luiz Alberto Colonna. *Governança Corporativa*. In: *Revista de Direito Renovar*, nº 31/2005. Rio de Janeiro: Renovar, p. 131/132.

its reliability and amplify the investments, based on transparency (disclosure), accountability, sense of justice and equity (fairness) and obedience to the laws (compliance)<sup>81</sup>.

## **6. CORRUPTION RESPONSES IN BRAZIL**

Given all the data that has been presented concerning the harm caused by corruption, as well as the current need of Brazil and the state of Rio de Janeiro to attract foreign and international investments, it becomes clearer the urge to accomplish more, as an overall reaction from Brazilian institutions and society.

In order to maximize the actions to prevent corruption, Brazilian government is broadening and strengthening its relationship with other countries through international cooperation<sup>82</sup>.

In the last decade, Brazil ratified and adopted the main anti-corruption treaties, the OECD<sup>83</sup>, OAS<sup>84 85</sup> and the UN<sup>86</sup> Conventions

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81 LAMAS, Natália Mizrahi. *A Cláusula Compromissória Estatutária como Regra de Governança Corporativa: Uma Análise de seu Alcance Subjetivo*. Rio de Janeiro: Universidade do Estado do Rio de Janeiro, Faculdade de Direito; Agência Nacional do Petróleo, 2004. 94f. Monografia (Bacharel em Direito). Professor advisor Carmem Tiburcio, p. 24, Apud: RIBEIRO, Marilda Rosado de Sá. As empresas transnacionais e os novos paradigmas do comércio internacional. p. 455-492. IN: Novas perspectivas do direito internacional contemporâneo – Estudos em homenagem ao Professor Celso D. de Albuquerque Mello / Carlos Alberto Menezes Direito, Antônio Augusto Cançado Trindade, Antônio Celson Alves Pereira (orgs.) – Rio de Janeiro: Renovar, 2008. p. 484

82 CGU. Available at: < <http://www.cgu.gov.br/onu/convencao/info/index.asp>>. Accessed in February 3rd, 2013.

83 The mission of the Organisation for Economic Co-operation and Development (OECD) is to promote policies that will improve the economic and social well-being of people around the world. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was ratified on June 15, 2000 and promulgated by Decree No. 3678 of November 30, 2000.

84 The Organization of American States (OAS) is the world's oldest regional organization, dating back to the First International Conference of American States, held in Washington, DC, from October 1889 to April 1890. The Inter-American Convention against Corruption entered into force in Brazil on August 24th, 2002. Source: <[www.oas.org](http://www.oas.org)>. Accessed February 2, 2013.

85 OAS. Federative Republic of Brazil signed the Declaration on the Mechanism for FollowUp on the Implementation of the Inter-American Convention against Corruption on August 9, 2002. Source: <[www.oas.org](http://www.oas.org)>. Accessed February 11, 2013.

86 Two years after it was signed by over 120 countries in the Mexican city of Mérida, became effective as of December 14th, 2005, in all countries signatory to the UN Convention against Corruption. Brazil was the twentieth country to ratify the document. Important legal instrument for the effective combating of corruption worldwide, the Convention has an integrated approach between prevention, criminalization, international cooperation, and asset recovery. Source: <<http://www.cgu.gov.br/imprensa/Noticias/2005/noticia016205.asp>> e <<http://www.unodc.org>>

against Corruption.

Brazil also applies good governance practices<sup>87</sup>, for both private and public sector, which is seen as a good sign by investors, according to FIESP's report about the costs of corruption in Brazil. FIESP's report stated that the establishment of good governance strengthens the scrutiny of existing rules, which increases the moral costs of corrupt acts<sup>88</sup>.

Another way to fight corruption is to decrease information asymmetries in order to simplify administrative procedures, law, and taxes issues, i.e. having less bureaucracy<sup>89</sup>.

