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RESEARCH ARTICLE

Business environment pillar: Analysis of the institutional evolution in Brazil (2001-2017)

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ABSTRACT

This paper evaluates how a given jurisdiction reacts to corruption based on the institutional evaluation of the National Integrity System (NIS). The Brazilian institutional evolution of the NIS is examined in relation to one of the 13 pillars, to wit, the "business environment" pillar. From this perspective, the purpose is to confirm to what extent the business environment generates conditions to fight corruption from an institutional perspective, in accordance with the Sustainable Development Goals (SDG) 16, in particular, 16.5 (corruption and bribery in all their forms) and 16.6 (development of accountable and transparent institutions). The research is limited, however, to the period from 2001 to 2017; despite the long lapse of time, it involves a transition phase, during which significant law amendments took place and, as a consequence, their initial effects were felt in the private business sector.

Keywords: Brazil, corruption, bribery, National Integrity Systems, transparency, accountability

ملخص:

يقيّم هذا البحث كيفية رد السلطة قضائية على الفساد وفق معايير التقييم المؤسسي لنظام النزاهة الوطني (NIS). فتتم دراسة التطور المؤسسي البرازيلي لنظام النزاهة الوطني وفق واحدة من الأركان الثلاثة عشر، وهو ركن "بيئة الأعمال". ومن هذا المنظور، يتمثل هدف البحث في تأكيد الفكرة الآتية، وهي: إلى اي مدى توّلد بيئة الأعمال التجارية ظروفًا لمكافحة الفساد من منظور مؤسسي، وذلك فقًا لأهداف التنمية المستدامة (SDG) ١٦، ولا سيما ١٦,٥ (الفساد والرشوة بجميع أشكالها) و١٦,٦ (تطوير مؤسسات مسؤولة وشفافة). ولابد من التنويه إلى أن البحث محدد زمنيا من سنة ٢٠٠١ إلى سنه ٢٠١٧؛ فعلى الرغم من مرور فترة زمنية طويلة، إلا أنه ينطوي على مرحلة انتقالية، تخللتها تعديلات قانونية جوهرية، ونتيجة لذلك، ظهرت آثارها الأولية في قطاع الأعمال الخاص.

الكلمات المفتاحية: البرازيل، الفساد، الرشوة، نظام النزاهة الوطني، الشفافية، المساءلة .

1. INTRODUCTION

This paper evaluates how a given jurisdiction reacts to corruption based on the institutional evaluation of the National Integrity System (NIS), a methodology typically used by Transparency International (TI). The NIS evaluates "key pillars in a country's governance system, both in terms of their internal corruption risks and their contribution to fighting corruption in society at large."[1] Therefore, "[w]hen all the pillars in a National Integrity System are functioning well, corruption remains in check. If some or all of the pillars wobble, these weaknesses can allow corruption to thrive and damage a society"[2].

As per Sutherland's conclusion, white-collar criminals act like common criminals. In fact,

> Sutherland also noted that whenever the representatives of these corporations wished to meet to make their decisions, they always looked for country hotels and used a specific jargon that could not be identified by those who did not belong to that production sphere. Thus, instead of mentioning a price list, they used terms such as "Christmas list." They called each other from public phones, registered in hotels without indication of the firms they represented etc. Sutherland considered that all these conducts where similar to those of the so-called conventional criminals, even if they didn't present all those characteristics.[3]

One of the factors that contributes to the success of an anti-corruption policy is the appropriate identification of the motivation of each agent. However, the motive may change according to the environment. This paper reviews the particular situation in Brazil.

2. METHODOLOGY

The methodology of the NIS investigates the presence of the legal conditions to fight corruption, but it also questions if these conditions are effective in practice. The question is to know what type of institution must be investigated in Brazil, in order to identify how the business environment system behaved during the period.

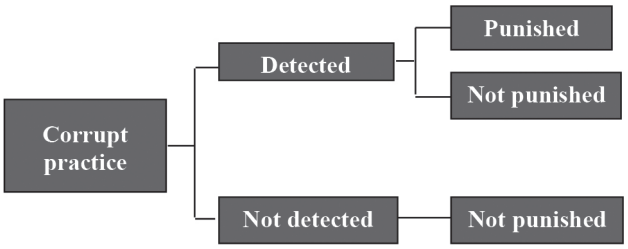
In this context, the analysis of the business environment pillar is broad, as a considerable part of the fight against corruption in the private sector was implemented by means of self-regulatory incentives. It is not enough to prepare an inventory of the command and control rules; it is necessary to go beyond that to examine how the Brazilian private sector has reacted to and implemented the initiative.

To duly localize the problem of corruption in the private sector and to understand how the scores have been awarded, it is crucial to question what motivates corrupt agents and, in the specific case of the business environment pillar, what leads the corruptors to breach the law. As occurs with a player, it is an individual's personal motivations and perception of the risks that induces their behavior at the moment of wrongdoing. Based on that assumption, it would be possible to responsively adapt the anti-corruption action to each motive, and thus to force corrupt agents to redefine their strategies. The focus is to increase the efficiency of anti-corruption actions.

Questions about the institutional capacity typically center on the independence of the private sector and how capable it is of resisting the pressures of the public sector. Those relating to corporate governance, in turn, ask how the private sector wishes to relate to its peers – will there be honesty when the risks of the activity involve corruption? Finally, the role of the private sector indicates the existent degree of political commitment. These three variables may be changed and in a certain way manipulated by democratic participation mechanisms.