The Bovespa Corporate Sustainability Index can be quoted as a pioneering initiative in Latin America: it surveys the economic, environmental, social, as well as financial and corporate governance status, of major companies listed on the Stock Exchange São Paulo (BM & FBOVESPA). The index aims to acknowledge companies actively involved in social responsibility and encourage ethical corporate responsibility in all businesses<sup>90</sup>.

## **6.1 Brazil's Legislative Responses**

With respect to bribery of domestic public officials, Brazil is already in compliance with the UN Convention. Section I of Article 9 of Law No. 8.429/92, in addition to articles 316, 317 and 333 of the Penal Code, deal with crimes of graft<sup>91</sup>, passive bribery, and active bribery, respectively. The Criminal Code also mentioned in its articles 337-B the active corruption in international business transactions; 337-C the influence peddling in international business transactions; and 337-D carries the definition of what is considered a Foreign Public Official. However, Brazil has not criminalized the act of bribery committed by

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[org/brazil/pt/press\\_release\\_2005-12-14.html](http://brazil/pt/press_release_2005-12-14.html) >. Accessed in: August 20th, 2011.

87 IBGC. Available at: <<http://www.ibgc.org.br/Secao.aspx?CodSecao=17>>. Accessed in September 7th, 2011.

88 FIESP, Federação das Indústrias do Estado de São Paulo. DECOMTEC: Área de Competitividade. Relatório Corrupção: custos econômicos e propostas de combate. Março de 2010. p. 30-31. Available at: <[http://www.fiesp.com.br/competitividade/downloads/custo\\_economico\\_da\\_corrupcao\\_-\\_final.pdf](http://www.fiesp.com.br/competitividade/downloads/custo_economico_da_corrupcao_-_final.pdf)>. Accessed: Ago. 28th, 11.

89 FIESP, Federação das Indústrias do Estado de São Paulo. DECOMTEC: Área de Competitividade. Relatório Corrupção: custos econômicos e propostas de combate. Março de 2010. p. 30-31. Available at: <[http://www.fiesp.com.br/competitividade/downloads/custo\\_economico\\_da\\_corrupcao\\_-\\_final.pdf](http://www.fiesp.com.br/competitividade/downloads/custo_economico_da_corrupcao_-_final.pdf)>. Accessed: Ago. 28th, 11.

90 BM&FBOVESPA. Available at: < <http://www.bmfbovespa.com.br/indices/ResumoIndice.aspx?Indice=ISE&idioma=pt-br>>. Accessed in December 15th, 2012.

91 GRAFT is the act of using a position of trust to gain money or property dishonestly; esp., a public official's fraudulent acquisition of public funds. BLACK'S Law Dictionary. Ninth Edition. Bryan A. Garner, editor in Chief.

foreign public officials or officials of public international organization, the Brazilian law criminalized only the act of bribery to foreign public officials or officials of public organization committed by private individuals<sup>92</sup>.

Moreover, Brazil has not criminalized the crime of corruption in the private sector<sup>93</sup>, bribery in the private sector, and embezzlement of property in the private sector, respectively Article 21 and 22 of the UN Convention, but both are non-mandatory provisions of the convention<sup>94</sup>.

The crime of Laundering of the Proceeds of Corruption is a mandatory provision that focuses on criminalization of actions involving the proceeds of corruption. The actions include conversion or transfer of property, concealment or disguise of the nature and source of property, and the acquisition, possession, and use of property, as well as the participation in money laundering conspiracies. Provided that it is in accordance with fundamental principles of domestic law, all offenses dealt with in Chapter III of the UN Convention shall be considered as predicate offenses, in order to punish in the case of crimes of money laundering, the individual whose property, rights, and values have its origin in corrupt acts<sup>95</sup>.

The Law N°9613 of 3 March 1998 addresses the problem of money laundering in Brazil. It establishes the necessary legal measures, such as the definition of the money laundering offence, the preventive measures, a suspicious reporting system, and various procedures for international cooperation<sup>96</sup>. The list of predicate offences, which is not exhaustive, is also mentioned in such Law, and includes the major criminal activities according to the Brazilian Penal Code, such as terrorism and its financing.

Law N°9613 brought into Brazil's legislation a number of international initiatives such as Vienna Convention, Palermo Convention, UN Convention against the Financing of Terrorism, the FATF 40+9 Recommendations, etc.

Additionally, Brazil has a bill in progress in Congress that seeks to give effect to the UN Convention against Corruption on matters of

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92 CGU. Available at: <<http://www.cgu.gov.br/onu/convencao/info/index.asp>>. Accessed in February 3rd, 2013.

93 To see more about the problematic of corruption in the public sector read Azevedo, Carolina Araújo de. *As transnacionais como veículo de investimento e o problema da corrupção*. Rio de Janeiro: Universidade do Estado do Rio de Janeiro, Faculdade de Direito, 2012. 172f. Dissertação de Mestrado

94 CGU. Available at: <<http://www.cgu.gov.br/onu/convencao/info/index.asp>>. Accessed in February 3rd, 2013.

95 Ibidem.

96 CGU. Available at: <<http://www.cgu.gov.br/onu/convencao/info/index.asp>>. Accessed in February 3rd, 2013.

company's liability due to corrupt acts. The bill in progress nº 6.826/2010 is an Executive Power initiative sent to Congress on February 8, 2010. At the moment, it awaits the opinion from a Special Commission within the House of representatives. (Câmara Dos Deputados)<sup>97</sup>.

According to an official letter dated October 23, 2009, from the Comptroller General's Office, together with the Ministry of Justice, and Attorney General of the Union, the bill aims to fill a gap in the Brazilian legal system with regard to liability of legal entities due to illicit behavior in face of public national or foreign administration, mainly with regard to acts of corruption and fraud in procurement contracts. That is, in order to meet Brazil's international obligations as regards to the fight against corruption, as well as for loans received through the World Bank system, it was necessary to create an effective and specific mechanism to punish corporations guilty of corruption<sup>98</sup>.

Brazil's bill, abandoning the position of the current law, will hold companies strictly liable for a corruption crime. This might avoid existing discussions about the need to verify the offender's culpability for the offense, in other words, once the facts, result, and causality, are proven, the legal entity may be held liable.

Furthermore, for purposes of compliance with the OECD Convention to fight corruption of foreign public officials in international business transactions, Brazil adopted the following measures<sup>99</sup>:

- (i) Criminalized the act of offer, promise, or give any undue advantage, whether directly or through intermediaries, to foreign officials, to facilitate the execution of transactions for commercial, or other advantage in the conduct of international business;
- (ii) Forbade accounting and audits practices that can be used to cover up corruption;
- (iii) Established agreements for legal assistance with its key trading partners, allowing extradition due to corruption;

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97 CAMARA DOS DEPUTADOS. Projeto de Lei nº 6.826/2010. Available at: <<http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=466400>>. Acesso em: 07 set. 11.

98 CAMARA DOS DEPUTADOS. Ofício CGU/MJ/AGU – EMI n 00011/2009 – datado de 23 de outubro de 2009. Projeto de Lei nº 6.826/2010. Available at: <<http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=466400>>. Accessed January 12nd, 2013.

99 CGU. Available at: <<http://www.cgu.gov.br/ocde/perguntasFrequentes.asp>>. Accessed in February 3rd, 2013



(iv) Presented a bill that increases the penalty for the offense of bribery of foreign public officials in international business.

Other Brazil's legislative responses may be exemplified with: the Principle of Morality (art. 37, §4 of the Federal Constitution); Law n. 8.429/1992, against administrative misconduct (*improbidade administrativa*)<sup>100</sup>; and Complementary Law. 101/2001, which deals with liability in fiscal management (*lei de responsabilidade fiscal*)<sup>101</sup>.