In a scenario in which it is not possible to change the rules of the game by means of institutional reform or by means of a collaboration with the wrongdoers, the expectations of the corrupt agents may be summarized in Table, as follows:

Table 1. Possible consequences of corrupt practices.



Source: Prepared by the authors.

The fact that corruption is detected does not necessarily mean that it will be punished, although the situation already results in certain costs to the corrupt agents, in particular, the damage to reputation, which is serious both to politicians and to firms, and the expenses involved in defending themselves in court. In Brazil, the lack of punishment may result from various reasons (limitation period, procedural errors, incompetence in the obtainment of proof by the judicial police, by the Federal Accounting Court (TCU) and by the administrative authorities etc.). Even if corrupt players are punished, the punishment may be softer than the benefits obtained, which would produce no dissuasive effect with respect to the conduct of other potential corrupt players – after all, if the corrupt players are detected (which is not always certain), they could keep some of the benefits obtained by means of money laundering, for example. These factors are strongly considered by the players of the business environment pillar because they are profit-maximizing agents.

Risking simplification, Kagan and Scholz have identified at least three basic prototypes of motivations: the amoral calculator, the political citizen and the organizationally incompetent player.[4] A fourth prototype, the irrational non-complier, may be added to these.[5] The explanation below is based on the analyses and rationales contained in these texts, to which we add our own considerations on corrupt practices.

Table 2. Prototypes of the behavior of economic agents.

	Ill-intentioned	**Well-intentioned**
Ill-informed	Irrational non-complier	Organizationally incompetent
Well-informed	Amoral calculator	Political citizen

Source: BALDWIN, Robert. *Rules and regulation*. Oxford: Oxford University Press, 1995. p. 148-152.

1 Transparency International, http://www.transparency.org/whatwedo/nis (last accessed Sept. 27, 2015).
2 Transparency International, https://www.transparency.org/whatwedo/nis (last accessed Sept. 27, 2015).
3 Sérgio Salomão Shecaira, Criminologia e direito penal: um estudo das escolas sociológicas do crime (2002). (Criminal Law Thesis, Faculty of Law, Universidade de São Paulo, São Paulo) at 189.
4 R. A. Kagan & J. T. Scholz, *The Criminology of the Corporation and the Regulatory Enforcement Strategies, in* Enforcing Regulation 67-68 (K. Hawkins & J. M. Thomas eds., 1984).
5 Robert BALDWIN, Rules and Regulation 149 (1995).

In the business pillar, it is intuitive to assume that the irrational calculator type predominates. However, it is not difficult to find organizationally incompetent firms – those who wish to comply with the laws but are preventing from doing so by internal disorganization. Similarly, it is possible to see political-citizen firms willing to comply with the law at all costs. Even if such exists, the irrational non-complier is not so believable, especially if we take into consideration that firms aim for profit and that such behavior may bring serious financial consequences.

The ideal solution would be to manipulate incentives to create a multitude of political-citizen firms. From a realistic perspective, we should focus on the amoral calculators, because they carefully compare the cost of compliance to the cost of non-compliance. The analysis of the evolution will show how this has occurred.

3. WHERE HAS THE BUSINESS ENVIRONMENT PILLAR COME FROM? THE SCENARIO IN 2001

In 2001, there was already a minimally structured anti-corruption legal framework. By means of command and control type rules, the Brazilian Penal Code punished individuals, whether public or private agents, with up to 12 years of imprisonment for some corruption-related crimes – even corrupt acts against foreign Governments were punished. The punishments are severe if compared to other countries, and although there were some cases of conviction, criminal repression was something distant, limited to low-ranking public officials and businesspersons.

An example that confirms this impression was the case of the overbilling in the construction of the São Paulo Labor Court. The crimes were committed during the 1990s and charges of embezzlement, swindling, payment of bribes, use of false documents and conspiracy were filed against former senator Luiz Estevão de Oliveira Filho in 2000. However, his final sentence of 31 years of imprisonment was only confirmed by the Superior Court of Justice (STJ) at the end of 2011.

Similarly, the Administrative Misconduct Act (Law No. 8.429/92), enacted in 1992 at the time of the impeachment of President Fernando Collor de Mello, also imposed financial punishments to public and private agents who were convicted of corrupt practices. Application thereof was slow and difficult and there were few cases, which did not significantly change the private sector's perception of the incentives for engagement in corrupt practices. For comparison purposes, the same case relating to the construction of São Paulo Labor Court commenced in 2000 and the lower-court judgment was only rendered in 2011. In the following year, OK Group, one of the involved parties, entered into a settlement with the Office of the General Counsel to the Federal Government to return R$468 million. Even if impressive, the number was an isolated decision at that time. The slowness of the Judicial Branch enables the persons to dispose of the assets during the long-lasting lawsuit so that when the case goes to trial the responsible persons have insufficient assets to redress the damage they have caused. Moreover, the Administrative Misconduct Act does not foresee the joint liability of legal entities belonging to the same economic group, which further facilitates attempts to hide assets.

On the other hand, a silent revolution occurred which diminished the incentives of tax and financial corruption. 1998 saw the introduction of a law on money laundering (Law No. 9.613/98), which resulted in the creation of the financial intelligence unit in Brazil, called the Council for Financial Activities Control (COAF), and defined the crime of money laundering as "to conceal or dissimulate the nature, origin, location, availability, transfer or ownership of assets, rights or amounts directly or indirectly originating from crime." The list of crimes included crime "against the Government, including the demand, to oneself or to others, directly or indirectly, for any benefit, as a condition or price for the performance or non-performance of administrative acts" and the crime "committed by a private agent against a foreign government." The punishment for white-collar crimes is severe: imprisonment from three to ten years and a fine.