## **6.2. Brazil's Oversight Bodies with a View to Implementing Anticorruption Mechanisms**

In order to fulfill the obligations set forth in the ratified international treaties against corruption, Brazil has various oversight bodies with a view to implementing modern mechanisms for preventing, detecting, punishing, and eradicating corrupt acts<sup>102</sup>. The following administrative bodies are highlighted as examples of some of Brazilian responses regarding opposing corruption and money-laundering within the country.

The Office of the Comptroller General (*Controladoria-Geral da União—CGU*) is the agency of the Federal Government in charge of assisting the President of the Republic in a range of matters, including corruption. It acts as a central authority, with focus on prevention, auditing, investigation, sanctioning, and ombudsman. It is also responsible for pursuing actions to promote transparency, and to perform all anti-corruption functions at the federal level, except asset recovery and mutual legal assistance<sup>103</sup>.

On January 24, 2006, through Decree n. 5,683, CGU created a special unit named Corruption Prevention and Strategic Information Secretariat (*Secretaria de Prevenção da Corrupção e Informações Estratégicas—SPCI*) to centralize corruption intelligence and prevention actions, which before were carried out by different CGU units in a

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100 That law sparked controversy as to its applicability in relation to politicians, who are, above all, public officials, but cannot be classified as such, not to be punished by the law of Impropriety. The controversy became even greater with mitigation given by the Supreme Court of Brazil, that through trial Complaint n. 2138 decided that the administrative Improbability Act inapplicable to political agents, they are subjected to the application of Law n. 1.079/1950.

101 This law brought the concern to the setting of the budget and the limitation commitments, and the redefinition of forecasts and priorities became essential requirement to balance public accounts.

102 OAS. Available at: <[http://www.oas.org/juridico/PDFs/mesicic4\\_bra\\_en.pdf](http://www.oas.org/juridico/PDFs/mesicic4_bra_en.pdf)>. Accessed in February 11, 2013.

103 CGU. Available at: <<http://www.cgu.gov.br/>>. Accessed in February 11, 2013.

disperse manner<sup>104</sup>.

Linked to CGU, another administrative body that deals with corruption is the Council on Public Transparency and Fighting Corruption (Conselho de Transparência Pública e Combate à Corrupção)

<sup>105</sup> The main functions of this collegiate body<sup>106</sup> are: (i) suggest and discuss actions to improvement and develop control methods; (ii) increase transparency in public management in general; as well as (iii) come up with strategies to fight corruption and impunity<sup>107</sup>.

The Federal Police Department (Departamento de Polícia Federal – DPF) is Brazil's crime squad for investigating crimes against political and social order, or against property, services, and interests of the federation or of its independent agencies and public companies, as well as other offenses that have an impact across state lines or international borders and demand uniform punishment, as established by law<sup>108</sup>. DPF is an agency of the Ministry of Justice, but it has autonomy to investigate crimes over which it has jurisdiction. DPF has also created a special division for investigating crimes of corruption, which is named Federal Police Division for Combating Financial Crimes.

Also subject to the Ministry of Justice under the scope of the National Secretariat of Justice (SNJ), the Department of Asset Recovery and International Cooperation (Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional – DRCI) was created through Decree No. 4991 of February 18, 2004. Its role is asset recovery and mutual legal assistance<sup>109</sup>.

The Federal Public Prosecutor Office (Ministério Público Federal–MPF) is part of the prosecution of the Union Prosecutor Office (Ministério Público da União–MPU), which also includes the Labor Public Prosecutor Office (Ministério Público do Trabalho–MPT), and the Military Public Prosecutor Office of the Federal District and Territories (MPDFT). The MPU and state prosecutors form the Brazilian Public Prosecutor Office (MP). Its main role is prosecution

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<sup>104</sup> CGU. Available at <<http://www.cgu.gov.br/english/AreaPrevencaoCorrupcao/OQueE/>>. Accessed in February 2, 2013.

<sup>105</sup> Created through the Brazilian Decree No.4,923 of December 18, 2003.

<sup>106</sup> The collegiate body is chaired by the Minister of State of the CGU and has 20 members, who include representatives of the federal public administration and civil society. (Law 10.683/03, Art. 17, § 2). The specific composition of the Council is defined in Article 3 of Decree 4.923/03. For the current composition, see: <<http://www.cgu.gov.br/ConsejoTransparencia/Composicao.asp>>

<sup>107</sup> CGU. Decree 4.923/03. Available at <<http://www.cgu.gov.br/english/ConselhoTransparencia/>>. Accessed in February 2, 2013.

<sup>108</sup> OAS. [http://www.oas.org/juridico/PDFs/mesicic4\\_bra\\_en.pdf](http://www.oas.org/juridico/PDFs/mesicic4_bra_en.pdf)

<sup>109</sup> ASSET RECOVERY. Available at <<http://www.assetrecovery.org/kc/>>. Accessed in February 2, 2013.

and international cooperation for matters of corruption. It is for the Public Prosecutor Office to defend the inalienable social and individual rights, the legal system, and the democratic regime.

The Ministry of Foreign Affairs (Ministério das Relações Exteriores–MRE–Itamaraty) is responsible for advising the President of the Republic of Brazil on the formulation and execution of Brazilian foreign policy. In this sense, its focus for fighting corruption is international cooperation<sup>110</sup>.

Ruling the capital markets and their participants, such as public companies, financial intermediaries, investors, and others<sup>111</sup>, the Securities and Exchange Commission of Brazil (Comissão de Valores Mobiliários–CVM) is empowered to discipline, rule, and supervise the activities of all market participants. Its regulatory activities encompass all matters related to the Brazilian securities market, prevention, and investigation for corruption matters<sup>112</sup>. This federal agency is linked to the Ministry of Finance, and was established by the Law No. 6.385 of December 7, 1976.

The Central Bank of Brazil (Banco Central do Brasil–BACEN), created by Law no. 4,595, of December 31, 1964, is an autonomous federal institution, part of the National Financial System (Sistema Financeiro Nacional–SFN). Its mission is to ensure the stability of the currency's purchasing power and a solid and efficient financial system. And as part of the effort against corruption its leading challenge is prevention<sup>113</sup>.

Regarding auditing powers, the Brazilian Court of Audit (Tribunal de Contas da União–TCU) is the agency responsible for auditing the accounts of administrators and other persons responsible for federal public funds, assets, and other valuables; as well as the accounts of any person who may cause loss, misapplication, or other irregularities to the public treasury.

TCU has also power to impose penalties, including fines and disqualifications from holding public office or public positions for a specified period of time. Likewise, it can declare the unfitness of contractors who commit wrongdoings in public bidding processes<sup>114</sup>. Such administrative and judicative authority is established, among others articles, in art. 71 of the Brazilian Constitution.

Brazil's financial intelligence unit against corruption is called

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110 MRE. Available at < <http://www.mre.gov.br>>. Accessed in February 2, 2013.

111 CVM's duties and powers were established by both the law that created it (6385/76) and the Corporation Law (6404/76)

112 CVM. Available at < <http://www.cvm.gov.br>>. Accessed in February 2, 2013.

113 BACEN. Available at < <http://www.bacen.gov.br>>. Accessed in February 2, 2013.

114 OAS. Available at < [http://www.oas.org/juridico/PDFs/mesicic4\\_bra\\_en.pdf](http://www.oas.org/juridico/PDFs/mesicic4_bra_en.pdf)> February 3, 2013.

Council for Financial Activities Control (Conselho de Controle de Atividades Financeiras–COAF). COAF is a result of a significant reform in the anti-money laundering law, through the enactment of Complementary Law 105 of 20 January 2001, which extended COAF’s access to information subject to banking secrecy, and the Law 10701/03 adding the financing of terrorism as a predicate offence for money laundering, provided additional authority for the COAF to obtain information from reporting parties, and creates a national registry of bank accounts<sup>115</sup>.