Equally, the provisions of the Bank Secrecy Act (Supplementary Law No. 105), approved in 2001, enabled more flexibility in relation to the issue. For example, article 1, paragraph 3, item IV set forth that there was no breach of secrecy in the event of "communication, to the competent authorities, of the commission of crimes or administrative violations, including the provision of information on transactions involving funds originating from any criminal conduct." Paragraph 4, item VI of article 1 allowed the breach of secrecy in the event of police investigation or lawsuit investigating crimes against the government.

However, these measures would not have been successful if considered individually. Two factors must be taken into consideration. First, the rules against money laundering have been conceived to fight drug trafficking and, subsequently, are broadly used against terrorism. Corruption crimes are a small part of its overall purpose, but they have benefited from the amendments to the law.

Second, in view of its concern with the collection of taxes, the Federal Revenue Service has perfected the system to track financial transactions by means of the Individual Taxpayer Registry (CPF) and of the Corporate Taxpayer Registry (CNPJ). It has become almost impossible to transfer funds without these registries, and at the same time these transfers have become more easily traceable and monitored; as required by the regulations of the Central Bank of Brazil, financial institutions must keep records of the transactions carried out for up to 5 years. Only the sophisticated system has permitted the monitoring of a large number of financial transactions deemed suspicious.[6] Table 05 illustrates the increase in the number of notifications to COAF which occurred (most evidently from 2007) and how COAF responded by increasing the number of reports of financial intelligence, in order to support further investigative measures (see Table 3).

Table 3. Communications to the COAF versus reports of financial intelligence.

2004	2005	2006	2007	2008	2009	2010
83,873	157,333	193,984	335,364	645,785	1,803,865	1,038,505
N.a.	N.a,	1,169	1,555	1,431	1,524	1,125

6 In 2013, the Brazilian Federal Revenue Service reported that at least two Federal Police operations were launched to fight corruption due to "tax intelligence" actions. Available at: http://www.receita.fazenda.gov.br/AutomaticoSRFsinot/2014/02/24/2014_02_24_18_40_44_311746055.html. The first one was an operation coordinated by the Special Group Against Organized Crime - Gaeco of the Public Prosecutor's Office of the State of Paraná, with the participation of the Federal Revenue Service. "The action fought a supposed scheme to manufacture counterfeit products, corruption, money laundering and tax evasion." The second operation was a "Joint operation of the Federal Revenue Service, Federal Police, Public Prosecutor's Office Federal and Office of the Federal Controller General to investigate circumstantial evidence of the commitment of several crimes, such as bid-rigging, corruption, tax evasion and money laundering." In both cases several search warrants and preventive detention warrants were executed in different Brazilian states; the loss was estimated in million.

2011	2012	2013	2014	2015	2016	2017
1,289,087	1,587,450	1,286,233	1,144,389	1,382,197	1,492,684	1,502,373
1,471	2,104	2,104	3,178	4,304	5,661	6,608

The change has allowed increased vigilance of financial transactions, which has been slowly perceived by the private sector. In order to comply with the growing enforcement, the private sector has made substantial investments in the detection and prevention of suspicious transactions, notably in the IT department of financial institutions. The agents involved in the corruption game noted that controls were tightening, and there was a change in the possibility of detection.

Although the existing mechanisms do not differ greatly from those that exist in other countries, the Brazilian scenario was not very encouraging – the dominant defense strategy of the investigated agents, whether individuals or legal entities, was to deny involvement in the unlawful practices. The use of self-reporting mechanisms, such as state evidence and leniency, was not even considered, even though these mechanisms already existed in Brazilian law. Proof of the resistance strategy may be found in the legal consequences of the Satiagraha Operation in 2008, in which the involved parties are not mentioned as cooperating with the investigations, even though the mechanism of "*colaboração premiada*" for individuals[7] had been available for longer than a decade. Although the introduction of leniency in the antitrust law in 2000 indicates a change trend for legal entities, the first agreement was executed by the Economic Law Office (SDE) only in 2003 – coincidently, the cartel of security guards was involved in bid-rigging.

The paradox was to observe that, while companies implemented a cooperation strategy abroad, such an approach did not exist in Brazil. The procedural legislation applicable to the Foreign Corrupt Practices Act (FCPA) allowed companies to enter into agreements in the United States which didn't exist in Brazil at that time. This explains why there was a succession of cases involving Brazil in the United States, in which cases had a different outcome in the two jurisdictions, such as Control Systems Specialist, Inc. (1998), Tyco International Ltd. (2006), Control Components, Inc. (2008), Bridgestone Corporation (2008), Nature's Sunshine Products, Inc. (2009), Universal Leaf Tabacos Ltda. (2010), Panalpina World Transport (Holding) Ltd. (2010), and Alliance One International AG (2010).

It is difficult to measure the impact of the enactment of the Anti-Bribery Convention of the Organization for Economic Co-Operation and Development (OECD Anti-Bribery Convention) in Brazil in 2002. Full implementation thereof would represent an important change in the business environment and, therefore, the constant monitoring of compliance of the OECD Anti-Bribery Convention[8] may have represented an additional pressure for approval of the Brazilian Anti-Corruption Law in 2013.