The administrative authorities in charge of regulating the obligations of Law N. 9.163 of 1998, are, in addition to COAF, the Central Bank of Brazil – BACEN, the Securities and Exchange Commission – CVM, the Superintendency of Private Insurance – SUSEP, and the Secretariat for Complementary Social Security–SPC, designated as the respective supervisory authorities for the following:

<b>Financial Institutions</b>	<b>BACEN</b>
<b>Buying and selling of foreign exchange or gold</b>	<b>BACEN</b>
<b>Administrators of Consortiums</b>	<b>BACEN</b>
<b>Leasing Companies</b>	<b>BACEN</b>
<b>The Mercantile Exchange</b>	<b>COAF</b>
<b>Credit Cards</b>	<b>COAF</b>
<b>Electronic or magnetic transference of funds</b>	<b>COAF</b>
<b>Factoring Companies</b>	<b>COAF</b>
<b>Lotteries</b>	<b>COAF</b>
<b>Real Estate</b>	<b>COAF</b>
<b>Bingos</b>	<b>COAF</b>

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115 COAF. Available at <<http://www.coaf.gov.br>>. Accessed in February 2, 2013.

<b>Dealers of jewels, precious stones and metals</b>	<b>COAF</b>
<b>The Stock Exchange</b>	<b>CVM</b>
<b>The Mercantile and Futures Exchange</b>	<b>CVM</b>
<b>Insurance, Capitalization and Private pension funds</b>	<b>SUSEP</b>
<b>Closed Pension Funds</b>	<b>SPC</b>

Regarding circumstances where administrative misconduct is found, or the freezing of assets is recommended, the CGU shall refer them to the Office of the Attorney General of the Union (Advogado-Geral da União-AGU) to take the required steps for the purposes of refunding the state treasury, or even take further mandatory measures according with the law<sup>116</sup>. AGU is the agency responsible for the supervision, and advisory of legal services. Pursuant article 131 of Brazil's Constitution<sup>117</sup>, "the Office of the Attorney General of the Union is the institution which, either directly or through a connected body, represents the Union, and out of court, it shall, under the supplemental law, which provides for its organization and operation activities, consult and provide legal advice to the Executive Branch."

Finally, created in 2003, the Expanded scope of action for the National Strategy against Corruption and Money Laundering (Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro-ENCCLA) is a national strategy with exclusively focus on fighting money laundering. Currently, ENCCLA is made up of over 50 agencies or bodies of the Executive, Legislative and Judiciary branches plus the

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116 OAS. Available at: <[http://www.oas.org/juridico/PDFs/mesicic4\\_bra\\_en.pdf](http://www.oas.org/juridico/PDFs/mesicic4_bra_en.pdf)> February 3, 2013.

117 Art. 131 of the Brazil Federal Constitution: "The Office of the Attorney General of the Union is the institution that, either directly or through a subordinated agency, represents the Union judicially and extrajudicially, and it is responsible, under the terms of the supplemental law that contains the provisions on its organization and operation, for legal consultation and advisory services to the executive branch. § 1 - The Office of the Attorney General of the Union is headed by the Attorney General of the Union, who is freely appointed by the President of the Republic chosen from citizens over 35 years of age of notable juridical learning and high standing. § 2 - Admission to the initial levels of the career systems of the institution covered by this article is by public competitive examination and credentials. § 3 - Representation of the Union in the execution of an outstanding tax debt shall be exercised by the Office of the Prosecutor General of the National Treasury, observing the provisions of the law."

Federal Prosecutor's Office, the Brazilian Court of Audit, and members of civil society. ENCCLA is Brazil's response in emphasizing the role of fighting money laundering as part of a criminal policy, putting together all public agents in charge of addressing the topic, and the civil society, in order to jointly fight corruption<sup>118</sup>.