4. WHERE HAS THE BUSINESS PILLAR GONE? THE SCENARIO FROM 2014 ONWARDS

In 2007, OECD issued its report, "Brazil: Phase 2 (Report on the application of the Convention on Combating Bribery of Foreign Public Officials In International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions"[9] (OECD Peer Report 2017), which made the following recommendations which impacted on the business environment:

a) To increase cooperative efforts with the business sector and civil society to raise awareness of the problem of transnational corruption;
b) To increase the awareness and monitoring efforts involving financing by the Brazilian Bank of Economic and Social Development (BNDES);
c) To encourage and create mechanisms to protect the agents that report information in the private sector;
d) To encourage Brazilian multinationals to adopt compliance programs;
e) To require that accountants and independent auditors report all nonconformities, as well as to require that all large companies, whether listed on the stock exchange or not, be subject to an independent audit;
f) To take urgent measures to hold legal entities liable for the bribe of foreign public officials with effective, proportional and dissuasive sanctions, including fines and confiscation.

OECD's greatest concern was international corruption: the situation in which Brazilian companies bribe foreign public officials in other jurisdictions. Such concern turned out to be appropriate, especially taking into account the practice of the Brazilian multinationals operating abroad later revealed in the Petrobras scandal, dubbed "Operação Lava Jato" (or "Car Wash Investigation" in English).

Other measures were mainly focused on the public sector. However, the diagnosis seems to have encountered some resistance: even though the OECD Peer Report was issued in 2007, only in 2010 did the Brazilian government submit a bill of law to the National Congress to address the informed gaps (Bill of Law No. 6.826/10 in the House of Representatives or 39/2013 in the Senate). The bill of law addressed some defects of the legal system that adversely affected the effectiveness of the enforcement in the business sector, including the following:

a) Strict liability of legal entities for corruption perpetrated by third parties, facilitating the punishment of the involved companies;
b) Introduction of several fines to the companies, streamlining the system of the Administrative Misconduct Act;
c) Introduction of a self-report mechanism for legal entities (leniency agreement);
d) Creation of attenuating circumstances for the companies that implement an effective compliance program.

7 "Colaboração premiada" has been translated as plea agreement. However, we believe such a translation is mistaken, since the "colaboração premiada" must be embodied in an agreement (plea agreement) under Brazilian Law. Such an agreement put the defendant in a disadvantaged position from the procedural perspective. For this reason, we prefer using the "state's evidence", which better translates what actually happens under Brazil Law. State's evidence can be defined as "the testimony given by an accomplice or joint participant in the commission of a crime, subject to an agreementthat the person will be granted Immunity from prosecution if she voluntarily, completely, and fairly discloses her own guilt as well as that of the other participants." Available at https://legal-dictionary.thefreedictionary.com/State%27s+Evidence.

8 The OECD conducted monitoring reviews in 2004, 2007 and 2014.

9 OECD. Brazil: Phase 2 (Report on the application of the Convention on Combating Bribery of Foreign Public Officials In International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/45518279.pdf.

However, the bill of law was challenged in the National Congress and made very slow progress. While other jurisdictions progressed with the enactment of new anti-corruption laws, Brazil remained inert.

The subsequent institutional evolution sped up from 2012 when the anti-corruption issue returned to the center of attention of Brazilian society in view of the investigations into the *Mensalão* scandal, called 'Big Monthly Payment' in English.

Following international trends and guidelines related to money laundering, Law No. 12.683 of 2012 brought significant changes, such as the end of the crimes listed as subject to the Money Laundering Law. Following the amendment, any preceding crime could lead to a money laundering offense, which was defined as "to conceal or dissimulate the nature, origin, location, disposition, transfer or ownership of property, rights or amounts directly or indirectly originated from criminal offense." Although crimes against the government were already included in the list of preceding crimes of the Money Laundering Law, their type may lead to discussions regarding the inclusion or not of a given corrupt act.

The change in the law impacted on the business environment. The Brazilian Federation of Banks (FEBRABAN) took the lead to discuss how to adjust to the new rule: it feared that more flexibility in the analysis of the documentation could cause disadvantage to more rigid financial institutions in comparison to less rigid ones. In view of the recent involvement of various financial institutions in the covering up of corruption, that fear was justifiable. Therefore, in 2013 FEBRABAN issued a self-regulatory rule (SARB Rule 011/2013) that standardized the requirements made and created a level playing field[10]. Currently, twenty out of the 256 financial institutions that are members of FEBRABAN adhere to the rule – certainly, there remains the doubt about which criteria the other financial institutions are adopting, for example, to deal with politically exposed persons.

However, the massive protests of June 2013 in Brazil affected the direction of the facts. The anti-corruption law bill, which was previously back-burned, was suddenly elected as one of the priorities: after one and a half months, it was approved in the House of Representatives and in the Senate, and it was sanctioned on August 1st 2013 (Law No. 12.846/13). The following day, another bill of law which was unlikely to be approved was sanctioned: Law No. 12.850/13 dealt with criminal organizations, granting new investigative powers to the police and to the Public Prosecutor's Office, and streamlining the state's evidence for individuals. More than merely aggravating the possible penalties, it was the combination of the new sanctions with the old ones that changed the incentives for the business environment behavior.

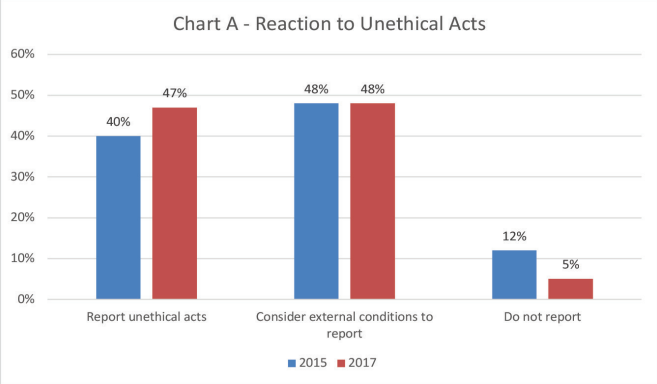
The increase in sanctions amplified the financial risk for breaches of the law: the institution of state's evidence under Law No. 12.850/13 combined the leniency under Law No. 12.846/13 (Anti-corruption Law) and increased the possibility of detecting corruption; the adoption of strict liability for corruption perpetrated by third parties reduced the possibilities of defense limited to mere denial of the conduct; and finally, the possibility of reducing penalties with the existence of a compliance program generated more concrete gains than prior to the Anti-Corruption Law.

The new Anti-Corruption Law brought high expectations into the business environment. The compliance issue, which was previously limited to financial institutions and to a few "political citizen" companies, became the center of attention. There were a large number of courses of study and a large demand for professionals to implement the compliance programs, which had suddenly become an attenuating circumstance in the possible imposition of fines.

The joint use of the instruments allows a sophistication in the fight against corruption – even the OECD, in a report issued in October 2014, acknowledged that the gaps had been addressed in the 2013 legislative reform.[11] Incentives to promote cooperation with the enforcement authorities through leniency and state's evidence became possible. There have been a number of corruption scandals in Brazil, most of which relate to facts arising prior to the enactment of the Anti-Corruption Law. In those cases, the focus of the authorities was the criminal liability of the individuals involved in the schemes and a few of those scandals resulted in the arrest of politicians and public servants.

The first big test took place during the Car Wash Operation when the new legal rules were put to the reality test and worked better than before. It started as a money laundering investigation targeting a black market dollar operator who laundered money from gas stations and car washes. As the investigation continued, it was discovered that the initial target, the doleiro (black market money dealer) Alberto Youssef, had bought a Land Rover vehicle for Paulo Roberto Costa, a director of Brazilian state-owned-company oil company, Petrobras. Further evidence revealed improper payments to Youssef from companies that won Abreu & Lima (Petrobras) refinery contracts. Costa and Youssef both struck a plea agreement with prosecutors in exchange for information on a kickback scheme in which several top Petrobras public agents colluded with a cartel of Brazilian construction companies to overcharge the oil company for construction and service work. Following these two plea deals, the operation mushroomed, revealing the largest corruption scheme under investigation in the world. The cartel would decide which construction company should win a contract bid to, for example, service an oil rig or build part of a refinery. This fake competition was overseen by Petrobras directors and agents, who were rewarded with bribes. They kept some of the money but shared much of it with politicians. Petrobras, while publicly traded, is 51% government-owned. Many Petrobras executives owe their jobs to elected public officials. After three years of investigations, Operation Car Wash became the largest anti-corruption case in the world, leading to the arrest of tycoons (two out of the 10 richest men in Brazil were jailed), senior politicians and civil servants. Such legal reinforced framework combined with strong enforcement directly influenced the behavior of the companies, mainly because of its strict liability for corrupt practices perpetrated by third parties. Chart A illustrates how ethical behavior has changed substantially in the past few years in connection with the implementation of whistle-blowing channels by companies.

10 FEBRABAN. SARB Rule (2013), http://www.autorregulacaobancaria.org.br/pdf/Normativo_SARB_011_2013_PLDCFT.pdf.
11 OECD, Phase Three Report on Implementing the OECD Antibribery Convention in Brazil (2014), http://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf.



Source: ICTS Global – "Perfil Ético dos Profissionais Brasileiros" – 2017 Report.

Another example comes from the pharmaceutical industry, which used to outsource most of its sales to the government. The new Anti-Corruption Law triggered changes in the industry, including a decrease in the use of distributors and an increase in direct sales. Currently, the sales made by distributors in the pharmaceutical industry account for 70% and, according to Panorama ILOS "Supply Chain no Setor de Saúde", 34% of the companies would like to increase the direct sales.[12]

Another remarkable example of the induced changes is the increase in the number of companies interested in the *Pró-Ética* (*Cadastro Nacional de Empresas Comprometidas com a* Ética *e a Integridade* – National Register of Companies Committed to Ethics and Integrity). To put it simply, the *Pró-Ética* is a kind of certification of the effectiveness of the compliance programme, jointly sponsored by Instituto Ethos (a Brazilian think-tank NGO) and by the *Controladoria Geral da União* (CGU - General Comptroller of the Federal Government). Such an initiative does not generate a direct benefit to the company; the incentive to join is public recognition of the company's commitment to integrity. In 2014, 16 companies were awarded the Pró-Ética certification; in 2017, 23 companies received the award out of 375 applicants.[13] Pró-Ética reviewed all the integrity actions and the companies which were not certified received suggestions to improve their programs.