## **7. CONCLUSION**

Empirical evidence and legal efforts to fight corruption, both domestically and in the international arena, show that corruption cannot be regarded as a mere nuisance to any country, since it has great influence with regard with attracting foreign and portfolio investments, as well as international investment, besides its potential to undermine society.

The problem of corruption translates into a major obstacle to be tackled seriously by the Brazil's government, at the federal, state, and local levels, and even globally.

Indeed, there is no paradox in the current situation of Brazil in relation to attracting investment despite corruption numbers. The truth is that investment is extremely necessary for economic and social development of the country, especially taking into consideration the major events that the city of Rio de Janeiro will host in the coming years (Confederations Cup Men's Football in 2013, World Cup Men's Football in 2014, Copa America Soccer Male in 2015 and Olympics in 2016), and that Brazil, among other jurisdictions, may be included among the hot spots in the E&P industry. The overall statistics show numbers of growth in the world reserves map that may be translated into a political and strategic importance of Brazil if compared to other prolific areas in the globe that present other challenges for consumer countries.

Accordingly data proves that Brazil could have an even higher rate of foreign investments if it had acted more effectively in fighting corruption.

Notwithstanding, Brazil has already developed a solid legal framework that places the country among one of the most seriously engaged on matters of fighting corruption and money-laundering in the worldwide scenario. Brazil also continues to strengthen its mechanisms to monitor and fight corruption, since the need to attract investments is undeniable.

However, in order to enable all development and investment planned for this decade and change the old saying "Brazil is the country of the future" to "Brazil is the country of the present", it is extremely

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118 CGU. Available at: <<http://www.cgu.gov.br>>. Accessed in February 11, 2013.

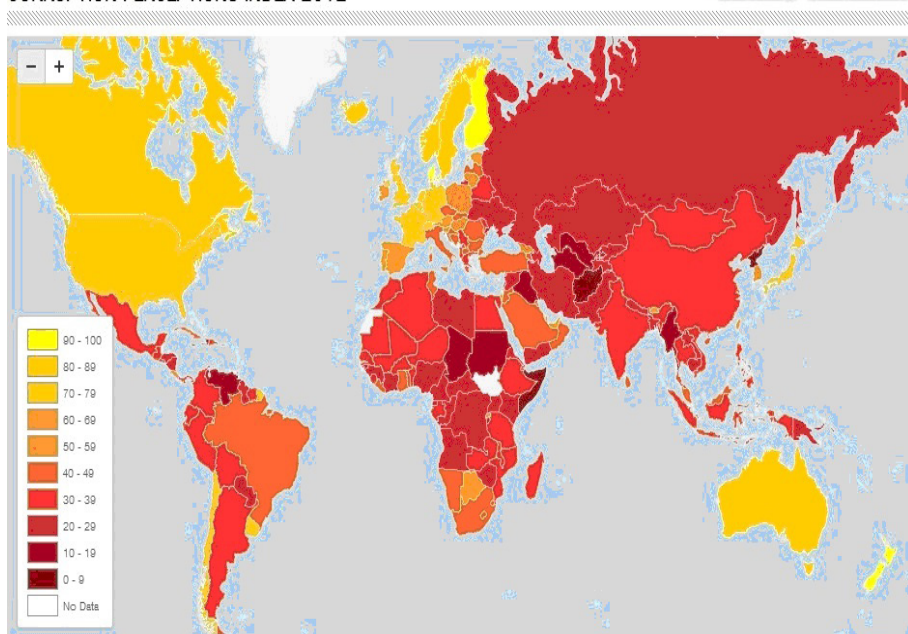


important that governments, businesses, and citizens, keep moving ahead with anticorruption efforts.

## APPENDIX I

Corruption worldmap:

CORRUPTION PERCEPTIONS INDEX 2012



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