5. ACCESS TO THE INFORMATION, TRANSPARENCY, INSTITUTIONAL FRAMEWORK AND ACCOUNTABILITY

Basically, three groups of issues may be raised relating to the business environment pillar within the scope of the NIS (see table 04):

i) Institutional capacity: these questions aim at confirming the degree of funds available to the private sector, as well as its level of independence from the public sector. The lower the funds and the independence, the larger the private sector's subordination to the public sector.
ii) Governance: these questions aim at measuring the degree of transparency in the conduction of business, the level of accountability of the private sector in relation to the company and to the investors, and the existence of integrity mechanisms within the scope of the private sector. The higher the degree of corporate governance, the higher the pressure of the stakeholders in relation to the businesspersons – in this scenario, we imagine that the stakeholders wish to comply with the law and to avoid the imposition of penalties on their investments.
iii) Role: these questions wish to determine the degree of civic commitment of the private sector in the fight against corruption. The higher this commitment, the higher the support to the civil society in the fight against corruption.

The three issues above may help us to understand how to promote accountable and transparent institutions in Brazil, in order to achieve the Sustainable Development Goals (SDG) 16 and, in particular, 16.5 (substantially reduce corruption and bribery in all their forms) and 16.6 (Develop effective, accountable and transparent institutions at all levels).

5.1. Access to information and transparency

The investigation into the access to information and transparency in the business environment and its role in the fight against corruption differs from the approach of the public sector. In the latter example, the whole society has the right to monitor government actions, and a limitation to the access to information is admitted only in exceptional cases.

On the other hand, in the private sector, the access to information and transparency is inherently limited: the business secret is an element of competition. The competitor cannot know what its rival is doing, otherwise it could act to undermine the rival's actions, or act in order to minimize the level of competitiveness. The protection to intellectual property is maybe the most evident example of business secret legitimated by the law. Therefore, the protection of business secrets is integral to the market system.

Table 4. National Integrity System – Business Environment Pillar

Institutional Capacity	Funds	Law	To what extent does the legal framework offer an enabling environment for the formation and operations of individual businesses?
		Practice	To what extent are individual businesses able, in practice, to form and operate effectively?
	Independence	Law	To what extent are there legal safeguards to prevent unwarranted external interference in the activities of private businesses?
		Practice	To what extent is the business sector free from unwarranted external interference in its work in practice?

12 http://www.ilos.com.br/web/venda-direta-ou-atraves-de-distribuidores-o-dilema-do-setor-de-saude/
13 CONTROLADORIA GERAL DA UNIÃO, Empresa Pró-Ética (2018), http://www.cgu.gov.br/assuntos/etica-e-integridade/empresa-pro-etica.

Governance	Transparency	Law	To what extent are there provisions to ensure transparency in the activities of the business sector?
		Practice	To what extent is there transparency in the business sector in practice?
	Accountability	Law	To what extent are there rules and laws governing oversight of the business sector and governing corporate governance of individual companies?
		Practice	To what extent is there effective corporate governance in companies in practice?
	Integrity Mechanisms	Law	To what extent are there mechanisms in place to ensure the integrity of all those acting in the business sector?
		Practice	To what extent is the integrity of those working in the business sector ensured in practice?
Role	Anti-corruption policy engagement (law and practice)		To what extent is the business sector active in engaging the domestic government on anti-corruption?
	Support for/engagement with civil society (law and practice)		To what extent does the business sector engage with/provide support to civil society in its task of combating corruption?

However, the business secret does not involve every aspect of the business activity. There are aspects that are relativized, either for issues inherent in the common good or for issues inherent in the public interest.

The public interest may relativize the business secret, especially in tax and financial aspects. In terms of tax, the Brazilian tax bodies have great inspection capacity granted by the applicable rules, and they face hardly any resistance to their actions. A similar situation occurs in respect to finance: the Brazilian law regulates the events of breaches of bank secrecy and the Judicial Branch can breach bank secrecy at the reasonable request of the competent authorities. From another perspective, the COAF also plays its inspection role very actively.

With respect to the private interest, the relativization occurs in the relationship between the businesspersons and their partners. Dissimilarly to the public interest, in which there is a direct interest in the inspection of possible wrongful acts, the purpose of the transparency of the private sector is to enable the investors to have access to the relevant information for their decision-making process. Since the investors are agents that maximize their results, they are averse to risk, and corruption is one of the most significant risks of doing business in Brazil. Thus, a higher degree of transparency in the capital market would facilitate the choice between investing in a "corrupt" company and investing in a "non-corrupt" company and would be in accordance with the SDG 16.5 and 16.6.

In fact, the institutional framework of the Brazilian capital market has constantly been improving, accompanied by the implementation of internationally adopted accounting rules. Both the access to information and the transparency have been given special attention by the regulatory agent of that market, the Brazilian Securities Exchange Commission (*Comissão de Valores Mobiliários* – CVM).

5.2. Accountability

Accountability must be understood as the legal or contractual duty of an agent to be accountable for its activities, to be held liable for its performance and to transparently disclose the results. The concept is inherent in the business environment: every time an investor believes in a company and invests in it, the relationship requires the company to account to the investor.

There is a close relationship between (i) accountability in the business environment, and (ii) access to information and transparency. For this accountability to exist, the investor must have transparency and access to the relevant information. The access to information and transparency would not be useful if the investor couldn't hold the investor or its management liable for conduct that adversely affects the business.

Accountability is important in the fight against corruption as the corrupt manager takes liability for the business environment itself. Even if the corrupt agents are not formally convicted, officers accused of corruption will hardly be re-employed, and they may be sued for the damages caused during their management. These factors certainly influence the decision to bribe or not to bribe. In this sense, indicator 16.5.2 measures the "proportion of business that had at least one contact with a public official and that paid a bribe to a public official, or were asked for a bribe by those public officials during the previous 12 months." In fact, a corrupt agent will scarcely be hired after a corruption issue.

In the business environment, accountability may result from the law, soft law (such as SDG 16.5 and 16.6) and from agreements.

The accountability resulting from the law and enforced by the regulatory body found the appropriate institutional conditions to develop. Brazil received an average score in the analysis.

On the other hand, whenever there are self-regulatory accountability mechanisms, the data relating to corruption situations is still limited. Due to their very nature, there is greater proximity between the regulated agents and the regulator; this tends to facilitate capture as they work more closely to the regulated interests and have a greater likelihood of being granted access to the relevant information as a result of their cooperation, without which they cannot perform their duties. For no other reason, these situations may be called "gentlemanly self-regulation."

Even so, it is possible to identify as soft law the example of the Corporate Sustainability Index (ISE), created in 2005, as a "tool for comparative analyses of the performance of the companies listed on B3 from the corporate sustainability perspective, based on economic efficiency, environmental balance, social justice and corporate governance."[14] Using the

14 ÍNDICE DE SUSTENTABILIDADE EMPRESARIAL, O Que é o ISE?, http://www.isebvmf.com.br/index.php?r=site/conteudo&id=1#. "The ISE is a tool for comparative analysis of the performance of the companies listed on BM&FBovespa.

method of questionnaires sent to the companies, only some companies are chosen. The inclusion of a company in the ISE may render a company listed on the stock exchange more attractive to the investor. Therefore, an incentive for compliance with the anti-corruption law is created because the companies may be excluded from the ISE due to objective criteria.

In the ISE 2015 questionnaire, in addition to discussing various corporate governance aspects that are relevant to the access to information and transparency, there is express reference to the theme of corruption in its general part: criterion IV is the "Fight against Corruption", which alone generates one of the criteria for inclusion in the ISE.

In 2006, Instituto Ethos launched the Corporate Pact for Integrity and Against Corruption, another example of soft law used in the Brazilian business environment, as per SDG 16.5 and 16.6. Aiming at a larger scope than the ISE, since it is not limited to companies listed on the stock exchange, the Pact encourages the adoption of certain ethical principles that would prevent the signatory companies from engaging in corrupt practices.[15] Adhesion to the pact has grown since then – it currently features more than 540 signatories. In addition, the Pact has a list of suspended companies.

5.3. Institutional framework.

The timeline prepared in Exhibit I shows the evolution of the institutional framework. Sometimes, a normative change especially designed for the public sector may affect the business environment and, therefore, it has been included therein.

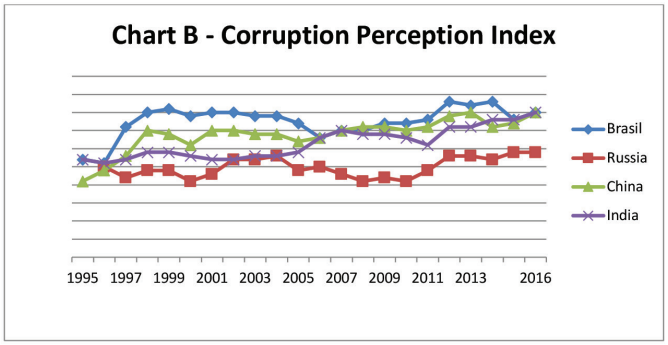
The normative evolution between 2001 and 2017 shows that there was an improvement in the institutional framework that directly affects the business environment (see analysis of items III and IV, *above*). For example, in 2002, the issues involving secrecy and transparency in the Government were regulated only by a decree (Decree No. 4.553/02). In 2011, in turn, Law No. 12.527/11 was approved, which regulated in a broader and more detailed form the access to information, determining at the same time what should be subject to restricted access.

In addition, what was identified as a normative bottleneck for the OECD Report for Implementation of the 1997 Antibribery Convention, prepared in 2004, was granted a certain treatment as from 2010. The new Anti-Corruption Law (Law No. 12.846/13) and its regulation by Decree No. 8.420/15 illustrate how those deficiencies were tackled. Decree No. 8.420/15 listed 16 effectiveness criteria which should be met by private company's compliance programmes, including the commitment of high management and board members to the program, periodic training, and accurate and complete books and records.

Gradually, other issues have been dealt with. Several materials issued by the CGU detail how to structure a compliance programme, even for medium-sized companies.[16] Law No. 13.303/16, dated 30 June 2016, was passed in order to increase the corporate governance levels within the state-owned companies, some of which are publicly traded at B3 – besides creating barriers for purely political appointment in state-owned companies, Law No. 13.303/16 also required the implementation of a compliance program.

5.4. Future challenges

As per the Corruption Perception Index (CPI) - TI, Brazil has not improved during the reviewed period in the corruption perception rankings, even though, on average, it is higher ranked than the other BRICs. Of course, much criticism has been made about the CPI-TI, since it captures only perceptions on corruption, which may be misleading, especially in a country where there is free press and strong anti-corruption enforcement –not exactly the case in Russia, India or China.



Solely considered, the changes in the business environment pillar are not enough to transform the whole country's situation in relation to the fight against corruption: in accordance with the methodology of the National Integrity System, the business environment pillar is only one of the 13 criteria to be evaluated. As seen, it impacts especially on the behavior of the rational agents that act in the market, who tend to make a cost-benefit analysis to determine whether to engage in corrupt practices; they are the amoral calculators, who will only comply with the law if the appropriate incentives are in place.

The analysis shows that for business environment purposes, the legal framework is appropriate for the fight against corruption – there is certainly space to improve the law, but this doesn't seem to be such a serious problem. On the other hand, if the effectiveness of this framework is reviewed in practice, the results are not so encouraging. There is still a mismatch between the provisions of the law and what happens in practice.

In this respect, the greatest challenge in the future is to bring the practice of the business environment nearer the score obtained for the right that regulates it. Specific actions may be performed to improve the rules, but stakeholders' commitment is more important for a successful outcome.

It is surprising that, irrespective of efforts to get business-persons involved in the anti-corruption policy, such involvement still seems to be limited to speech and not always action. The business environment pillar within the NIS needs to focus all its attention on deepening the role of the private sector in the government anti-corruption policy, as well as supporting civil society in the fight against corruption, as per the goals of SDG 16.5 and 16.6. The existing initiatives have only slightly touched upon the awareness issue.

Therefore, to increase the scores related to the practical aspects of the business environment pillar, the private sector must deepen its involvement in anti-corruption issues. The quality of the rules may also be improved, but the effects of this change may be marginal if there is not a deeper involvement of the private sector, especially in regards to its leadership.

EXHIBIT I – TIMELINE

The table below is a timeline that summarizes the main events that have affected the business environment pillar. Brief comments are made on the direct effect caused by the relevant event.

15 INSTITUTO ETHOS, O Pacto, http://www.empresalimpa.org.br/index.php/empresa-limpa/pacto-contra-a-corrupcao/o-pacto.
16 For all the official guidelines on compliance programmes, see: http://www.cgu.gov.br/Publicacoes/etica-e-integridade/colecao-programa-de-integridade.

Year	Event	Comment
2000	Leniency introduced in the antitrust law (Law No. 10.149/2000).	The first example of a change in incentives in the relationship between the companies and the Government, since it presents benefits to cooperation.
2001	New Bank Secrecy Act (Supplementary Law No. 105/2001)	Although it is seen as a protection of bank secrecy, it actually expands the power of agents to take action to access bank data.
2002	Decree on secrecy in the Government. Entry into force of the OECD Antibribery Convention.	Guidance about when the Government can keep its actions secret, indirectly permitting transparency to reach the private sector.
2003	First competition defense leniency agreement signed by the Economic Law Office (Security Guard Cartel)	The first leniency is signed after almost 4 years of the legislation coming into effect.
2005	Corporate Sustainability Index is launched by B3	Pioneering initiative of B3 which created a portfolio of shares of companies that meet certain ethical criteria, including the fight against corruption.
2006	Launch of the Business Pact for Integrity and Against Corruption by Instituto Ethos.	Initiative to increase the ethical commitment of businesspersons and to spread the importance of the fight against corruption.
2008	Satiagraha Operation fiasco	Procedural flaws lead to the nullity of proceedings that could have unveiled a major corruption scheme.
2011	Law on access to information.	Institutional improvement of the 2002 Decree, redefining behaviors of the public agents in all levels of the federation and indirectly of the private sector.
2012	New money laundering law expands the possibilities of lawsuits involving corruption. Trial of the *Mensalão* scandal with severe decisions against businesspersons.	Improvement of the Money Laundering Law facilitated the punishment of those involved in the legalization of funds originating from various crimes. At the same time, the trial of the *Mensalão* scandal imposed punishments on the businesspersons involved and began to revert expectations of impunity.
2013	Anti-Corruption Law approved by the Brazilian Congress. States and municipalities regulate the law. Approval of the Law on Organized Crime. FEBRABAN's self-regulation on money laundering (Rule 11). Law on the Conflict of Interests in the Federal Government.	As a result of strong popular pressure, the new Anti-Corruption Law is approved, perfecting the system of the Administrative Misconduct Act, increasing the punishments and creating the leniency agreement for companies involved in corrupt acts. The Law on Organized Crime potentializes the tools to investigate Money Laundering and Anti-corruption.
2014	Car Wash Operation began to unfold with the imprisonment of senior businesspersons. Multinational companies present self-information abroad with effects on Car Wash Operation in Brazil. The first leniency is proposed under the new Anti-corruption Law, although it had not been regulated by the Presidency of the Republic.	New legal investigation tools are used in the Car Wash Operation, catalyzing the effects of the police work: the self-reporting tools increase the performance of the investigations, leading to the arrest of senior businesspersons.
2015	Clearer requirements for entering into leniency agreements, guidelines about the calculation of fines under the Anti-Corruption Law and criteria for an effective compliance programme (Decree No. 8.420/15). Political contributions by private companies are ruled out by the Supreme Court.	Amid a harsh recession and political instability, companies began to implement or to consider implementing compliance programmes. Old practices began to be challenged as senior businesspersons remained arrested.
2016	Enhanced corporate governance requirements for state-owned companies and mandatoriness of the implementation of compliance programme for state-owned companies. Odebrecht group entered into a multi-jurisdictional settlement with Brazilian, Swiss and American prosecutors.	Local elections took place without contributions from companies. State-owned companies began to implement compliance programmes.
2017	First leniency agreement signed by the CGU, AGU and the MPF at the same time.	After complex negotiations, the first leniency agreement is entered. Rules and incentives are still unclear in relation to the pros and cos of cooperation for legal entities.

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